



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

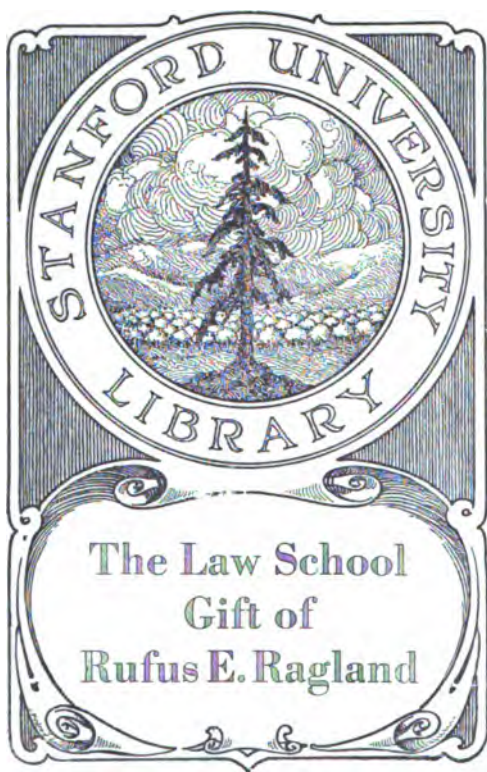
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



TCB
1912
Suppl.



TCI
18
1912
Suppl.

SUPPLEMENT

1913--1919

TO

Bliss' Annotated N. Y. Code of Civil Procedure, 6th Edition

AND

Stovers' Annotated Code of Civil Procedure of New York

CONTAINING

**Amendments to the Code of Civil Procedure enacted by the
Legislatures of 1913, 1914, 1915, 1916, 1917, 1918 and 1919**

AND THE

NEW SURROGATES CODE of 1914

**AS AMENDED TO THE END OF THE
LEGISLATIVE SESSION OF 1919**

ANNOTATED BY

**Decisions of the Courts from May 1, 1912, to May 17, 1919
Explanatory Notes and Cross References**

EDITED BY

FRANK B. GILBERT

AND

JOHN T. FITZPATRICK

THE BANKS LAW PUBLISHING COMPANY,

**BAKER, VOORHIS & COMPANY,
NEW YORK CITY, N. Y.**

**MATTHEW BENDER & COMPANY,
INCORPORATED,**

ALBANY, N. Y.

1919

COPYRIGHT, 1919,
By
THE BANKS LAW PUBLISHING COMPANY,
BAKER, VOORHIS & COMPANY,
MATTHEW BENDER & COMPANY,
INCORPORATED.

PREFACE.

This work is intended as a supplement to Bliss' Annotated Code of Civil Procedure, Sixth Edition, 1912, and Stover's Annotated Code of Civil Procedure of New York, with supplements to 1912. These codes are exhaustively annotated with citations and digests of cases decided by the courts from the date of the enactment of the original Code of Procedure down to about May 1, 1912.

The supplement contains all amendments to the Code of Civil Procedure enacted by the legislatures of 1913, 1914, 1915, 1916, 1917, 1918 and 1919. All cases construing and applying the several sections of the Code, and relating to practice in the courts, from May 1, 1912, to May 17, 1919, have been digested and arranged in their appropriate order under the sections to which they relate. The new matter in the amendments has been indicated, and where necessary references have been to other sections of the Code and to sections of the consolidated laws.

The new Surrogates' Code, revised by the official commission appointed for the purpose, and enacted by the legislature of 1914, is made a part of the supplement. The sections have been carefully annotated with the notes showing their derivation, and with the explanatory notes prepared by the Commission. In view of the fact that the Surrogates' Code is a complete substitute for the former sections of the Code of Civil Procedure, it has been deemed advisable to annotate the sections of the new code with citations of cases arising under the former sections, which remain applicable to the present practice.

The cases digested and cited include those reported from 204 N. Y. to 226 N. Y. page 156; from 148 App. Div. page 500 to 186 App. Div. page 690; from 75 Misc. page 216 to 106 Misc. page 576, and from 135 N. Y. Supp. 42 to 173 N. Y. Supp. page 927.

Albany, N. Y., June 15, 1919.

FRANK B. GILBERT.
JOHN T. FITZPATRICK.

Supplement

To

Annotated Codes of Civil Procedure, 1913-1919

§ 22. Writs, etc., in name of the people, and in English; abbreviations.

Service of the summons by publication, in an action for divorce, in a newspaper printed entirely in the Italian language, is ineffectual though both parties to the action are Italians; and where the action is uncontested, plaintiff's application for judgment must be denied and the complaint dismissed. *Alfonso v. Alfonso* (1917), 99 Misc. 550, 165 N. Y. Supp. 1037.

§ 24. Writ or process to be subscribed or endorsed; when error, etc., not to vitiate.

Disregarding errors.—The provisions of this section as to disregarding errors in process apply only to courts of record. *Richmond Sales Co. v. Morris* (1913), 157 App. Div. 374, 142 N. Y. Supp. 244.

§ 25. No discontinuance by reason of vacancy, etc.

This provision gives a judge out of office authority to settle a case, but not to make an order in a case three years after he is out of office or to sign an order previously made. *Smith v. Smith* (1916), 173 App. Div. 524, 159 N. Y. Supp. 1035.

§ 26. When one judge may continue proceedings commenced before another.

Continuance by adjournment.—Proceedings supplementary to execution are proceedings before a judge and not before the court, and while a proceeding commenced before one judge may be continued before another, yet it is essential to preserve the continuity by adjournment from time to time. *Matter of Wilson v. Bracken* (1912), 150 App. Div. 577, 135 N. Y. Supp. 435. This section has no bearing on the power of a court, as distinguished from a judge thereof, to make an order in supplementary proceedings requiring a judgment debtor to turn over certain property to a receiver. *Chestnut v. Greenberg* (1916), 162 N. Y. Supp. 137.

§ 55. Party may appear in person or by attorney.

Subscribing summons.—The summons in a supreme court action must be subscribed by the plaintiff's attorney notwithstanding the provisions of this section. But where the summons is subscribed only by the plaintiff, who is not an attorney, the service of an answer by a defendant waives the defect as to him. *Jaworower v. Rovere* (1917), 98 Misc. 377, 162 N. Y. Supp. 1075.

§ 65. Death or disability of an attorney; proceedings thereupon.

If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action against the party for whom he appeared, until thirty days after notice to appoint another attorney has been given to that party, either personally, or in such manner as the court directs. If after such notice, given as herein provided, no attorney ap-

pears for the party notified within the time specified in this section, the party serving the notice may proceed with the cause, and take a dismissal of the complaint, or a verdict, decision or judgment, as the case requires, and it is not necessary to give any further notice.

Amended by L. 1913, ch. 741, in effect May 26, 1913. The amendment of 1913 added the last sentence.

Source.—R. S., pt. 3, ch. 3, tit. 2, § 67.

Necessity for notice.—The prohibition of this section against any further proceedings where an attorney has been "disabled to act" until 30 days after the notice provided in said section, is absolute and in no way dependent on the knowledge of the other party of the death, removal or other

disability of his adversary's attorney. Hence, a judgment taken by default against a plaintiff, after his attorney was disbarred, must be vacated and set aside. *McGovern v. Suter & Co.* (1916), 159 N. Y. Supp. 475.

§ 108. Trial of claim of title by third person; to property seized by sheriff.

What does not constitute "trial."—*Montagnino v. Minolfi* (1916), 160 N. Y. Supp. 103.

§ 111. Limit of imprisonment on execution.

A bond is discharged by operation of law where the amount of the judgment in the action in which the body execution was issued was less than \$500. *Rosenzweig v. U. S. F. & G. Co.* (1914), 151 N. Y. Supp. 237.

Second imprisonment.—The rule that one who has been imprisoned for a failure to pay alimony cannot again be imprisoned upon like process in the same action applies only where such person has served the full term of imprisonment prescribed by this section. Hence, where a husband having been arrested for failure to pay alimony, paid the same and was discharged without having served any term of imprisonment, he is not immune from a sec-

ond arrest for contempt in failing to pay alimony which subsequently accrued. *Chadwick v. Chadwick* (1915), 170 App. Div. 328, 156 N. Y. Supp. 190.

A maximum of imprisonment only is fixed.—The term is left entirely open, except that such term shall not exceed three months. It thus leaves room for the application of the debtor and creditor law in effecting an earlier discharge. Section 28 of the conservation law, providing that judgments may be enforced against the person and providing specific terms of confinement, cannot be reconciled with the provisions of the code, and of the debtor and creditor law. *Mater of Locke* (1916), 174 App. Div. 287, 160 N. Y. Supp. 431.

§ 158. Sheriff's liability for escape of prisoner.

Extent of sheriff's liability.—In an action against a sheriff brought solely for the escape of a person held upon a body execution the plaintiff can recover only such damages as he has sustained, and the complaint should be dismissed where it appears that the prisoner was and remains insolvent and without property out of which the execution could be satisfied, for under the

circumstances the plaintiff has not been damaged by the escape. But where the sheriff has become liable as bail and the action is of that nature, the insolvency of the prisoner who escaped is no defense and cannot be shown in mitigation of damages. *Buczynski v. Anderson* (1916), 174 App. Div. 790, 156 N. Y. Supp. 697.

§ 172. Duties of coroner when sheriff is a party.

Duties of coroner within the city of New York under this title have been transferred to the county clerk. *Matter of Senior* (1917), 179 App. Div. 746, 167 N. Y. Supp. 140.

§ 190. The jurisdiction of the court of appeals in civil actions.

From and after the thirty-first day of May, nineteen hundred and seventeen, the jurisdiction of the court of appeals shall, in civil actions

and proceedings, be confined to the review upon appeal of an actual determination made by an appellate division of the supreme court in either of the following cases, and no others:

1. An appeal may be taken as of right to said court from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding where is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

2. An appeal may also be taken as of right to said court from an order of the appellate division granting a new trial on exceptions, where the appellants stipulate that, upon affirmance, judgment absolute shall be rendered against them.

3. An appeal may also be taken from a determination of the appellate division of the supreme court in any department, other than from a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

4. An appeal may also be taken from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding, but which is not appealable as of right under subdivision one of this section, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

The provisions of this section shall not apply to an appeal taken to the court of appeals prior to the first day of June, nineteen hundred and seventeen, but an appeal so taken shall be heard and determined under existing provisions of law.

Amended by L. 1882, ch. 61; L. 1895, ch. 943; L. 1917, ch. 290, in effect June 1, 1917. The amendment of 1917 materially changed this section.

Source.—Code of Proc., § 11.

Constitutional question.—In order to appeal upon the ground that there is a constitutional question directly involved, there must be presented directly and primarily an issue determinable only by the construction by the court of appeals of the constitution of the state or of the United States. *People ex rel. Moss v. Supervisors* (1917), 221 N. Y. 367.

An appellant, who relies upon the provision of the code permitting as of right appeals where a constitutional question is involved as an authority for his appeal, assumes the burden of presenting a record which establishes that such construc-

tion has been not only directly but necessarily involved in the decision of the case. If the decision was or may have been based upon some other ground, the appeal will not lie. *Matter of Haydorn v. Carroll* (1918), 225 N. Y. 84.

Where an order of a county court dismissing a writ of habeas corpus and remanding the relator has been unanimously affirmed by an order of the appellate division an appeal cannot be taken to the court of appeals unless the appeal involves the construction of the constitution of this state or of the United States, and where the appellant avers that he is held in im-

prisonment by virtue of a sentence and judgment which the court had not the power to render and which is, therefore, void, but the appeal involves only the determination of the meaning and not the validity of the statutes conferring jurisdiction upon the court, and does not present the constitutionality of the statutes in question or the construction of the constitution of the state, such appeal must be dismissed. *People ex rel. Curtis v. Kidney* (1919), 225 N. Y. 299.

Constitutional right of appeal.—Where an order disbarring an attorney was an actual determination of the appellate division and none of the justices thereof dissented from the decision, an appeal to this court is not a matter of right. There is no constitutional right of appeal to the court of appeals. *Matter of Mathot* (1917), 222 N. Y. 8.

Appeal as of right may be taken where the order of the appellate division is one of modification and also institutes a proceeding distinct, independent and involving no further or future order. *Matter of Whitman* (1918), 225 N. Y. 1.

The court of appeals is limited to a review of the actual determinations of the appellate division. So a question which has not been considered by the appellate division is not open to review. *Gen. Fireproofing Co. v. Keepsdry Const. Co.* (1919), 225 N. Y. 180.

Appeals from judgments in actions triable by court.—In actions triable by the court in which specific questions are submitted to a jury under § 971, the trial of the whole issue by the court is to be considered as a trial by the court without a jury, and the judgment rendered by the trial court is to be reviewed upon appeal precisely as though the case had been tried without the intervention of a jury. *Carroll v. Bullock* (1913), 207 N. Y. 567.

Auxiliary order.—An order made in an action on an application incidental and auxiliary to the judgment and for the purpose of regulating, carrying out and enforcing rights already settled and determined is not appealable. *Rudiger v. Coleman* (1912), 206 N. Y. 412.

Nature of order.—The fact that a paper is labelled an order does not determine its character, if, in fact, it has all the attributes of a final judgment. *Trust Co. of America v. United Box Board Co.* (1915), 213 N. Y. 334.

Order in condemnation proceedings.—An order in a condemnation proceeding denying a motion to amend "the proceedings and the map filed" is not a final order, and an appeal therefrom will not lie to this court. *Matter of Simmons (Catskill Aqueduct)* (1912), 206 N. Y. 577.

Order in proceeding for taking deposition.—A proceeding for the purpose of taking a deposition within this state for use without this state is especially denomi-

nated a special proceeding by section 914 of the code; and an order denying a motion to vacate a subpoena *duces tecum*, issued under section 915, operates as a final adjudication to the effect that the petitioner is entitled to take the desired deposition. Hence such an order is a final order in a special proceeding from which the party aggrieved is entitled to appeal as a matter of right. *Matter of Mohawk Overall Co.* (1914), 210 N. Y. 474, aff'g 156 App. Div. 879, 140 N. Y. Supp. 1132.

Final order; proceeding to compel production of will.—Where a will of a decedent has been admitted to probate and a proceeding is afterwards commenced in the surrogate's court upon the petition of an heir at law asking for an order requiring a certain person to show cause why he should not produce a will alleged to have been executed by decedent, subsequent to the will admitted to probate, which is alleged to be in his possession, such proceeding is an independent special proceeding, and hence an order of the appellate division affirming an order of the surrogate's court vacating the order to show cause is a final order in such proceeding and is appealable to the court of appeals. *Matter of Hardy* (1915), 216 N. Y. 132.

Id.; mandamus.—Order in a proceeding for a writ of mandamus under § 381 of the election law is not a final order. *Matter of Whitman* (1918), 225 N. Y. 1.

Id.; condemnation proceedings.—An order of the appellate division which modified an order of special term confirming the report of commissioners in condemnation proceedings by directing "that the report be referred back to the same commissioners to ascertain the value" of the interest of one of the parties and "to award the amount to him," is not a final order within the purview of the constitution and of this section and, therefore, this court is without jurisdiction to entertain an appeal therefrom. *Matter of City of New York* (1918), 224 N. Y. 697.

Order compelling additional security for costs.—An order denying appellants' application to compel petitioner in a proceeding for permission to sell real estate to pay debts of decedent, to file an additional undertaking as security for costs is not appealable to the court of appeals without permission. *Matter of Reed* (1917), 221 N. Y. 585.

Order denying application to vacate judgment of divorce is not appealable as of right to court of appeals. *Mokarzel v. Mokarzel* (1918), 224 N. Y. 340.

Review of order of affirmance of appellate division.—An order in an action, which purports to "enforce a stipulation" made therein, by directing payment of a sum of money, does not finally determine a special proceeding, nor grant a new trial, nor is it a final judgment in an action.

This court, therefore, has no jurisdiction to review an order of affirmance by the appellate division. *Cataract Journal Co. v. Fuller* (1917), 220 N. Y. (mem.).

An unanimous decision of the appellate division which in effect modifies an order of special term finally determining an action or special proceeding is appealable without permission to the court of appeals even where such modification is in favor of the party who desires to appeal. *Matter of City of N. Y. (White Plains Road)* (1918), 224 N. Y. 454.

Dismissal of appeal by appellate division operating as affirmance.—Where a landowner whose lands were taken by a municipality in condemnation proceedings accepted payment of the award but, nevertheless, appealed from the order of confirmation and the appellate division dismissed his appeal, the court of appeals has jurisdiction to review the order of dismissal. The effect upon the rights of the appellant was the same as an affirmance upon the merits would have been, and since a special proceeding regularly terminates in a final order, this order possesses all the elements of finality. *Matter of the City of New York* (1916), 216 N. Y. 491.

Where an appeal to the appellate division has been dismissed by an order of that court, upon a motion based on affidavits, and a judgment of dismissal has been entered upon such order, an appeal from such judgment will lie to the court of appeals. *Metropolitan T. Co. v. Long Acre E. L. & P. Co.* (1918), 223 N. Y. 69.

Certified question.—The court of appeals by this section is restricted to a consideration of the precise question formulated by the appellate division. *Waldorf-Astoria Hotel Co. v. New York* (1914), 212 N. Y. 97, affirming 159 App. Div. 888, 144 N. Y. Supp. 494.

The appellate division should not certify questions of law when the plaintiff has the right to appeal as of right to the court of appeals under subd. 1 from judgments or orders finally determining actions or special proceedings. It is only when an appeal is allowed under subd. 2 that questions should be certified to the court of appeals. *Wahle-Phillips Co. v. Fitzgerald* (1916), 173 App. Div. 129, 158 N. Y. Supp. 158.

Jurisdictional question; when not considered on appeal.—In an action by a shipper against a railroad company for failure to furnish cars, the court of appeals is without power to consider or decide the question raised for the first time on appeal, that the court had no jurisdiction, because a substantial number of cars demanded were for interstate shipments, where there was no attempt on the trial to separate the interstate from the intrastate shipments. *Dobbins v. Syracuse, Binghamton & New York R. Co.* (1915), 215 N. Y. 674.

Denial and exercise of discretion of application for alternative writ of mandamus is not reviewable by the court of appeals. *People ex rel. Elmira Advertiser Assn. v. Gorman* (1918), 222 N. Y. 712.

§ 191. Limitations, exceptions and conditions.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

2. The jurisdiction of the court is limited to the review of questions of law.

3. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals.

Amended by L. 1877, ch. 416; L. 1887, ch. 435; L. 1888, ch. 562; L. 1895, ch. 946; L. 1896, ch. 559; L. 1898, ch. 574; L. 1900, ch. 592, and L. 1917, ch. 290, in effect June 1, 1917. The amendment of 1917 omitted old paragraph 2.

Source.—Code of Proc., § 11.

Application.—*Tidd v. Skinner* (1919), 225 N. Y. 422.

Review of questions of law.—Where at

the close of the evidence the parties concede that it presents no question of fact for the jury, the question whether there was

any evidence to support a verdict in plaintiff's favor, directed by the trial court and unanimously affirmed by the appellate division, is a question of law reviewable in the court of appeals. *International Ferry Co. v. Am. Fidelity Co.* (1913), 207 N. Y. 350.

Question of law whether writings constitute a contract.—A unanimous affirmance by the appellate division of findings of the trial court, that a contract alleged in the complaint was made, does not preclude the court of appeals from reviewing the question whether there was a contract between the parties, where it is evident that the contract, which the findings declare to exist, is based upon the letters or writings which passed between the parties and these letters are included in the findings. The question of law, whether these writings constitute a contract, and if so, whether they satisfy the provisions of the statute of frauds, survives the unanimous decision of the appellate division, and is subject to review by this court. *Poel v. Brunswick-Balke-Collender Co.* (1915), 216 N. Y. 310.

From an order of the appellate division affirming the final judgment of the special term an appeal may not be taken to the court of appeals. It must be taken from the judgment entered upon the order of affirmance. *Wahle-Phillips Co. v. Fitzgerald* (1916), 173 App. Div. 129, 158 N. Y. Supp. 158.

Error of law.—It is not an error of law to refuse to find an immaterial fact even upon uncontradicted evidence. *Wallach v. Riverside Bank* (1912), 206 N. Y. 434.

Entry of order.—Under the provisions of § 1355, an order made by the appellate division on an appeal must be first entered in the office of the clerk of the county where the judgment was entered, and upon such certified copy of the order and on the papers upon which the appeal was heard, such county clerk enters judgment which is the judgment of the appellate division and an appeal is properly taken therefrom to the court of appeals. *Dwight v. Gibb* (1913), 208 N. Y. 153.

Necessity for service of notice of entry of judgment.—Under § 1310 service of notice of entry of the judgment of affirmance upon the appellant was necessary to set the time running within which the application for leave to appeal must have been made in a case specified in subdivision 1 as it existed prior to the amendment of 1917. *Galvin v. New York Central, etc., R. Co.* (1915), 216 N. Y. 710.

Evidence tending to support decision; order dismissing writ of certiorari.—An order of the appellate division dismissing a writ of certiorari and unanimously affirming the proceedings before a police commissioner, dismissing a policeman from the department, necessarily includes a decision that there was evidence supporting, or tending to sustain, the finding of the commis-

sioner that the relator was guilty of the charges made against him. *People ex rel. Stephenson v. Bingham* (1912), 205 N. Y. 168.

If the judgment entered upon the decision of the court without a jury is against the weight of evidence, it may be reviewed by the appellate division, and if any findings are without evidence to support them, they may be excepted to as a ruling upon a question of law and as such reviewed both in the appellate division and court of appeals. *Dann v. Palmer* (1912), 151 App. Div. 151, 135 N. Y. Supp. 411.

Review of question of fact.—Whatever may be the rule in a court which has power to review the action of a jury on questions of fact, it cannot, in the court of appeals, be maintained that an error in the submission of one question to the jury should or did affect its verdict on the other issue. *Matter of Kindberg* (1912), 207 N. Y. 220.

When the appellate division has made a finding of fact, the sole question presented to the court of appeals is whether there is any evidence tending to support the finding, for it can only review questions of law and it is only when there is no evidence in the case tending to support the finding that a question of law is raised by an exception to the findings of fact. *Scott & Co., Inc. v. Scott* (1919), 186 App. Div. 518, 174 N. Y. Supp. 583.

Questions relating to the comparative weight of evidence or the fairness of the sentence in a proceeding to discipline an attorney are beyond the jurisdiction of the court of appeals. *Matter of Hawes* (1916), 217 N. Y. 603.

Judgment of reversal on facts.—The court of appeals has no jurisdiction to review the action of the appellate division in reversing upon the facts a judgment of special term unless there was no question of fact on which the reversal could be based. To make out such a question it is not necessary that there be any conflict in the evidence; it is enough that conflicting inferences may be drawn from uncontroverted evidence. Hence, where the appellate division has reversed a judgment, based on findings of fact, as contrary to the weight of evidence, this court is concluded by its judgment upon the facts. *Ga Nun v. Palmer* (1916), 216 N. Y. 603.

Allowance of an appeal under § 191, subd. 1, must be given at the term which rendered the determination or at the next term after judgment is entered thereupon; it cannot be subsequently granted and is in no way affected or controlled by the time of service of the order from which an appeal is desired, either with or without notice of entry thereof. *Terwilliger v. Browning, King & Co.* (1913), 207 N. Y. 479.

Questions of law on an appeal to the court of appeals should not be certified by the appellate division where the case is

within one of the classes prescribed in subdivision 2 as it existed prior to the amendment of 1917; the mere certification that in the opinion of the court a question of law is involved which ought to be reviewed by the court of appeals is sufficient. *Wahle-Phillips Co. v. Fitzgerald* (1916), 173 App. Div. 129, 158 N. Y. Supp. 158.

Action at law wherein fraud alleged.—Subdivision 2 of this section, as it existed before the amendment of 1917, which provided that "no appeal shall be taken to . . . (the court of appeals) from a judgment of affirmance hereafter rendered in an action to . . . set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors," referred to an action in equity for the purpose named and was not intended to include an action at law wherein the fraud is a mere incident to the main relief demanded. *Booth v. Slee* (1916), 217 N. Y. 667.

Stay where two actions pending; reviewability of decision.—Where two actions for partition are pending concerning the same real property, a motion for a stay involves the question of the good faith of the parties, diligence in the procedure of the moving party, the general advantages to the parties, and other elements addressed particularly to the discretion of the court, and hence, a decision thereon is not reviewable in the court of appeals. *Doerfler v. Pottberg* (1916), 218 N. Y. 27.

Unanimous decision.—Prior to the amendment of 1917, under the provisions of the workmen's compensation act (L. 1914, ch. 41, § 23), an appeal could not be

taken from a unanimous decision of the appellate division to the court of appeals unless the former court permitted it or certified a question of law to be reviewed, or unless, in case of a refusal to certify, an appeal was allowed by a judge of the court of appeals. *Harnett v. Thomas J. Steen Co.* (1915), 216 N. Y. 101; *Garrison v. Sun Printing & Publishing Assn.* (1918), 222 N. Y. 691.

Whether there was evidence to support or tending to sustain such finding is a question of law, but it is one that cannot be reviewed in the court of appeals, because of the constitutional provision as to the effect of a unanimous decision of the appellate division. *People ex rel. Stephenson v. Bingham* (1912), 205 N. Y. 168.

No allowance of an appeal to the court of appeals in a negligence case is necessary under subdivision 2, as it existed prior to the amendment of 1917, when the appeal is from a judgment of reversal. *Middleton v. Whiteridge* (1915), 213 N. Y. 499.

Fraud of the rights of creditors, prior to amendment of 1917.

Although there are allegations in the complaint that the mortgage by the vendor to his wife was made in fraud of creditors and that plaintiff's lien should be held superior, plaintiff does not need to prove the fraud in order to prevail. Hence, the action cannot be held to be one to set aside an instrument in fraud of creditors, and this court is not precluded from reviewing the judgment herein although unanimously affirmed by the appellate division. *Flickinger v. Glass* (1918), 222 N. Y. 404.

§ 194. Remittitur; when judgment absolute to be rendered, and proceedings thereupon.

Directions strictly followed.—The remittitur of the court of appeals is its mandate to the court below and the directions contained therein must be strictly followed in the final judgment which is to make the decision effective. *Fulton v. Krull* (1912), 151 App. Div. 142, 135 N. Y. Supp. 432.

Order making judgment that of supreme court.—When a judgment of the court of appeals comes before the supreme court on a motion to have it become the judgment of the latter court, the sole and only duty of the special term is to issue an order making the judgment of the court of appeals the judgment of the supreme court. *O'Brien v. Seybolt* (1914), 163 App. Div. 162, 164, 148 N. Y. Supp. 489.

Judgment absolute.—Where a defendant appeals to the court of appeals on a stipulation for judgment absolute and the decision below is affirmed, it is the duty of the special term to follow the directions of the remittitur of the court of appeals and enter judgment absolute for the plaintiff. *Whiting v. Fidelity Mut. Life Ass.* (1912),

150 App. Div. 157, 134 N. Y. Supp. 696.

Effect of decision directing judgment absolute.—The effect of a decision by the court of appeals affirming an order granting a new trial and directing judgment absolute for plaintiff, in an action to recover for personal injuries, is the same as if a default had occurred, and the proceeding to assess the damages if taken at a trial term, is similar to the taking of an ordinary inquest; but where the assessment is by a jury at a trial term the rules for reviewing the trial of an action do not prevail. *Bornstein v. Faden* (1914), 84 Misc. 256, 145 N. Y. Supp. 758.

Setting aside verdict.—Where after judgment absolute for the plaintiff has been rendered by the court of appeals on the defendant's stipulation and subsequently the damages of the plaintiff have been assessed under § 194, it is improper for the defendant to move to set aside the verdict on the judge's minutes and for a new trial under § 999. *Triebner v. New York & Queens County Railway Co.*

(1912), 149 App. Div. 804, 134 N. Y. Supp. 267.

Assessment of damages; writ of inquiry.

—A writ of inquiry for an assessment of damages in an action for personal injuries

may be executed before a judge where some difficult point of law is likely to arise in the course of the inquiry, or the facts are important. *Bornstein v. Fadden* (1914), 84 Misc. 256, 145 N. Y. Supp. 758.

§ 217. General jurisdiction of supreme court.

In respect to persons and property of infants.—The general jurisdiction in law and equity which the supreme court possesses under the constitution includes the

powers formerly exercised by the court of chancery with respect to the persons and property of infants. *Hang v. Hewitt* (1914), 87 Misc. 67, 150 N. Y. Supp. 236.

§ 220. Jurisdiction of appellate division and powers of justices thereof.

The determination of the court upon a demurrer is appealable whether characterized as an order or an interlocutory judgment. *Kahn v. Johnston* (1917), 177 App. Div. 383, 163 N. Y. Supp. 984.

Appeal from children's court, New York city.—The appellate division has jurisdiction of an appeal from a judgment of that court. *People v. Di Stepano* (1915), 170 App. Div. 600, 156 N. Y. Supp. 679.

§ 231. Reargument, etc., when cause to be heard in another department.

Where in any case four justices of the appellate division in any department are not qualified to sit therein, or where the justices qualified to hear the appeal are equally divided, the court must direct the same to be sent to another department to be specified in the order to be there heard and determined. Where in any case when an appeal to the appellate division of any department comes on for argument, and the justice before whom the action was tried or who granted the order appealed from, is a member of such appellate division, the appellant may make an application to such appellate division for, and the court may grant, an order directing that such appeal be sent to an adjoining department to be specified in the order, to be there heard and determined. The appellate division may in any other appeal make an order in the furtherance of justice, directing that such appeal be sent to the appellate division of any department to be there heard and determined.

Amended by L. 1895, ch. 946; L. 1900, ch. 209; L. 1915, ch. 553, in effect May 8, 1915. The amendment of 1915 added the last sentence.

Source.—L. 1870, ch. 408, § 6, in part, and § 10.

Application.—*Matter of Babcock* (1915), 166 App. Div. 963, 151 N. Y. Supp. 1102; *Globe Woolen Co. v. Utica Gas & Electric Co.* (1915), 166 App. Div. 964, 151 N. Y. Supp. 1118; *Village of Fredonia v. Fredonia Natural Gas Light Co.* (1915), 167 App. Div. 955, 152 N. Y. Supp. 1147; *Vil-*

lage of Fredonia v. Fredonia Natural Gas Co. (1915), 169 App. Div. 690, 155 N. Y. Supp. 212; *Village of Fredonia v. Fredonia Natural Gas Light Co.* (1915), 169 App. Div. 912, 154 N. Y. Supp. 1148; *Davis v. Seaward* (1915), 168 App. Div. 960, 153 N. Y. Supp. 1111.

§ 241. What judges may perform duties of justices at chambers

Application.—*Ingalls v. Nutter* (1918), 172 N. Y. Supp. 210.

§ 251. Stenographers.

The only condition under which the fees of a stenographer may be taxed, is specified in this section. *Van Valkenburgh v. Bishop* (1917), 164 N. Y. Supp. 86.

Taxing of stenographer's fees is unauthorized unless the parties have so stipulated. *Matter of French* (1918), 181 App. Div. 719, 168 N. Y. Supp. 988.

Defendant is not liable for half of stenographer's fees paid by plaintiff for copy of minutes when it is plain that the justice did not "require" the plaintiff's copy, and it appears he never asked for it and never used it, although each of the parties procured at its own expense a copy for its own use at the trial. *Meads & Co. v. City of New York* (1918), 183 App. Div. 947, 170 N. Y. Supp. 1072.

§ 263. Court of claims.

The board of claims is hereby abolished and the court of claims re-established. Such court shall consist of three judges, to be known as judges of the court of claims, who shall be appointed by the governor, by and with the advice and consent of the senate. The judges first appointed shall be appointed for terms of three, six and nine years, respectively, from the first day of January of the calendar year in which such appointments shall be made. Thereafter the full term of office of each judge shall be nine years. Whenever the term of office of a judge shall expire, or his office become vacant from any cause, his successor shall be appointed for the unexpired term. Notwithstanding the provisions of section five of the public officers law, a judge of the court of claims shall hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified, but after the expiration of such term the office shall be deemed vacant for the purpose of choosing his successor. By an order to be filed in the office of the secretary of state, the governor shall designate one of the judges as presiding judge, who shall act as such during his term, and thereafter upon the appointment of his successor, the governor shall designate such successor or any other judge of the court as presiding judge, who shall act as such during his term. The office of commissioner of claims is hereby abolished, but the commissioners now in office shall continue to have the powers and duties of commissioners of claims until the appointment and qualification of judges of the court of claims, except that after this section as amended takes effect and until the appointment and qualification of judges of the court of claims they shall not hear, try or determine any claim, or entertain a motion or make an order affecting the substantial rights or* a party. During the period of three months after the first appointment and qualification of judges hereunder such commissioners shall have power to determine and dispose of questions, claims and matters which shall have been finally submitted to and heard by such board on or before January twenty-third, nineteen hundred and fifteen, in the same manner and with the same effect as if such board had not been abolished. Such commissioners shall for their services rendered during such period of three months receive compensation at the rate of five hundred dollars per month. A judge of the court of claims, appointed under the provisions of this section, as amended, must be an attorney and counselor-at-law admitted to practice in the courts of this state, of at least ten years' experience in practice. A judge shall not during his term of office practice the profession of law, or act as referee in any action or proceeding in any court of this state. A judge shall not hold any other office or public trust to which any salary or compensation is attached, nor serve as a member of any political committee. Except as herein otherwise provided, the judges appointed under this section shall have jurisdiction to

* So in original.

hear and determine all matters pending in the court of claims at the time they shall take office, and all matters pending in the board of claims at the time when this section, as amended takes effect, shall be heard and determined by the court of claims. But if any matter or claim be left undisposed of by the commissioners of claims, the court of claims shall have jurisdiction thereon. Whenever in this act or in any other statute, heretofore enacted or enacted at the legislative session of the year nineteen hundred and fifteen, reference is made to the board of claims or any officer thereof, the same shall be deemed to refer to and mean the court of claims or an officer thereof. A determination of the board of claims, heretofore rendered shall have the same force and effect and be subjected to the same procedure as provided in this article for a judgment.

Added by L. 1897, ch. 36; amended by L. 1904, ch. 16; L. 1906, ch. 692; L. 1911, ch. 856; L. 1915, ch. 1, in effect January 28, 1915. The amendment of 1915 materially changed this section, the general effect being to reorganize the board of claims into a court of claims.

Source.—L. 1883, ch. 205, § 1.

§ 264. Jurisdiction.

The court of claims possesses all of the powers and jurisdiction of the former board of claims. It also has jurisdiction to hear and determine a private claim against the state, including a claim of an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused, which shall have accrued within two years before the filing of such claim and the state hereby consents, in all such claims, to have its liability determined. It may also hear and determine any claim on the part of the state against the claimant, or against his assignor at the time of the assignment, and must render judgment for such sum as should be paid by or to the state. But the court has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim, or some part thereof, has been rejected by such tribunal or officer. In no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, and of the items of damage alleged or claimed to have been sustained, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths. The attorney-general may require any person filing such a notice of claim for any cause whatever against the state to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant's residence, relating to such claim, and when so sworn, to answer orally as to any facts relative to the justness of such claim. Whenever any claim for the appropriation of property is

pending or has been determined in the court of claims and the attorney-general is required by law to examine the title of the claimant thereto, prior to the payment of an award, the attorney-general may require such claimant to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant's residence, or if the claimant be a corporation within the county where its principal place of business in this state is located, or if the claimant be a nonresident within the county where the property is situated, relating to such title, and when so sworn, to answer orally as to any facts relative to the title to such property. The attorney-general may also require such claimant to file with him an affidavit stating any material facts relating to such title. Wilful false swearing before the attorney-general or deputy attorney-general is perjury and punishable as such. Provided further, that nothing herein contained shall be construed to allow the court to hear any claim which as between citizens of the state would be barred by lapse of time or of any claim heretofore accrued and of which the said court or board has had jurisdiction and which was barred by lapse of time at the date when this section, as amended, takes effect. Provided further, that the court shall have jurisdiction, and may hear and determine all claims accrued and actually filed at any time prior to September first, nineteen hundred and twelve, and filed within two years from the time they accrued, though no notice of intention to file was given, as required by this section, if such claims when filed were not barred by lapse of time and the court or board had jurisdiction and authority to hear and determine the same except for the lack of such notice; and such jurisdiction shall attach without refileing or previous notice.

Added by L. 1897, ch. 36; amended by L. 1905, ch. 370; L. 1906, ch. 692; L. 1908, ch. 519; L. 1912, ch. 545; L. 1915, ch. 1; L. 1917, ch. 669; L. 1919, ch. 157, in effect Sept. 1, 1919. The amendment of 1915 materially changed this section, the general effect being to make it conform to the new court of claims. The amendment of 1917 inserted sentences 8 and 9. The amendment of 1919 inserted the words "and of the items of damage alleged or claimed to have been sustained" in lines 24, 25.

Source.—L. 1883, ch. 205, § 7, as amended by L. 1884, ch. 60.

Application.—*Smith v. State of New York* (1915), 169 App. Div. 438, 154 N. Y. Supp. 1003.

As to destruction of intent to file claim in the capitol fire of 1911, see *Coble v. State of New York* (1916), 173 App. Div. 921, 157 N. Y. Supp. 1120.

Determination of damages.—A contractor, who by direction of the state engineer demolished a saw mill standing on state lands, is not liable in damages to the owner, who must litigate the question of compensation with the board of claims. *Watson v. Empire Engineering Corporation* (1912), 77 Misc. 543, 137 N. Y. Supp. 231.

The court of claims has jurisdiction of an action against the state for injuries caused during automobile races held on the state fair grounds. *Arnold v. State of New York* (1914), 163 App. Div. 253, 148 N. Y. Supp. 479.

The amount of award is limited to the damage which accrues from six months prior to the notice of intention to file up

to the time of the filing of the claim. *Collins v. State of New York* (1918), 103 Misc. 217.

In the absence of any trespass and of any negligence, there can be no recovery for damage accruing to a claimant as the result of a public improvement effected under legislative authority. In such case the injury is *damnum absque injuria*. *Williams v. State of New York* (1919), 106 Misc. 19.

Validity of title.—The court of claims having only the jurisdiction conferred by statute has no power to pass upon the validity of the title to lands taken from a claimant by eminent domain for canal purposes. *People ex rel. Smith v. Sohmer* (1914), 163 App. Div. 830, 149 N. Y. Supp. 276.

Jurisdiction to determine title of land as between claimant and estate. *People ex rel. Palmer v. Travis* (1918), 223 N. Y. 150.

Salary of state official.—The court of claims has jurisdiction to hear and deter-

mine claim for salary of state official, although the comptroller has refused to audit a pay-roll therefor, upon the ground that no appropriation had been made. *O'Neil v. State of New York* (1918), 223 N. Y. 40.

The erection of a dam, resulting directly and necessarily in the flooding of plaintiff's premises to her damage, being a continuous trespass for which the state might be held liable in an appropriate proceeding, plaintiff's right to recover, though not barred by lapse of time, is limited under § 264 to the damage accruing within six months prior to the filing of the notice of intention to file the claim, but the trespass not having been pleaded, no recovery can be had therefor, and a motion to amend the claim to conform to the proof so as to allege a claim for trespass instead of negligence will be denied. *Williams v. State of New York* (1919), 106 Misc. 19.

Filing of a notice in writing of intention.—The court of claims has no jurisdiction to hear and determine a claim against the state, where no notice in writing of intention to file a claim has been filed. The question being one of jurisdiction, it can be raised at any time and cannot be waived by any officer or authority representing the state. *Buckles v. State of New York* (1917), 221 N. Y. 418.

The filing of a claim against the state is not equivalent to the filing of the written

notice of intention to file a claim. *Butterfield v. State of New York* (1917), 221 N. Y. 701.

Failure to file notice of intention; construction of ch. 420 of the Laws of 1916.—Chapter 420 of the Laws of 1916, giving the court of claims jurisdiction to hear and determine any claim against the state theretofore accrued, which shall be filed within one year after the act takes effect, for compensation or damages on account of the appropriation or use by the state of property in connection with the improvements of the canal, and further providing that "the filing of such claim shall also be in lieu and stead of any notice of intention to so file," was intended to relieve claimants from the result of a failure to file a notice of intention and renders it unnecessary to refile a claim already filed, thereby saving any claim filed before the date when said act took effect, although there was a failure to file a notice of intention. On a motion to dismiss appeals upon the ground that there was a failure to file a written notice of intention to file a claim as required by § 264, the appeal should be heard so that the court may determine whether or not claimants have suffered damages on account of the use of their lands or property by the state. *Rogers v. State of New York* (1918), 184 App. Div. 340, 171 N. Y. Supp. 337.

§ 265. Rules and procedure.

The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and methods of procedure before it, vacate or modify judgments and grant new trials, and except as otherwise provided in said rules and regulations, or the code of civil procedure, the practice shall be the same as in the supreme court. Rules of the board of claims or former court of claims, now in force, shall continue to be the rules of the court of claims until changed by such court.

Added by L. 1897, ch. 36; amended by L. 1906, ch. 692; L. 1915, ch. 1, in effect January 28, 1915. The amendment of 1915 added the last sentence.

Source.—L. 1883, ch. 205, § 3, in part.

Determination by judge who heard testimony.—The practice before the court of claims is the same as in the supreme court, which gives a litigant the right to have the case determined by the same judge who heard the testimony. Hence, a judge of the court of claims who did not become a member thereof until the evidence upon the

claim had been heard, and the case submitted, has no authority to decide the case or take part in its decision. *Smith v. State of New York* (1915), 214 N. Y. 140.

Signature of judges.—A decision must be authenticated by the signatures of the judges taking part therein. *Smith v. State of New York* (1915), 214 N. Y. 140.

§ 265-a. Perpetuating testimony.

At any time after a claim shall have been filed against the state, testimony in relation thereto may be perpetuated, upon the application of the attorney-general or of a claimant to the court of claims or a judge thereof, in accordance with rules and regulations which the court of claims is hereby

authorized to establish for the purpose, or, in the absence thereof, in substantial accordance with chapter nine, title three, articles one and two of the code of civil procedure; provided, however, that at any time after the state shall have lawfully appropriated lands, structures, waters, franchises or any other property whatsoever, the attorney-general or a claimant may apply to a justice of the supreme court for the perpetuation of testimony pursuant to chapter fourteen, title one, article ten of the code of civil procedure and upon such application it shall not be necessary to show that the property for one year next preceding the date of the petition has been in the possession of the state, or in the possession of the state and those from whom the state derives title, either as sole owner or as joint tenant or as tenant in common. The court of claims or the judge thereof or the justice of the supreme court to which or to whom any such application is made may direct the depositions to be taken before the court of claims or before one or more judges thereof or before an official referee acting pursuant to either chapter two hundred and twenty-nine of the laws of nineteen hundred and eleven or section one hundred and fifteen of the judiciary law.

Added by L. 1918, ch. 180, in effect April 10, 1918.

§ 266. Officers.

The court of claims shall appoint and may at pleasure remove, a clerk, a stenographer, and an attendant, who shall also act as messenger; and they shall perform such duties as the court may prescribe. Before entering upon the duties of his office, the clerk shall make and file in the office of the comptroller, a bond for the faithful performance of his duties in an amount and with sufficient sureties to be approved by at least two of the judges, which approval shall be endorsed on said bond. The court may also appoint such other employees as may be needed. The clerk and stenographer appointed by the board of claims are continued as such officers and employees of the court of claims until the appointment and qualification of their successors.

Added by L. 1897, ch. 36; amended by L. 1906, ch. 692; L. 1909, ch. 586; L. 1911, ch. 856; L. 1915, ch. 1, in effect January 28, 1915. The amendment of 1915 materially changed this section, the general effect being to make it conform to the new court of claims.

Source.—L. 1883, ch. 205, § 2, as amended by L. 1890, ch. 403.

§ 268. Sessions; duty to sheriff.

The court shall hold at least eight sessions each year, and unless otherwise ordered by the court shall be held as follows: On the fourth Monday of January at the city of Albany; on the third Monday of February at the city of Syracuse; on the fourth Monday of March at the city of Utica; on the fourth Monday of April at the city of Albany; on the fourth Monday of May at the city of Rochester; on the third Monday of June at the city of Buffalo; on the fourth Monday of September at the city of Albany; on the fourth Monday of November at the city of Albany, and it may also hold adjourned or special sessions at such other times and places in the state as it may determine. It may also hold a session and take testimony where the claimant resides or where the claim is alleged to have arisen, or in the vicinity, and may view any premises affected by the pro-

ceedings, and in case of any appropriation of land by the state, the value of which shall exceed five hundred dollars, it shall be the duty of the court, or the judge or judges hearing the claim, to view the premises affected by the appropriation. The sheriff of any county, except Albany, shall furnish for the use of the court suitable rooms in the court house of his county for any session ordered to be held thereat and shall if required attend said session. His fees for attendance shall be paid out of the contingent fund of the court at the same rate as for attending a term of the supreme court in that county.

A session of the court may be conducted and testimony and proof taken and arguments heard thereat, by one or more judges to be designated by the presiding judge; but no determination or judgment of the court shall be rendered except upon the concurrence of at least two of the judges of the court. Not more than three judges shall sit in any case.

Adjourned or special sessions of the board of claims heretofore designated to be hereafter held, shall be held as sessions of the court of claims unless such court shall cancel such designations.

Added by L. 1897, ch. 36; amended by L. 1906, ch. 692; L. 1911, ch. 856; L. 1915, chaps. 1, 100, in effect March 19, 1915. The amendments of 1915 materially changed this section, the general effect being to make it conform to the new court of claims.

Source.—L. 1883, ch. 205, § 4, as amended by L. 1884, ch. 60, and § 13, as amended by L. 1889, ch. 68.

Judges may view premises to fix values.
—*Davies v. State of New York* (1919), 186
App. Div. 393, 173 N. Y. Supp. 611.

§ 268-a. Disposition of adverse and conflicting claims.

If there are adverse and conflicting claims to the lands, structures, waters, franchises or any other property whatsoever lawfully appropriated by the state or an apparent lien or incumbrance on the property so appropriated or on any interest therein, or to the award therefor, unless the holders of such adverse or conflicting claims or the owner of such lien or incumbrance shall consent that their respective interests may be determined by the court of claims, or if the owners of any property so appropriated or of any interests therein are indeterminable or unknown, the court shall direct the comptroller to deposit the amount awarded in any bank, in which moneys belonging to the fund from which such compensation is payable may be deposited, to the account of such award, to be paid and distributed to the persons entitled to the same as ordered by the supreme court on application of any person.

Added by L. 1917, ch. 730, in effect June 5, 1917.

§ 269. Judgments.

Validity of judgment certified by clerk of court of claims after creation of board of claims. *People ex rel. Hutchinson v. Sohmer* (1913), 158 App. Div. 642, 143 N. Y. Supp. 1086.

The fact that no certificate has been furnished by the attorney-general showing that no appeal has been or will be taken by the state, is no defense when judgment has been affirmed by the appellate division and court of appeals, and no appeal lies

to United States supreme court. *People ex rel. Palmer v. Travis* (1918), 223 N. Y. 150.

Approval by attorney-general of abstract of title is not required.—The failure to furnish such search cannot be interposed as a defense to the payment of an award, nor can the comptroller be heard arbitrarily to say that the abstract is not satisfactory, or that it must be approved by the attorney-general before the comptroller is

able to determine as to the title, in view of the fact that the abstract and certificate filed with the comptroller, taken in connection with the certified copies of the said judgment rendered in the proceeding, show conclusively a good title in case the court of claims has jurisdiction to pass upon the question of title. *People ex rel. Palmer v. Travis* (1917), 180 App. Div. 25, 167 N. Y. Supp. 467.

§ 274. Costs not be taxed.

Filing of abstract of title. *People ex rel. Palmer v. Travis*, (1918), 223 N. Y. 150.

§ 275. Appeals.

Either party may appeal from an order or judgment of the court of claims to the appellate division of the supreme court of the third department, except that appeals from orders or judgments relating to claims which arose in the fourth department shall be taken to the appellate division of such fourth department. The appeal from a judgment may be taken upon questions of law or of fact, or both, or for an alleged excess or insufficiency of the judgment. Upon such appeal, the court may affirm, reverse, or modify the judgment, or dismiss the appeal, or grant a new trial. The provisions of this code relating to appeals in the supreme court apply, so far as practicable, to appeals from orders or judgments of the court of claims, except as modified in this article.

Amended by L. 1919, ch. 481, in effect Sept. 1, 1919. The amendment of 1919 added the last part of the first sentence beginning with "except that appeals."

L. 1919, ch. 481, § 2.—All appeals now pending from orders or judgments relating to claims which arose in the fourth department shall be transferred to such department.

§ 279. Salaries and expenses of judges.

Each judge of the court of claims shall receive an annual compensation of eight thousand dollars, payable monthly, and all actual and necessary traveling and other expenses and disbursements incurred or made by them in the discharge of their official duties elsewhere than in Albany, payable monthly, by the state treasurer on the audit and warrant of the comptroller.

Added by L. 1897, ch. 36; amended by L. 1906, ch. 692; L. 1910, ch. 684; L. 1911, ch. 856; L. 1915, ch. 1, in effect January 28, 1915. The amendment of 1915 materially changed this section, the general effect being to make it conform to the new court of claims.

§ 280. Salaries of officers of court of claims.

Each officer of the court of claims shall receive an annual salary, payable monthly, and other compensation as follows:

1. The clerk, three thousand six hundred dollars.
2. The court stenographers, who shall also be deputy clerks, three thousand dollars and five cents a folio for copies of minutes and testimony furnished at the request of the claimant.
3. The stenographer to the judges, who shall also act as relief court stenographer, three thousand dollars.
4. The clerk and court stenographer and the stenographer to the judges and relief court stenographer shall be paid their actual expenses while in the discharge of their respective duties, elsewhere than in the city of

Albany, to be audited by the court and paid from the contingent fund. No charge shall be made against the state by the clerk or the stenographers for copies of minutes, testimony or papers, furnished to the attorney-general or to the court or filed in the office of the clerk.

Added by L. 1897, ch. 36; amended by L. 1907, ch. 580; L. 1911, ch. 856; L. 1915, chaps. 1, 100; L. 1917, ch. 459, in effect July 1, 1917. The amendments of 1915 materially changed this section, the general effect being to make it conform to the new court of claims. The amendment of 1917 changed the salaries of the clerk and stenographers.

Source.—L. 1883, ch. 205, § 2, as amended by L. 1890, ch. 403; L. 1884, ch. 334, § 1, as amended by L. 1891, ch. 379.

L. 1915, ch. 100, § 2. The provisions of section two hundred and sixty-three of the code of civil procedure, as amended by chapter one of the laws of nineteen hundred and fifteen, in relation to the qualification of judges of the court of claims, shall not prevent a judge of such court from serving as a member of a constitutional convention and receiving the salary or compensation attached to such office.

§ 281-a. Bringing in parties.

If a claim arises in a case where the state seeks to appropriate or has appropriated land for a public use, the court of claims or a referee having jurisdiction to hear, try or determine such claim shall inquire as to whether there are other parties, known or unknown, who may have some right, title or interest in and to such land as disclosed by the abstract of title and certificate of search as to encumbrances required by section two hundred and sixty-nine of this act, or as disclosed by a certificate of the attorney-general after examination by him of the title to such land. The court of claims or such referee shall have jurisdiction and power to, and shall, order such parties to be brought in and made parties to the proceeding pending in such court or before such referee whenever it appears or is made to appear to the court or such referee necessary to a complete determination of the controversy, or the determination of a liability. Such parties shall be brought in by order of such court or such referee, which shall be served personally or by publication in like manner as is provided for the service of a citation in surrogate's court, except that publication in one newspaper published in the county where such land is located once in each of four successive weeks shall be sufficient publication unless otherwise ordered by such court or referee.

Added by L. 1919, ch. 208, in effect April 11, 1919.

§ 282. Additional judges.

The number of judges to constitute the court of claims may be increased to not more than five as provided by this section. An additional judge of the court of claims heretofore appointed pursuant to this section is continued in office until February first, nineteen hundred and eighteen. If the presiding judge of such court shall prior to February first, nineteen hundred and eighteen, or at any time thereafter certify to the governor in writing that the accumulation of business in the court of claims requires for the disposal thereof an additional judge or judges, specifying the number, not more than two, and the term for which such additional judge or judges should be appointed, not exceeding three years, the governor may appoint, by and with the advice and consent of the senate, such additional judge or judges, for such term, each of whom shall be an attorney and counselor-at-law, admitted to practice in the courts of

this state of at least ten years' experience in practice. If a vacancy shall occur otherwise than by expiration of term in the office of any additional judge, his successor shall be appointed by the governor, by and with advice and consent of the senate, for the unexpired term of his predecessor in office. An additional judge appointed pursuant to this section shall, during his term of office, receive the same compensation and be allowed his expenses, payable at the same time and in the same manner as a judge of the court of claims. Except as herein provided the provisions of section two hundred and sixty-three relating to judges of the court of claims shall apply to any such additional judge.

Added by L. 1915, ch. 1, and amended by L. 1917, ch. 255, in effect April 24, 1917. The amendment of 1917 relates to the terms of judges.

§ 283. Determination of appropriation cases; assignment of judges.

At least two of the judges of the court of claims shall be designated by the presiding judge thereof to devote their entire time, or so much thereof as shall be necessary, to the hearing and determination of claims filed against the state arising out of the appropriation of lands, structures, waters, franchises or other property in connection with the improvement of the Erie, Champlain and Oswego canals as provided by chapter one hundred and forty-seven of the laws of nineteen hundred and three, and acts amendatory thereof and supplemental thereto, the Cayuga and Seneca canals as provided by chapter three hundred and ninety-one of the laws of nineteen hundred and nine, and acts amendatory thereof and supplemental thereto, and for the purpose of furnishing proper terminals and facilities for barge canal traffic as provided for by chapter seven hundred and forty-six of the laws of nineteen hundred and eleven, and acts amendatory thereof and supplemental thereto. Such designations of judges may be changed in the discretion of the presiding judge, provided at least two of such judges be at all times assigned to the hearing and determination of such claims. Nothing in this section contained, however, shall be construed to limit the power of the judges so designated, or either of them, from hearing and determining claims other than such appropriation cases whenever and to the extent that it appears to the satisfaction of such judges, or either of them, that such appropriation cases do not require their attention or that of either of them.

Added by L. 1916, ch. 343, in effect April 27, 1916.

§ 284. Calendar practice.

A calendar shall be prepared by the clerk of the court of claims for each regular session thereof. Such calendar shall be comprised of all pending claims in the district where such session is to be held and the claims shall appear therein in the order of the date of the filing thereof respectively. The attorney-general may notice any of such claims for trial at any such term by serving upon the attorney for the claimant a notice of trial at least fourteen days before the commencement of such term. When any claim of the character mentioned in the last preceding section is reached for trial by the court, if the claimant fails to appear, or if he appears but is not ready to proceed to the trial thereof, the court, in its

discretion, may proceed forthwith to take proofs and testimony therein offered by the state or otherwise, and may make an award in accordance therewith and cause a judgment to be entered thereon. If, in such a case, the court shall decide not to proceed forthwith to take such proofs and testimony, interest shall not accrue or be allowed upon such claim between such date and the entry of judgment in such case, unless, in the exercise of its discretion, for good cause shown, the court shall otherwise determine.

When any claim other than one of those mentioned in the last preceding section is noticed for trial as herein provided, if the claimant fails to appear, the court, upon the motion of the attorney-general, may dismiss the same, in which event such default shall not be opened nor shall such claim be restored to the calendar except upon the motion of the attorney for the claimant, based upon affidavits showing a reasonable and satisfactory excuse for such default and that such claim is a meritorious one. Such notice of motion and the affidavits upon which the same is based shall be served upon the attorney-general at least eight days before such application, unless a shorter time shall be ordered by the court. Whenever any interest-bearing claim, other than one of those mentioned in the last preceding section, shall have been dismissed and thereafter restored to the calendar as herein provided, no interest shall accrue or be allowed thereon between the date of such dismissal and the entry of judgment in such case.

Added by L. 1916, ch. 343, in effect April 27, 1916.

§ 315. Jurisdiction of city court of city of New York.

Constitutionality of amendment increasing jurisdiction.—The amendment to § 315 by chap. 569, Laws of 1911, which raised the amount for which the city court of the city of New York was authorized to render judgment in actions for the recovery of money only from the sum of \$2,000 to the sum of \$5,000, is in conflict with the provisions of the state constitution (Art. 6, §§ 14, 18). *Lewkowicz v. Queen Aeroplane Co.* (1913), 207 N. Y. 290.

Although the city court of the city of New York has no general equity jurisdiction, it is a court of record and not an "inferior local court" within the meaning of art. 6, § 18 of the state constitution, which forbids the legislature to confer upon such courts "any equity jurisdiction." Hence, the legislature had the power to confer upon this court, as provided in subd. 2 of this section, the jurisdiction to foreclose or enforce a lien upon real property in the city of New York, although such an action is one in equity to

enforce a lien. *Schultz v. Teichman Engineering & Const. Co.* (1913), 140 N. Y. Supp. 429.

Action for accounting.—In an action on a contract where it is impossible to ascertain what amount, if any, is due plaintiff without an accounting, the case is not within the jurisdiction of the city court of the city of New York. *Lasky v. Coverdale* (1914), 84 Misc. 34, 145 N. Y. Supp. 994.

Demand of judgment for more than \$2,000.—A complaint in the city court of New York which states a cause of action and demands judgment for \$5,000, is good on demurrer, though a judgment in excess of \$2,000 cannot be entered. *Lickerman v. Motchan* (1913), 82 Misc. 405, 143 N. Y. Supp. 731.

Action against city.—The city court of the city of New York has no jurisdiction of an action against said city. *Gaines v. City of New York* (1913), 156 App. Div. 789, 142 N. Y. Supp. 401.

§ 316. The last section limited.

Jurisdiction.—Section 316 which increases the jurisdiction of the city court from \$2,000 to \$3,000 is unconstitutional, but where judgment has been rendered for more than \$2,000, the court may reduce the recovery to the amount limited by the con-

stitution. *Lewkowicz v. Queen Aeroplane Co.* (1913), 154 App. Div. 142, 138 N. Y. Supp. 983, rev'g 77 Misc. 151, 136 N. Y. Supp. 894; aff'd. 207 N. Y. 290.

A judgment in plaintiff's favor for \$5,000 will be reversed on the ground that the

court below had no jurisdiction to render a judgment for more than \$2,000 and costs. *Mills v. Gold* (1913), 79 Misc. 209, 139 N. Y. Supp. 846.
Application.—*Matter of Sudbury* (1916), 172 App. Div. 900, 156 N. Y. Supp. 878.

§ 319-a. Removal of cause in certain cases from city court to supreme court.

The supreme court, at a term held in the first judicial district, must, on the motion of any party, by an order made at any time before the entry of judgment, remove to itself an action brought in the city court of the city of New York in the following cases:

1. An action to foreclose or enforce a lien, for a sum exceeding two thousand dollars, exclusive of interest, upon one or more chattels.
2. An action wherein the complaint demands judgment for a sum of money only, exceeding two thousand dollars, exclusive of interest and costs as taxed; except where the action is brought upon a bond or undertaking given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in section three hundred and seventeen of this code.
3. An action to recover one or more chattels the aggregate value of which exceeds two thousand dollars.

Upon the entry of the order of removal in the office of the clerk of the county of New York, the city court shall proceed no further therein, and the clerk of the city court must forthwith deliver to the clerk of the county of New York all papers filed therein, and certified copies of all minutes and entries relating thereto, which must be filed, entered or recorded, as the case requires, in the office of the clerk of the county of New York, and thereupon the supreme court shall proceed in said action as though said action had been commenced in said supreme court, and all proceedings had in the city court prior to the entry of said order of removal shall be of like force and effect as though had in the supreme court.

Added by L. 1913, ch. 210, in effect April 4, 1913.

Removal of cause from city court to supreme court. See *Margies v. Clyde Steamship Company* (1914), 165 App. Div. 33, 150 N. Y. Supp. 4.

This section was intended to authorize the transfer to the supreme court of cases pending in the city court untried, and, it seems, others that may thereafter have been tried in that court by mistake. *Siegel v. Corvan Co.* (1913), 157 App. Div. 423, 142 N. Y. Supp. 267.

Upon the reversal of an order consolidating seven actions in which the aggregate

amount demanded is \$6,000, defendant may move for the removal of the several actions to the supreme court. *O'Neill Inc. v. Lockwhit Co.* (1913), 82 Misc. 383, 143 N. Y. Supp. 729.

Where after the commencement of an action for rent in the city court, the plaintiff learns that a judgment of the supreme court for prior instalments of rent amounting to over \$2,000, has been vacated, he is entitled to the removal of the action to the supreme court. In *re Sutton* (1917), 165 N. Y. Supp. 58.

§ 319-b. Vacation of judgment in certain cases.

Whenever judgment has been or shall be entered in the city court of the city of New York in any one or more of the following cases, to-wit:

1. An action to foreclose or enforce a lien, for a sum exceeding two thousand dollars, exclusive of interest, upon one or more chattels;
2. An action wherein the complaint demands judgment for a sum of money only, and the judgment is in favor of the plaintiff, and exceeds two

thousand dollars, exclusive of interest and costs as taxed; except where the action is brought upon a bond or undertaking given in an action or special proceeding in the same court or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in section three hundred and seventeen of this code.

3. An action to recover one or more chattels, and the judgment is in favor of the plaintiff for a chattel or chattels, the aggregate value of which exceeds two thousand dollars.

Any party to such action, at any time after the entry of such judgment, may apply to the said city court to have such judgment vacated, and thereupon the said city court may in its discretion vacate such judgment. Any case, wherein a judgment has been so vacated, may be removed to the supreme court in the first judicial district, as provided in section three hundred and nineteen-a.

Added by L. 1913, ch. 211, in effect April 4, 1913.

§ 332. Stenographers.

The justices of the court or a majority of them may appoint ten stenographers of the court, and may at pleasure remove either of them. The justices of the court, or a majority of them, must, from time to time, assign each of the stenographers to duty at the trial or special term. Each stenographer is entitled to a salary, fixed and to be paid as prescribed by law and must attend the term to which he is assigned. -

Amended by L. 1918, ch. 88, in effect March 26, 1918. The amendment of 1918 changed the word "must" in the second line to "may," and the word "nine" in the second line to "ten."

§ 338. What mandates may be executed without the city.

Subdivision 1 should be construed as relating only to executions against property, in order to harmonize with the other provisions of the code, and does not require the docketing of a judgment in another

county as a condition precedent to issuing a body execution on a judgment in the city court. *Weinus v. Light* (1918), 183 App. Div. 591, 170 N. Y. Supp. 173.

§ 340. Jurisdiction of county courts.

The test of jurisdiction is not the sum recoverable in the action, but the sum demanded in the complaint. *Halpern v. Langrock Bros. Company* (1915), 169 App. Div. 464, 155 N. Y. Supp. 167.

Demand for judgment sole test of jurisdiction.—The demand for judgment contained in the complaints in an action to recover a sum of money only (subdivision 3) is the sole test of jurisdiction of the county courts, which are without power to grant an order permitting the plaintiff to amend the demand for judgment as set forth in the complaint by reducing the amount. *Mansson v. Nostrand* (1918), 183 App. Div. 371, 170 N. Y. Supp. 285.

County courts are of limited jurisdiction.—*Kortwellyeszsky v. Manhattan Co.* (1914), 162 App. Div. 285, 147 N. Y. Supp. 586.

Opening judgment.—The county court has inherent power over its judgments and may open them in the furtherance of justice. *Wood v. Wesley* (1913), 75 Misc. 521, 135 N. Y. Supp. 876.

Equitable relief.—Where in an action for breach of contract, the items exceed \$2,000, the fact that equitable relief is also demanded does not give the county court jurisdiction. *Owen v. Brown* (1913), 78 Misc. 273, 139 N. Y. Supp. 451.

Equitable jurisdiction is limited to cases provided in the code. The court has no jurisdiction in actions to determine the title to real estate except where such questions arise as incident to a foreclosure or partition of real estate. Its jurisdiction does not extend to an action to set aside fraudulent transfers of real estate, for the appointment of a receiver and for

an accounting. *Ertrachter v. Locust Building Co.* (1918), 102 Misc. 368, 169 N. Y. Supp. 879.

Sum of money; counterclaim.—Where the complaint in a county court action to recover a sum of money only demands judgment for a sum not exceeding \$2,000, the court has jurisdiction to try the action and render judgment upon defendant's counterclaim irrespective of its amount. *Weinstein v. Halfenberg* (1912), 78 Misc. 190, 139 N. Y. Supp. 303.

Demand for \$2,000 judgment, with interest.—Where a complaint states two causes of action, one for wages alleged to have been earned by the plaintiff, and another for damages for a breach of a written contract of employment, and the demand for judgment is "for the sum of two thousand dollars upon both causes of action, with interest, besides the costs and disbursements of the action," the county court has no jurisdiction. *Halpern v. Langrock Bros. Company* (1915), 169 App. Div. 464, 155 N. Y. Supp. 167.

Demand of judgment in complaint; demurrer.—Where, in an action for assault, brought in the county court, a complaint demands judgment for \$2,500, and the defendant demurs on two grounds: First, that the complaint does not state facts sufficient to constitute a cause of action, and, second, that it appears on the face of the complaint that the court has no jurisdiction, so much of an interlocutory judgment as overrules the demurrer on the first ground as offsets the costs allowed and

permits the service of an amended complaint without the payment of costs, should be reversed. *Hackett v. Strumpf* (1913), 156 App. Div. 58, 141 N. Y. Supp. 172.

Where the complaint fails to allege defendant's residence in the county under this section and under article 6, section 14, of the constitution, providing that the legislature may enlarge the jurisdiction of county courts, but that it shall not be so extended as to authorize an action for the recovery of money only where any non-resident of the county is a defendant, it will be presumed that the defendant is a nonresident, and that the complaint is demurrable for want of jurisdiction and for insufficiency. *Maltin v. Royal Petticoat Co.* (1914), 147 N. Y. Supp. 545.

Necessity that all defendants be residents of county.—Considering the history of the county courts in this state, with the limits placed on them in the successive constitutions, it is manifest that all the defendants proceeded against must be residents of the county, as a condition of any jurisdiction by the county court. *Kortwellyesky v. Manhattan Cooperage Co.* (1914), 162 App. Div. 285, 147 N. Y. Supp. 586.

Where the removal of a cloud on title or an action in ejectment would be involved the county court cannot pass upon right of infant to annulment of conveyance in a suit of foreclosure. *Oneida County Savings Bank v. Saunders* (1917), 179 App. Div. 282, 166 N. Y. Supp. 280.

§ 341. Domestic corporations, etc., when deemed resident, etc.

For the purpose of determining the jurisdiction of a county court, in either of the cases specified in the last section, a domestic corporation or joint-stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or whose principal place of business or any part of its plant or plants, shops, factories or offices is actually located within the county, or in case of a railroad corporation where any portion of the road operated by it is within the county, it is deemed a resident of the county; and personal service of a summons made within the county, as prescribed in this act, or personal service of a mandate, whereby a special proceeding is commenced, made within the county, as prescribed in this act for personal service of a summons, is sufficient service thereof upon a domestic corporation wherever it is located. Provided, however, that a city which shall include within its boundaries more than one county shall not for the purpose of conferring jurisdiction on a county court be deemed a domestic corporation resident of any county so included.

Amended by L. 1899, ch. 320; L. 1911, ch. 68; L. 1914, ch. 350, in effect April 15, 1914. The amendment of 1914 added the last sentence.

Source.—New.

Action against New York City.—The county court of any county within the limits of New York city, wherein some of the municipal offices are located, has jurisdiction of an action against the city of New York to recover damages for personal injuries where the complaint demands judgment for a sum of money not exceeding \$2,000. *Eldred v. New York* (1913), 159 N. Y. App. Div. 301, 144 N. Y. Supp. 402.

Jurisdiction over railroad operating within county.—Under the provisions of this section, giving a county court juris-

diction over a railroad corporation where any portion of the road operated by it is within the county, jurisdiction arises from the residence of the defendant and not from the place of service of process, which may be made in any county of the state. Hence, in an action against such a corporation operating within the county of Queens, service of process may be made in the county of New York, where said corporation had its principal office. *Johnson v. Manhattan, etc., Traction Co.* (1914), 162 App. Div. 753, 147 N. Y. Supp. 965.

§ 342. Action, etc., wherein county judge is incapable to act.

Filing of certificate of disqualification with a request to another county judge to hold court, see *Queens-Nassau Mortgage*

Co. v. Graham (1913), 157 App. Div. 489, 142 N. Y. Supp. 589.

§ 348. When jurisdiction, etc., of county courts, co-extensive with supreme court.

Where in an action by the owners of the second mortgage to foreclose the same, the holder of the new mortgage appears by attorney but does not answer and at the sale appears with another attorney and forbids it, the proceeds being insufficient to satisfy the liens, and a motion to set aside the sale denied, but the owner of the new mortgage is allowed by answer to

raise the question of subrogation, the county court, in view of this section has jurisdiction to try the issue. *Bussing v. Whitaker* (1917), 177 App. Div. 95, 163 N. Y. Supp. 982.

Section cited.—*Oneida County Savings Bank v. Saunders* (1917), 179 App. Div. 282, 166 N. Y. Supp. 280.

§ 362. When the people will not sue.

Registration of title.—A person suing for the registration of title to lands which have escheated to the state and claiming that the people cannot assert title by reason of the expiration of the forty-year period of limitation provided by § 362, must prove not only that the people's cause

of action did not accrue within forty years before the action was commenced but also that the people have received no rents or profits within that period. *Hamlin v. People* (1912), 155 App. Div. 680, 140 N. Y. Supp. 643.

§ 365. Seizin within twenty years, when necessary, etc.

Plaintiff must show seizin.—Plaintiff in an action of ejectment must succeed upon the strength of his own title and not upon the weakness of his adversaries. *Fletcher*

v. City of New York (1914), 87 Misc. 109, 149 N. Y. Supp. 289.

When time begins to run against remainderman. See notes to section 415.

§ 369. Adverse possession under written instrument or judgment.

Titles by adverse possession are in disfavor with persons contemplating the purchase of property and with the courts. Such titles must commend unqualified respect, and a mere claim, unfortified by proofs establishing without dispute that possession has been clearly adverse for the required period, is not enough to move the courts in hostility to an unwilling vendee. *Crocker Point Assn. v. Gouraud* (1918), 224 N. Y. 343.

Public highway.—A municipal corporation cannot be deprived of the title to lands

held by it as a public highway by adverse possession. Land dedicated to the public for use as a highway can never be gained by adverse possession no matter how long continued and no matter if inconsistent to public right of passage. *Town of Brookhaven v. Dyett Sand-Lime Brick Co.* (1912), 75 Misc. 310, 135 N. Y. Supp. 165.

Right of one holding easement under condemnation proceeding against owner in fee.—In the exercise of the power of eminent domain by or in behalf of a railroad

company the permanent public use of the land is contemplated, and the use of the railroad company while the easement exists is exclusive of the owner of the fee. Hence a claim to the rightful possession of land under such an easement is hostile to the fee owners and is the assertion of a

title founded upon the decree or judgment of a competent court. *Long Island R. Co. v. Mulry* (1914), 212 N. Y. 108, reversing 149 App. Div. 924, 133 N. Y. Supp. 1130, overruling *Schur v. Long Island R. Co.*, 127 App. Div. 267, 111 N. Y. Supp. 569.

§ 370. What constitutes adverse possession.

Section cited.—*Italian Savings Bank v. Le Grange* (1915), 169 App. Div. 120, 154 N. Y. Supp. 814.

Hostile title.—One who claims title by adverse possession must show not only that he held the land, but that he held it claiming title thereto in hostility to the true owner. *Rathbunville Cemetery Assn. v. Betson* (1913), 208 N. Y. 364.

Cutting grass.—The cultivation and improvement must not only be open, notorious and exclusive of any other claimant or

owner, but it must consist of acts such as are usual in the ordinary cultivation and improvement of similar lands by thrifty owners. It cannot be asserted, as a matter of law and unqualifiedly that cultivation means to disturb the surface of land, and to sow and cultivate and reap, and in substance that, as a matter of law, cutting grass from a lot is not such improvement as may constitute adverse possession. *Ramapo Mfg. Co. v. Mapes* (1915), 216 N. Y. 362.

§ 371. Adverse possession under claim of title not written.

Even when held by mistake or through inadvertence adverse possession may ripen into a prescriptive right after twenty years of such possession, the actual physical occupation and improvement being in a proper case sufficient evidence of the intention to hold adversely. *Delotti v. Bickhardt* (1916), 101 Misc. 707, 167 N. Y. Supp. 19.

Title under judgment.—An invalid claim is as effectual, as a constituent of the notice to the rightful owner that the occupation under it is in defiance of his title, as a valid claim, and the fact that one had obtained a judgment that he was the owner of certain lands and that another had no

title thereto, does not prevent the statute of limitations from running on behalf of the latter as against the title under the judgment. *Monnot v. Murphy* (1913), 207 N. Y. 240.

Time of possession.—The time of possession of lands necessary to support the presumption of a lost grant cannot, under the law of this state, be less than twenty years. *Kellum v. Corr* (1912), 149 App. Div. 200, 133 N. Y. Supp. 784.

Use of a strip of land for access to premises deemed adverse possession. *Village of Manchester v. Post* (1916), 97 Misc. 451, 161 N. Y. Supp. 371.

§ 372. Id.; what constitutes it.

Adverse possession against state.—Where one asserts an adverse possession against the state not founded upon a written instrument, he must establish the matters required by § 372, the same as if the possession were claimed against an individual. *Hamlin v. People* (1913), 155 App. Div. 680, 140 N. Y. Supp. 643.

Evidence of adverse possession not founded upon a written instrument. *Green v. Horn* (1915), 165 App. Div. 743, 151 N. Y. Supp. 215.

It is not necessary to show that a tract of land was actually ploughed when it is shown that the tract was an abandoned railroad right of way, was a portion of a larger tract of agricultural lands which were fenced, and that the land was rocky and not fitted for cultivation. *Arnold v. New York, Westchester & Boston R. Co.* (1916), 173 App. Div. 765, 159 N. Y. Supp. 258.

§ 373. Relation of landlord and tenant, as affecting adverse possession.

Presumption of continuance of relation of state and custodian.—The possession of a custodian of the state is the possession of the state and is not hostile or adverse, and this is true even though a grantee took his deed of the fee in ignorance of the fact that his grantor stood in the relation of

custodian, and this relation is presumed to continue for twenty years, notwithstanding any claim by the custodian or his successor of a hostile title. *People v. Ladew* (1918), 102 Misc. 595, 170 N. Y. Supp. 196.

§ 376. When satisfaction of judgment presumed.

A judgment rendered in the municipal court of the city of New York for a sum of money and docketed in the county clerk's office the next day by the filing of a transcript is good for twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. *Grannis v. Ewell* (1912), 76 Misc. 484, 135 N. Y. Supp. 588.

What constitutes judgment or decree.—A citation or order to show cause issued by a surrogate is not a "judgment or decree" within the meaning of this section. *Matter of Watson* (1914), 163 App. Div. 41, 43, 148 N. Y. Supp. 525.

An action on a judgment rendered in the consular court of China is barred in twenty years under this section. *Newman v. Basch* (1915), 89 Misc. 622, 152 N. Y. Supp. 456.

Final accounting.—The provision that a final judgment for a sum of money is conclusively presumed to have been satisfied after the expiration of twenty years, does not prevent a judgment creditor from awaiting an accounting of executors and then asserting his judgment. *Matter of Watson* (1914), 163 App. Div. 41, 148 N. Y. Supp. 525.

The exception in the case of the absence of defendant from the state, contained in § 401, does not apply to the payment of a

judgment. *Brinkman v. Cram* (1916), 175 App. Div. 372, 161 N. Y. Supp. 965; *Jacobs v. Del Genovese* (1917), 179 App. Div. 163, 166 N. Y. Supp. 88.

The amendments of 1894 to this section and § 382, subd. 7 and § 3017, were intended to make a judgment of a court not of record, when a transcript is filed and the judgment docketed in the county clerk's office, a judgment of the county court, and permit an action to be maintained thereon within twenty years. *Brownell v. Parsons* (1917), 220 N. Y. 483.

Term of twenty years not extended for eighteen months after death under § 403. *Matter of Hoes* (1918), 183 App. Div. 38, 170 N. Y. Supp. 543.

Rebuttal of conclusive presumption of satisfaction of judgment by listing same in bankruptcy schedules. *Hyde Park Flint Bottle Co. v. Miller* (1917), 179 App. Div. 73, 166 N. Y. Supp. 110.

The remedy of a judgment creditor is to obtain leave after ten years from the docketing of his judgment and sue thereon. *Matter of Hoes* (1918), 183 App. Div. 38, 170 N. Y. Supp. 543.

Objection that judgment is presumed to be paid after twenty years must be raised by an administrator. *Matter of Hoes* (1918), 183 App. Div. 38, 170 N. Y. Supp. 543.

§ 379. Limitation of action to redeem from a mortgage.

An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained possession of the mortgaged premises, for twenty years after the breach of a condition of the mortgage, or the non-fulfillment of a covenant therein contained.

Amended by L. 1919, ch. 281, in effect Sept. 1, 1919. The amendment of 1919 omitted the words "an adverse" before the word "possession" in line 4.

Mortgagee in possession.—The effect of this section as construed by the court of appeals, is to prescribe a statute of limitations of twenty instead of ten years in the single case of an adverse holding by a mortgagee, and to recognize the dictum of Judge Grover in *Miner v. Beekman*, 50 N.

Y. 337, that, in case the mortgagor is in possession or in case the mortgagee is in possession avowedly as such, the right to redeem is a continuing right and may be asserted at any time. *Reich v. Cochran* (1915), 213 N. Y. 416, 426.

§ 381. Within twenty years.

Covenant in deed to pay note of grantor.—A provision in a deed by which the grantee agrees to pay a note of the grantor's is an enforceable covenant, and the statute of limitations thereon is twenty years. *Anguish v. Blair* (1913), 160 App. Div. 52, 145 N. Y. Supp. 392.

Action surety on bond.—Although a contractor engaged in blasting in the city of New York has given the city a bond as security against loss or damage to persons or property resulting from explosives, payment under said bond to be for the benefit of any person suffering damage, the ad-

ministrator of a person who was killed by a blast of dynamite cannot recover against the surety where the action was not commenced within two years after the death as required by § 1902 on the theory that the action is against the surety on a sealed instrument as to which this section applies. *Fallert v. Massachusetts Bonding & Insurance Co.* (1916), 172 App. Div. 690, 158 N. Y. Supp. 658.

Where the certificates of a corporation pledged as collateral bear the corporate

seal the period of the statute of limitations thereon is twenty years, and hence the pledgor is not entitled to an injunction restraining the discontinuance of an action on said certificates brought against the corporation which issued them by the pledgee upon the theory that if the action is discontinued the shorter statute of limitations will bar a recovery on the certificates. *Gillera v. Owens* (1918), 182 App. Div. 580, 169 N. Y. Supp. 958.

§ 382. Within six years.

Accounting of executor.—A cause of action, brought by a residuary legatee to set aside the accountings of an executor and to recover sums of money alleged to have been converted by such executor is deemed to have accrued at the time when the plaintiff discovered the facts constituting the cause of action. *Spallholz v. Sheldon* (1912), 148 App. Div. 573, 132 N. Y. Supp. 560.

Action for excessive fees paid testamentary trustee.—Where an executor made yearly accountings in the surrogate's court up to the time of his resignation, when, by direction of the surrogate, he transferred the estate to the general guardians of the plaintiff, then an infant, and was discharged from all liability and duty on account of the estate, and more than seventeen years after the first accounting, and more than ten years after the last one, an action was brought to vacate the decrees of the surrogate and reclaim excessive payments for commissions, costs and allowances, it was held that it was not an action on the ground of fraud within the meaning of subdivision 5. *Spallholz v. Sheldon* (1915), 216 N. Y. 205, affg. 158 App. Div. 367.

Admission of validity of claim for services is sufficient to stop running of statute. *Matter of Fingar* (1917), 101 Misc. 516, 168 N. Y. Supp. 361.

Trustee de son tort.—The six years statute of limitations applies where a trust arises by reason of the wrongdoing of the person against whom it is asserted, whether the trust is sought to be enforced at law, in equity, or in the surrogate's court. *Kellogg v. Kellogg* (1915), 169 App. Div. 395, 155 N. Y. Supp. 310.

Where a daughter at the time of her death was entitled to a vested remainder in her father's estate, subject to the life estate of her mother, and after her mother's death the executor and trustee under the will of her father undertook to distribute the estate and without authority paid to the daughter's husband her share, and he by receipt of said sum and solely by operation of law became a trustee *de son tort* and the moneys were not received by him upon any express trust

or promise or agreement to carry out the terms of the trust contained in the will of the daughter's father or under any agreement to perform the duties of the trustee, the six years' statute of limitations began to run from the time of the receipt of the moneys, and is a bar to an action by the daughter's administratrix to recover her share of the estate commenced long after the statute had run. It is immaterial that the form of relief demanded in the complaint was for an accounting, and that the husband received the moneys with notice of the trust. *Roediger v. Kraft* (1915), 169 App. Div. 304, 154 N. Y. Supp. 435.

Breach of promise.—In order to sustain an action for breach of promise of marriage and renewals thereof, it must appear that an action upon the original promise was not barred by the statute of limitations, or that such promise was kept alive and the time of its fulfillment extended by mutual consent. *Pearce v. Stace* (1913), 207 N. Y. 506.

Alienation of affections.—A wife's action for the alienation of her husband's affection, and the consequent loss of consortium, is not maintainable after the lapse of six years from the date of the alleged alienation. *Hall v. Smith* (1913), 80 Misc. 85, 140 N. Y. Supp. 796.

Action to correct error in life insurance policy.—The fact that an error in a policy of life insurance was not discovered for more than ten years after its issuance, is not of itself sufficient to bar a right to equitable relief as the statute of limitations would not begin to run until the discovery of the fraud. *Ulman v. Equitable Life Assurance Society* (1913), 161 App. Div. 708, 146 N. Y. Supp. 696.

Action to recover insurance moneys paid to carrier for benefit of shippers.—An action by the plaintiff in its own behalf and in behalf of all others similarly situated, against the executors of the owner of a vessel to recover moneys collected and retained by the testator under a fire insurance policy insuring goods "for account of whom it may concern, loss if any payable to" the defendant's testator, is based upon an implied contract, and the six-year

statute of limitations is a defense. Said statute began to run on the date of the receipt of the insurance money by the testator and not on the date of the plaintiff's discovery of that fact. *N. Y. & Boston Despatch Express Co. v. Carroll* (1915), 170 App. Div. 197, 156 N. Y. Supp. 14.

Insurer may fix time limit for its liability for secret breaches of trust, but it must use clear and unmistakable terms in order to cut off liability for delayed claims. *First National Bank v. National Surety Co.* (1918), 182 App. Div. 262, 169 N. Y. Supp. 774.

Condemnation; proceeding to compel award of damages.—A proceeding under a statute providing for the construction of a bridge, and authorizing an award of damages to abutting owners, is neither an action nor a special proceeding within the meaning of the code of civil procedure, and hence the six-year statute of limitations prescribed in the code does not bar an application by landowners to compel an award of damages. *People v. Zucca* (1913), 160 App. Div. 578, 145 N. Y. Supp. 754.

Action to recover damages for change of grade.—An action at law by an abutting owner to recover damages for a change of grade made without lawful authority, is barred by the six-year statute of limitations, which begins to run after the completion of the work. *Kehres v. New York* (1914), 162 App. Div. 349, 147 N. Y. Supp. 825.

Recovery of deposit to secure rent.—Where a deposit was given in renting premises and a note was given upon vacation for amount owing, the jury might well have found that the note was not given in payment of rent, and the right of action to recover the deposit did not accrue until payment of the note. Where such payment was made within six years an action to recover said deposit was not barred. *Shattuck v. Buck* (1912), 77 Misc. 95, 136 N. Y. Supp. 103.

Action for rent under extension of lease under seal.—In an action for rent which accrued after the expiration of a lease in writing and under seal and during the term for which said lease had been renewed, the six years' statute of limitations is not a defense. This, because the additional or extended term became a part of the term under the original lease which was under seal. *Hudson Building v. Compagnie Generale Transatlantique* (1915), 169 App. Div. 600, 155 N. Y. Supp. 488.

Promissory note.—The statute of limitations upon a promissory note payable upon demand begins to run from its date, when the right to make the demand accrues. *Sewell v. Swift* (1912), 151 App. Div. 584, 136 N. Y. Supp. 371.

A letter written by the maker, a corporation, through its treasurer, in which

it makes an unconditional promise to pay a demand note, is sufficient to take the claim out of the statute of limitations, though in the letter it is also stated "I do not agree that I am personally liable." *Quaker Oats Co. v. North* (1917), 102 Misc. 108, 168 N. Y. Supp. 145.

Claim against city of New York.—The spirit of section 261 of the Greater New York charter, which provides that no action shall be prosecuted or maintained against the city unless it appears by the complaint, or necessary moving papers, that at least thirty days have elapsed since the demand, claim or claims upon which the action is founded were presented to the comptroller of the city and that he has neglected to make payment thereof for thirty days after such presentment, simply gives the city a plea in abatement until a notice of claim has been filed with the comptroller, and for thirty days thereafter, and that as to a claim against the city the six-year statute of limitations will not be construed to run for six years and thirty days. *McCarthy v. New York* (1914), 84 Misc. 439, 146 N. Y. Supp. 281. The legislature has power to make exception in favor of New York city to §§ 382, 383. *Woentz v. City of New York* (1917), 101 Misc. 622, 168 N. Y. Supp. 699.

Revival by payment.—A payment upon a demand note, whether made before or after the debt is barred by statute, does not revive the note or interrupt the running of the statute unless made by the debtor himself or some one authorized. Where the authorization is contained in a pledge of collateral to apply the proceeds thereof in payment, an application by the creditor under the original agreement is insufficient, unless there is a new ratification under such circumstances as to raise an implication of a new promise. *Security Bank v. Finkelstein* (1912), 76 Misc. 461, 135 N. Y. Supp. 640.

Fraud; meaning of term.—It seems that the word "fraud" as used in subdivision 5 of this section, means actual and not constructive fraud, and that the statute of limitations commences to run against constructive fraud as soon as the act or omission constituting it occurs. *Spallholz v. Sheldon* (1913), 158 App. Div. 367, 143 N. Y. Supp. 417.

It appearing that there was no actual fraud in the issuance of stock issued to the principal defendant, but that it was issued with full knowledge of the then stockholders and upon said defendant's assertion that it was being issued to him by reason of his one-quarter interest in an option for the purchase of a certain timber tract, to take over which the corporation had been organized, and on account of services rendered and disbursements incurred by him, subdivision 5, postponing the running of the statute of limitations until the discovery of the fraud, does not

apply. *East Lake Lumber Co. v. Van Gorder* (1919), 105 Misc. 704, 174 N. Y. Supp. 38.

Breach of duty.—A charge against a defendant of a breach of duty, and a failure to exercise due care may not be such fraud as is contemplated by subdivision 6 of this section. *Glover v. National Bank of Commerce* (1913), 156 App. Div. 247, 141 N. Y. Supp. 409.

Action for deceit.—In an action at law to recover damages for deceit whereby the plaintiff was induced by false and fraudulent representations to make a contract for the purchase of stock, the six-year statute of limitations applies. *Ball v. Gerard* (1913), 160 App. Div. 619, 146 N. Y. Supp. 81.

Action for fraud and deceit.—The limitation period upon an action at law for fraud and deceit in the sale of corporate bonds begins to run from the time of the purchase of the bonds, under this section, and six years having elapsed since such purchase prior to the commencement of the action plaintiff's action is barred. *Dennin v. Powers* (1916), 96 Misc. 252, 160 N. Y. Supp. 636.

Upon a cause of action for actual fraud the statute of limitations begins to run six years after the discovery of the fraud, and in the case of an infant one year after he attains his majority after the expiration of the six-year period. *Otier v. Neiman* (1916), 96 Misc. 481, 160 N. Y. Supp. 610.

Fraudulent concealment.—An action in equity for fraudulent concealment of a sale of stock is not barred by the six-year statute of limitations, and the cause of action is not deemed to have arisen until the fraud is discovered. *Clarke v. Gilmore* (1912), 149 App. Div. 445, 133 N. Y. Supp. 1047.

The plaintiff's action, though based on fraudulent concealment and misrepresentation by defendant, being merely an action to recover a money judgment for overpayments, the statute of limitations began to run when the payments were made, and the right to recover them accrued, and not from the date of the discovery of the fraud. And no payments can be recovered which were made more than six years prior to the commencement of the action. *Saks & Co. v. New York Edison Co.* (1917), 178 App. Div. 634, 165 N. Y. Supp. 572.

Setting aside conveyance on ground of fraud.—In an action to set aside a conveyance for fraud, where the plaintiff was twenty years of age when the conveyance took place and knew the facts, he has six years from that time, in which to commence action, and such time is not extended by § 396. *Gabriel v. Gabriel* (1913), 79 Misc. 346, 139 N. Y. Supp. 778.

Reconveyance of land.—The six-year statute of limitations applies in a suit for the specific performance of an agreement to

accept a reconveyance of land. *Winne v. Queens Land & Title Co.* (1914), 166 App. Div. 314, 149 N. Y. Supp. 664.

In an action for conversion the fact that the plaintiff did not know that the property had been pledged by the defendants after the refusal of the defendants to return, did not prevent the running of the six-year statute of limitation. *San Lucas v. Bornn & Co.* (1916), 173 App. Div. 703, 160 N. Y. Supp. 131.

Money had and received.—Where a deed of land was made at a time when the grantor had a right of action in equity against an elevated railroad company for an injunction which might result in a payment of money as compensation for easements which had been appropriated by the railroad, but the deed did not reserve to the grantor the right to such compensation, it was held that the grantor's right to recover from the grantee moneys paid by the railroad in settlement of a suit to enjoin the maintenance of the railroad in front of the premises in question was, at most, a right to recover for moneys had and received and as the payment had been made more than ten years before the action for its recovery was brought by the grantor, the action was barred by the statute of limitations. *Trustees of Mission Church v. Ridley* (1915), 167 App. Div. 392, 152 N. Y. Supp. 745.

Where an account becomes an account stated by reason of its being forwarded and received and retained after examination the cause of action accrues and the statute commences to run, and it is not within the power of the creditor to extend the time merely by rendering the same account over again from time to time merely with the addition of the monthly interest. *Slayback v. Alexander* (1917), 179 App. Div. 696, 167 N. Y. Supp. 194.

Claim on a forged check becomes out-lawed six years after it is paid. *Parker-Smith v. Prince Manufacturing Co.* (1916), 172 App. Div. 302, 158 N. Y. Supp. 346.

Action in equity to enforce legal right.—Where an action is brought to enforce in equity a legal right of a corporation to recover from individual defendants damages resulting from their misuse of its assets, the statute of limitations and not laches is a bar. *Pollitz v. Wabash R. R. Co.* (1913), 207 N. Y. 113.

In equity action where plaintiff has remedy at law.—Where it does not appear that the vendee of land was insolvent at the time the purchase money was due, the six-year statute of limitations is a defense to an action in equity to have the debt declared a lien on the land and for foreclosure thereof; as the plaintiff has a remedy at law by bringing an action on the debt. *Fuller v. Morian* (1914), 85 Misc. 529, 147 N. Y. Supp. 650.

Statute to be pleaded.—Where the executrix of an estate is also a claimant, she is

bound to plead the statute against her own claim, so far as the same is applicable thereto. *Matter of Brown* (1912), 77 Misc. 507, 137 N. Y. Supp. 978.

Amendment where action is barred.—Where judgment in favor of a plaintiff in an action against a common carrier for breach of contract has been reversed, plaintiff will not be allowed to amend his complaint so as to change the cause of action to one of conversion, where the tort action is barred by the statute of limitations. *Nathan v. Woolverton* (1912), 149 App. Div. 791, 134 N. Y. Supp. 469.

The amendments of 1894 to this section and § 3017, were intended to make a judgment of a court not of record, when a transcript is filed and the judgment docketed in the county clerk's office, a judgment of the county court, and permit an action to be maintained thereon within twenty years. *Brownell v. Parson* (1917), 220 N. Y. 483.

The formal waiver of the statute cannot create an obligation where none had ever existed. *Andrews v. Cosmopolitan Bank* (1917), 101 Misc. 672, 167 N. Y. Supp. 935.

§ 383. Within three years.

Administrator's action.—Although intestate permitted his action for personal injuries to lapse, an administrator's action brought on behalf of next of kin, within two years after intestate's death, is in time. *Kelliher v. New York Central & H. R. Co.* (1912), 77 Misc. 330, 136 N. Y. Supp. 256.

Action by executor.—An executor or administrator is not authorized by § 1902 to recover damages for injuries sustained by a decedent from negligence, where an action by the decedent, if living, would be barred by the three-year statute of limitations. *Kelliher v. New York Central & H. R. Co.* (1912), 153 App. Div. 617, 138 N. Y. Supp. 256, rev'g 77 Misc. 330, 136 N. Y. Supp. 256.

Action for conversion by executor, etc.—The statute of limitations on an action for

the conversion of property by one holding the same in a representative capacity, is three years, as provided by subdivision 4. *Morales v. Klopsch* (1913), 158 App. Div. 824, 143 N. Y. Supp. 922.

When statute begins to run.—Where an executor having come into the possession of bonds to which his testator had not title, sells them and distributes the proceeds, he acts in hostility to the right and title of the true owner, and the statute of limitations on an action for the conversion immediately begins to run. *Morales v. Klopsch* (1913), 158 App. Div. 824, 143 N. Y. Supp. 922.

Claim against city of New York.—The legislature has power to make exception in favor of New York city to §§ 382, 383. *Woentz v. City of New York* (1917), 101 Misc. 622, 168 N. Y. Supp. 699.

§ 384. Within two years.

An action against a dentist for negligence to the injury of a patient is one for malpractice and must be brought within two

years. *Hurlburt v. Gillett* (1916), 96 Misc. 585, 161 N. Y. Supp. 994.

§ 385. Within one year.

Action against sheriff.—The statute of limitations does not begin to run against a cause of action against a sheriff for unlawful return of cash bail until after the

recovery of a judgment against the person giving bail. *Tiffany v. Harvey* (1913), 158 App. Div. 159, 143 N. Y. Supp. 31.

§ 386. When cause of action accrues on a current account.

Account for board and room.—Where the credits on an open account for board and room are all for the time for which the statute would not be a bar, they will not serve to prevent the running of the statute as to that part of the account which would

otherwise be within the statute. In re *Clyde's Estate* (1915), 155 N. Y. Supp. 621.

There must be items on both sides other than cash payments. *Crump v. Sefton* (1918), 172 N. Y. Supp. 338.

§ 388. Actions not before provided for.

Section cited.—*Continental Securities Co. v. Belmont* (1915), 168 App. Div. 483, 154 N. Y. Supp. 54.

Action to annul judgment.—Where in a suit to have adjudged null and void as to the plaintiffs a certain judgment of the

supreme court, entered more than twenty-eight years ago while the plaintiffs were infants, § 388, which is extended one year by § 396 as to each plaintiff after she attained her majority, is pleaded, the suit is barred. *Ford v. Clendenin* (1913), 155 App. Div. 433, 137 N. Y. Supp. 54, aff'd 215 N. Y. 10.

Action based on fraud.—In a stockholder's action against the directors of a corporation for fraud, the ten-year statute of limitations only applies. *Continental Securities Co. v. Belmont* (1913), 83 Misc. 340, 144 N. Y. Supp. 801. The statute does not begin to run until the fraud is discovered. *Clark v. Gilmore* (1912), 149 App. Div. 445, 133 N. Y. Supp. 1047.

In a cause of action in equity to set aside a conveyance for constructive fraud the statute of limitations is ten years and begins to run from the date of the conveyance, and under § 396 an infant has one year after attaining majority after the expiration of the ten-year period in which to maintain an action to set the conveyance aside. *Otier v. Neiman* (1916), 96 Misc. 481, 160 N. Y. Supp. 610.

Where stockholder entitled to an accounting.—Where a corporation sells or assigns all of its capital stock except that held by one stockholder, and the assignee without a merger forms a new corporation with said stock and the stock of two other companies, said stockholder may bring a suit in equity to obtain his share of the accumulated profits and earnings of the corporation and he has a right to an accounting, the period of which under the circumstances should cover the ten years preceding the commencement of the action. *Logan v. New York Sugar Refining Co.* (1917), 176 App. Div. 660, 163 N. Y. Supp. 214.

In an action to have adjudged and declared null and void certain certificates of stock in the plaintiff corporation issued to the defendants and severally held by them and directing the cancellation of said stock upon the ground that it was issued unlawfully and without authority of plaintiff,

the ten-year statute of limitations applies and begins to run from the time when said stock was in fact issued. *East Lake Lumber Co. v. Van Gorder* (1919), 105 Misc. 704, 174 N. Y. Supp. 38.

Separation.—Under § 388, an action for a separation on the grounds of cruel and inhuman treatment must be commenced within ten years after the cause of action accrues. *Sturm v. Sturm* (1913), 80 Misc. 277, 141 N. Y. Supp. 61.

Action to set aside mortgage.—An action to declare invalid a mortgage and deed is, in effect, an action to set aside a deed or to remove a cloud on the title, and must be commenced within ten years after the cause of action accrues. *German Savings Bank v. Wagner* (1914), 164 App. Div. 234, 238, 149 N. Y. Supp. 654.

Title acquired under foreclosure of mortgage.—Where more than ten years have elapsed since the foreclosure of the second mortgage, the validity of the title acquired thereunder cannot be attacked. *McCarty v. Downes* (1913), 161 App. Div. 667, 146 N. Y. Supp. 973.

Equitable action.—This section applies to every form of equitable action. *Ford v. Clendenin* (1915), 215 N. Y. 10.

An action in equity to obtain the possession of real property must be brought within ten years after the cause of action accrues. *Ford v. Clendenin* (1915), 215 N. Y. 10.

Specific performance.—Specific performance is not a strict legal right and is never granted when lapse of time renders such relief against equity and good conscience; the defense of laches is to be considered wholly independent of the statute of limitations. *Groesbeck v. Morgan* (1912), 206 N. Y. 385. Application to suit for specific performance. *Woolley v. Stewart* (1918), 222 N. Y. 347.

Action to set aside purchase by executors or trustees.—In such a case the statutory limitation is ten years. *N. Y. C. & H. R. R. Co. v. Cottle* (1917), 102 Misc. 30, 168 N. Y. Supp. 463.

§ 389. Actions by the people subject to the same limitations.

Actions relating to personality.—N. Y. C. & H. R. R. Co. v. Cottle (1917), 102 Misc. 30, 168 N. Y. Supp. 463.

§ 390. Action against a nonresident, upon a demand barred by the law of his residence.

Where a cause of action, which does not involve the title to or possession of real property within the state, accrues against a person, who is not then a resident of the state, an action cannot be brought thereon in a court of the state, against him or his personal representative, after the expiration of the time, limited, by the laws of his residence, for bring-

ing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this state for a like action, the limitation fixed by the laws of this state shall apply. This section shall not apply to a case in which a person is entitled, when this section as amended takes effect, to commence such action, where he commences the same before the expiration of six months after this section as amended takes effect; in which case the provisions of law applicable thereto immediately before this section as amended takes effect shall continue to be so applicable, notwithstanding the repeal thereof.

Amended by L. 1916, ch. 536, in effect May 15, 1916.

The amendment of 1916 materially changed this section.

Source.—New.

Foreign corporation.—Where one who is not a resident of this state sues a foreign corporation in our courts the defendant may, under § 390, set up as a defense the statute of limitations of the state under the laws of which it was created. *Smith v. Western Pacific Railway Co.* (1913), 154 App. Div. 130, 139 N. Y. Supp. 129.

Pennsylvania statute of limitations.—Where a debtor, a resident of the state of

Pennsylvania, removes to and becomes a resident of the state of New York before the Pennsylvania six-year statute of limitations has run against his debt, an action brought thereon within seven years after his removal to the state of New York is maintainable. *Miskawaka Woolen Mfg. Co. v. Phillips* (1916), 93 Misc. 224, 156 N. Y. Supp. 778.

§ 390-a. Action upon cause of action arising in another state or country and barred by its laws.

Section cited.—*Jacobus v. Colgate* (1918), 217 N. Y. 235.

This section is not unconstitutional as violative of art. 4, § 2 of the constitution of the United States. *Klotz v. Angle* (1917), 220 N. Y. 347.

Exclusion of period of defendant's absence.—In an action in this state on notes which were executed and indorsed by the defendant, and which matured in another state in 1894, during which year he removed to this state, where he has subsequently continuously resided, the statute of limitations of the foreign state, which excludes from the time of its running the period of defendant's absence, is no defense. The defendant may, under the circumstances, claim the protection of our

own statute of limitations. *Dalrymple v. Schwartz* (1917), 177 App. Div. 650, 164 N. Y. Supp. 496.

Action against stockholders of foreign corporation.—In an action maintained in this state against resident stockholders of a dissolved foreign corporation, a statute of the foreign state, limiting the time for the commencement of such action to eighteen months, is available as a defense. *Shipman v. Treadwell* (1912), 150 App. Div. 57, 133 N. Y. Supp. 970.

Action on Ohio judgment.—When action on judgment obtained in Ohio courts is barred by statute of said state, it is also barred in this state. *Shipman v. Treadwell* (1913), 208 N. Y. 404.

§ 395. Acknowledgment or new promise must be in writing.

Payment by co-surety; contribution.—A co-surety or a co-guarantor cannot step in and pay a claim upon which he has been discharged of liability, by reason of the running of the statute of limitations, and then compel contributions by his co-surety or co-guarantor. *Hard v. Mingle* (1912), 206 N. Y. 179.

Payment by committee of incompetent.—A part payment on a debt due from an incompetent sufficient to prevent the running of the statute of limitations may be made by the committee of her person and property; any doubt as to the authority of the

committee to make such payment will be resolved in favor of the creditor by the subsequent approval and ratification of such payment by the debtor after she becomes competent to manage her own affairs. *Jakobson v. Lawrence* (1915), 93 Misc. 61, 156 N. Y. Supp. 635.

Money received by creditor from security.—Where a debtor assigned to his creditor as security for a note, moneys due or to become due to the debtor from a bank, or its receiver, the receiver of the bank in paying dividends to the creditor under the terms of the assignment was

not the agent of the debtor, and no legal presumption arose from such payments that a new promise was made by the debtor to pay the balance on the note. *Security Bank v. Finkelstein* (1913), 160 App. Div. 315, 145 N. Y. Supp. 9.

Particular claim to be indicated.—Where a creditor has several claims against which the statute has run, an acknowledgment or promise in writing must indicate the particular claim to which it refers. *Zinn v. Stamm* (1912), 152 App. Div. 76, 136 N. Y. Supp. 737.

Acquiescence of partner.—Payment of interest upon the notes of a former partnership by a corporation which purchased the business must be shown to have been made with the knowledge and acquiescence of a former partner in order to remove the bar of the statute of limitations as to him. *Union National Bank v. Dean* (1913), 154 App. Div. 869, 139 N. Y. Supp. 835.

Renewal of note.—Where, upon a note the maker writes the word "renewed" together with his signature, there is an unequivocal renewal of his promise to pay

sufficient to take the case out of the statute of limitations. *Maurice v. Fowler* (1912), 78 Misc. 357, 138 N. Y. Supp. 425.

Oral purchase.—An oral purchase of books is insufficient to take a claim out of the statute of limitations as a part payment, where there does not appear to have been any delivery. *Young v. Ingalsbe* (1912), 151 App. Div. 753, 135 N. Y. Supp. 939.

Where the debtor orally promised the creditor's husband that he would pay the debt and later wrote a letter in which he stated that he had made the promise, the letter was sufficient to take the case out of the operation of the statute, although the writing alone was not a promise to pay the debt. *Rosopaky v. Lucas* (1915), 154 N. Y. Supp. 1.

Scheduling of debts in bankruptcy is not a sufficient acknowledgment to revive the right of action thereon. The acknowledgment must be under such circumstances as to imply a promise to pay. *Hyde Park Flint Bottle Co. v. Miller* (1917), 179 App. Div. 73, 166 N. Y. Supp. 110.

§ 396. Exceptions, as to persons under disabilities.

Judgment while plaintiff was infant; action to annul.—Where in a suit to have adjudged null and void as to the plaintiffs a certain judgment of the supreme court, entered more than twenty-eight years ago while the plaintiffs were infants, § 388, which is extended one year by § 396 as to each plaintiff after she attained her majority, is pleaded, the suit is barred. *Ford v. Clendenin* (1913), 155 App. Div. 433, 133 N. Y. Supp. 54, aff'd 215 N. Y. 10.

Suit to set aside conveyance for fraud.—In an action to set aside a conveyance for fraud, where the plaintiff was twenty

years of age when the conveyance took place and knew the facts, he has six years from that time, in which to commence action, and such time is not extended by § 396. *Gabriel v. Gabriel* (1913), 79 Misc. 346, 139 N. Y. Supp. 778.

Infancy of claimant of real property.—In case of infancy of a claimant to the possession of real property at the time a cause of action therefor arises, the time within which the action must be brought is determined by this section. *Ford v. Clendenin* (1915), 215 N. Y. 10.

§ 398. When action deemed commenced.

Application.—This section applies to a special statute of limitations, to wit, the provisions in § 2653a (repealed by surrogate's code of 1914). *Crocker v. Williams* (1913), 208 N. Y. 480.

Right to set up barred cause of action by amendment.—Where two causes of action arise out of the same transaction a complaint based on one may be amended so as to include the other, although at the time of the amendment the second cause of action is barred by the statute of limitations. *Groff v. Great Atlantic, etc. Tea Co.* (1913), 161 App. Div. 859, 147 N. Y. Supp. 182.

Defendant unaffected by prior service on others not united in interest with her.—

In an action of ejectment a defendant owning the fee, who was brought into the action by the service of an amended summons and complaint after other defendants had been served, may plead the statute of limitations by alleging the lapse of twenty years "before the commencement of this action," although she does not assert the statute "as to this defendant." Such defendant was not affected by the prior service on others not united in interest with her. *Good v. Brown* (1918), 181 App. Div. 808, 168 N. Y. Supp. 1028.

§ 399. Attempt to commence action in a court of record.

Service of summons.—Where the summons, in an action under § 372 of the general business law, though delivered for ser-

vice to the sheriff within a year after the cause of action accrued, was not served on defendant until after the expiration of

said year, the action must fail. *Landecker v. Property Security Co.* (1913), 79 Misc. 157, 140 N. Y. Supp. 745.

An action on a judgment is included. And hence where the summons and complaint were duly placed in the hands of a sheriff for service on the defendant in the county where he resided within twenty years from the recovery of the judgment, the action is not barred although the sheriff did not actually succeed in making service within the twenty-year period. *Jacobs v. Del Genovese* (1917), 179 App. Div. 163, 166 N. Y. Supp. 88.

Lien law.—Application of this section

extends to proceedings under. *Matter of Selwyn Realty Corporation* (1918), 184 App. Div. 355, 170 N. Y. Supp. 491.

Delivery of process to sheriff.—It is the settled law of this state that in all actions or proceedings in a court of record the delivery of process to the sheriff of the proper county within the time limited by statute or by contract, with the intention to have the same served, is equivalent to the commencement of the action or proceeding within said time. *Matter of Selwyn Realty Corporation* (1918), 184 App. Div. 355, 170 N. Y. Supp. 491.

§ 401. Exception when defendant is without state.

The provisions of § 390, *ante*, are not nullified or in conflict with the provisions of this section, but are reasonably to be construed as consistent parts of a settled policy. A foreign corporation sued by a non-resident of this state may, under § 390, set up as a defense the statute of limitations of the state where created and where it exists as a corporation. *Smith v. Western Pacific Railway Co.* (1912), 154 App. Div. 130, 139 N. Y. Supp. 129.

This section does not apply to § 376; and the payment of a judgment after twenty years is presumed, notwithstanding the absence of the defendant from the state. *Brinkman v. Cram* (1916), 175 App. Div. 372, 161 N. Y. Supp. 965; *Jacobs v. Del Genovese* (1917), 179 App. Div. 163, 166 N. Y. Supp. 88.

A foreign insurance corporation, doing business in this state by virtue of a license granted under authority of the insurance law of this state, is to be dealt with *pro hac vice* as a domestic corporation and may avail itself of the statute of limitations

when it is applicable. It is not deemed absent from the state within this section. *Comey v. United Surety Co.* (1916), 217 N. Y. 268.

A foreign corporation, which has failed to file the designation of a person upon whom process may be served, cannot avail itself of the statute of limitations. *Garrett v. Locke Regulator Co.* (1917), 167 N. Y. Supp. 64.

Contractual limitation.—There is no distinction between a limitation prescribed by statute and one imposed by contract. *Comey v. United Surety Co.* (1916), 217 N. Y. 268.

In an action upon a promissory note made and executed in Illinois where both parties reside, our statute of limitations does not begin to run until the coming into this state of the non-resident. *Plummer v. Lowenthal* (1917), 165 N. Y. Supp. 220.

Application.—*Woolley v. Stewart* (1918), 222 N. Y. 347.

§ 403. Id.; when a person liable dies within the state.

This section cannot be read into § 376 providing that a judgment is conclusively presumed to have been paid after twenty

years. *Matter of Hoes* (1918), 183 App. Div. 38, 170 N. Y. Supp. 543.

§ 405. Provision where judgment has been reversed.

The section is remedial and should be liberally construed. *Sweeting v. Staten Island & Midland R. Co.* (1917), 176 App. Div. 494, 162 N. Y. Supp. 961.

The provisions have reference to civil remedies provided by the code and are not controlling in an action brought under a special statute prescribing a special limitation of time like the federal employers' liability act. *Norton v. Erie R. Co.* (1917), 167 N. Y. Supp. 177.

Mistake as to forum.—Where a suitor in good faith invokes the aid of a court of justice and initiates a proceeding by ser-

vice of process, he will be deemed to have commenced an action, even though he has mistaken his forum. *Gaines v. City of New York* (1915), 215 N. Y. 533.

Effect where court has no jurisdiction.—The commencement of an action in a court which has no jurisdiction over the subject-matter thereof, does not suspend the running of the statute of limitations. *Gaines v. City of New York* (1912), 78 Misc. 126, 137 N. Y. Supp. 964.

The bringing of an action in a court wherein the complaint was dismissed for lack of jurisdiction, does not entitle the

plaintiff to the benefit of this section, which allows a plaintiff to commence a new action within one year, under certain circumstances. *Gaines v. City of New York* (1913), 156 App. Div. 789, 142 N. Y. Supp. 401, affg. case above cited.

Application to action to recover damages for death.—The provision permitting the commencement of a new action within one year, although the statute of limitations on the original cause of action has expired, applies to an action brought under § 1902 to recover damages for death caused by wrongful act, where the dismissal of the complaint at the close of plaintiff's evidence was affirmed on appeal, without granting a new trial. *Hoffman v. Delaware & Hudson Co.* (1914), 163 App. Div. 50, 148 N. Y. Supp. 509.

Within one year after affirmance of judgment dismissing complaint.—Where an administrator's action for causing the death of his intestate was brought within two years, another action for the same cause brought more than three years after said death, but within one year after a judg-

ment dismissing the complaint in the first action had been affirmed, is maintainable under this section. *Hoffman v. Delaware, etc. Co.* (1914), 85 Misc. 535, 147 N. Y. Supp. 475.

Discontinuance by stipulation.—Where an action is discontinued by virtue of a stipulation signed by counsel for the respective parties, it is not a voluntary discontinuance within the intent and meaning of this section. *O'Neil v. Franklin Fire Ins. Co.* (1913), 159 App. Div. 313, 145 N. Y. Supp. 432.

When year begins to run.—The year within which a plaintiff is entitled to commence a new action as provided by this section begins to run from the rendition of the judgment of affirmance by the court of appeals. *People ex rel. Nolan v. Prendergast* (1914), 88 Misc. 307, 150 N. Y. Supp. 683.

Lien law.—Application to proceedings under. *Matter of Selwyn Realty Corporation* (1918), 184 App. Div. 355, 170 N. Y. Supp. 491.

§ 410. Provision where the action cannot be maintained without a demand.

Necessity that demand be made within reasonable time.—Where a defendant agrees to procure another to deliver property to the plaintiff, but no time is fixed in which the plaintiff is entitled to demand and receive the property, such demand must be made within a reasonable time. A demand made more than six years after the execution of the contract is ineffective under the statute of limitations, and, hence, no cause of action exists for the defendant's refusal to perform. *Seeley v. Osborne* (1913), 161 App. Div. 844, 147 N. Y. Supp. 116.

Demand note.—The statute of limitations upon a promissory note payable upon demand begins to run from the time when the right to make the demand is complete, that is, from the date of the note. *Sewell v. Smith* (1912), 151 App. Div. 584, 136 N. Y. Supp. 371.

Inability to comply with demand.—In the case of a cause of action in which a demand and refusal is an essential element, a defendant cannot claim the ad-

vantage of the statute because before the demand had been made and the cause of action had accrued, he had wrongfully incapacitated himself from complying with the demand when it should have been made. *Glover v. National Bank of Commerce* (1913), 156 App. Div. 247, 253, 141 N. Y. Supp. 409.

"Fiduciary capacity" is defined as the relation based upon the personal confidence reposed by one person in another. *Glover v. National Bank of Commerce* (1913), 156 App. Div. 247, 253, 141 N. Y. Supp. 409.

When bank not acting "in a fiduciary capacity" within the meaning of subdivision 1 of this section. *Glover v. National Bank of Commerce* (1913), 156 App. Div. 247, 141 N. Y. Supp. 409.

Defendants, whose bill for burial plaintiff paid, on condition that she be reimbursed if it developed deceased left an estate, did not act for plaintiff in a fiduciary capacity. *Butter v. Winterbottom* (1918), 171 N. Y. Supp. 59.

§ 413. How objection taken, under this chapter.

Application.—*Hughes v. Stoutenburgh* (1915), 168 App. Div. 512, 154 N. Y. Supp. 65.

§ 414. Cases to which this chapter applies.

Operation of general rules extended.—The trend of adjudications is in the direction of broadening the scope and operation of the general rules regulating limitations embodied in the code of civil pro-

cedure. *Sharrow v. Inland Lines, Ltd.* (1915), 214 N. Y. 107.

Promise to answer for default of another.—Where the defendant agreed to indemnify the plaintiff if he would indorse

the promissory note of a third person and should be forced to pay the same, and to fulfill his promise gave to the plaintiff his own non-negotiable promissory note, the statute of limitations on the latter note did not begin to run until the plaintiff had in fact paid the note upon which he was indorser. Moreover, the defendant, by

making part payment on his obligation to the plaintiff after the latter had paid the note, took the case out of the statute of limitations. *O'Brien v. Donnelly* (1915), 169 App. Div. 709, 155 N. Y. Supp. 790.

Section cited.—*American Steel & N. Co. v. Southern Surety Co.* (1916), 161 N. Y. Supp. 434.

§ 415. Mode of computing periods of limitation.

Note given for rent; recovery of deposit upon payment.—Where a deposit was given on renting premises and a note was given upon vacating premises for amount owing, the jury might well have found that the note was not given in payment of rent, and the right of action to recover the deposit did not accrue until payment of the note. Where such payment was made within six years an action to recover said deposit was not barred. *Shattuck v. Buek* (1912), 77 Misc. 95, 136 N. Y. Supp. 103.

Action for deceit in making contract.—In an action to recover damages for deceit whereby the plaintiff was induced by false and fraudulent representations to enter into a contract, the statute begins to run when the contract is executed and not at the time of making a subsequent part payment or the delivery of the goods. *Ball v. Gerard* (1913), 160 App. Div. 619, 146 N. Y. Supp. 81.

Breach of contract for contingent fee.—Where a contract of retainer entitles the attorney to a specific percentage of the re-

covery and to nothing if there is no recovery, and, after the attorney has made material progress in the case, the client substitutes another attorney without cause and a recovery is had the statute of limitations on such contract of retainer does not begin to run until the amount of the recovery is determined. *Martin v. Camp* (1913), 161 App. Div. 610, 146 N. Y. Supp. 1041.

Periods of limitation fixed by special contract are held to be periods of limitation prescribed by this chapter, as that expression is used in this section. *O'Neil v. Franklin Fire Ins. Co.* (1913), 159 App. Div. 313, 145 N. Y. Supp. 432.

Running of statute against remainderman.—The period of twenty years necessary to the acquisition of a title by adverse possession does not begin to run against a remainderman until the termination of precedent life estates, for until he has the right to possession there can be no possession adverse to him. *Cramp v. Dady* (1913), 162 App. Div. 321, 147 N. Y. Supp. 619.

§ 416. Action to be commenced by summons; time when court acquires jurisdiction.

Service.—A non-resident plaintiff coming into this state as a necessary witness in his own case cannot, within an hour after the trial of his own action and before he has had an opportunity to leave the state, be served with a summons in another action brought by the defendant. *Roberts v. Thompson* (1912), 149 App. Div. 437, 134 N. Y. Supp. 363.

The provisions of § 312 of the general corporation law, regarding service upon the attorney general of all motions and other papers in actions or proceedings for the dissolution of a corporation or the distribution of its assets, do not apply to proceedings supplementary to execution. *Attorney General Rep.* 1913, page 107.

An action to foreclose a mechanic's lien pursuant to § 20 of the lien law is commenced by the service of a summons. *Empire City Lumber Co. v. Agress Const. Co.* (1912), 75 Misc. 519, 135 N. Y. Supp. 879.

Where an action was commenced by the service of a summons in the supreme court prior to the service of the citation issued in the proceeding in the surrogate's court, the jurisdiction of the supreme court was retained to the exclusion of the surrogate's

court. *Matter of Carey* (1912), 77 Misc. 602, 138 N. Y. Supp. 682.

Supplementary proceedings are not commenced by the mere signing of an order therein. *Matter of Dorfman v. Jacobs* (1917), 100 Misc. 592, 166 N. Y. Supp. 403.

Foreclosure action; service on tenant.—The filing of a *lis pendens* and the service of a summons and complaint in an action of foreclosure upon a tenant of the property constitutes a commencement of the action, and a subsequent tender of payment by the mortgagor, even if made before service was made upon her, is insufficient to relieve her from liability for costs. *Harvey v. Mooney* (1915), 168 App. Div. 169, 153 N. Y. Supp. 268.

Summons issued with writ of attachment.—An action against a foreign corporation to recover for breaches of contracts in which an attachment has been granted is deemed commenced when the summons is issued to accompany the writ of attachment. *Import Chemical Co. v. Forster & Gregory* (1916), 172 App. Div. 406, 158 N. Y. Supp. 409.

§ 417. Requisites of summons.

Name of defendant.—Service upon Edward Catalano (the name Edward being stated to be fictitious) is not service upon Eugenio Catalano, where there is no proof to show that the latter was actually served and where he did not appear in the proceeding. *Breger v. Catalano* (1916), 158 N. Y. Supp. 671.

By whom subscribed.—The summons must be subscribed by the plaintiff's attorney and not by the plaintiff, notwithstanding the provisions of § 55. But where the summons is subscribed only by the plaintiff, who is not an attorney, the service of an answer by a defendant waives the defect as to him. But where a defendant, who served no notice of appearance, having defaulted in pleading, obtained an order extending her time to answer, and the

papers were indorsed with the name and address of her attorney, and her answer subscribed by him was returned because not served in time, and a stipulation that the order extending her time to answer be vacated was signed by her attorney, it was held that said defendant had not waived the defect in the summons and that her motion to set aside the service thereof must be granted. *Jaworower v. Rovere* (1917), 98 Misc. 377, 162 N. Y. Supp. 1075.

Copy of summons entitled in county court instead of supreme court; it is not void, where defendants are not misled or prejudiced, but voidable under § 426; and the supreme court can permit amendment under § 723; *Sivaslian v. Akulian* (1917), 166 N. Y. Supp. 535.

§ 420. Cases where such service must be made.

An action brought for damages for non-delivery of property is not covered. *McArdle v. Barret* (1918), 171 N. Y. Supp. 585.

Action upon indemnity bond of county

officer by county alleging breach of contract. *County of Sullivan v. Downie* (1918), 102 Misc. 348, 168 N. Y. Supp. 923.

§ 421. Appearance of defendant.

History and purpose of section.—*Metal Shelter Co. v. Fosdick* (1918), 172 N. Y. Supp. 273.

A demand for a copy of the complaint is not an appearance, either general or special. Defendant's general appearance can be made only in the manner indicated in this section. *Musluaky v. Lehigh Valley Coal Co.* (1919), 225 N. Y. 584.

The filing of a demurrer on the ground that the complaint failed to show jurisdiction of the defendant and of the subject of the action is not a waiver of the jurisdictional question. *Maltin v. Royal Petticoat Co.* (1914), 147 N. Y. Supp. 545.

Construction of stipulation extending time.—Under a stipulation allowing a defendant "until" a certain date in which to answer, the answer may be served at any time during the day mentioned. *Sugerman v. Jacobs* (1913), 160 App. Div. 411, 145 N. Y. Supp. 429.

Motion to compel acceptance of answer.—Laches is not a bar to a motion by a defendant to compel the acceptance of his answer made nearly a year after the service thereof, where it appears that he moved just as soon as he learned that the plaintiff was about to try the case against other defendants. *Sugerman v. Jacobs* (1913), 160 App. Div. 411, 145 N. Y. Supp. 429.

Where defendant comes into court and opposes an injunction on its merits, he submits himself to the jurisdiction of the court, although having made no "appearance." *Metal Shelter Co. v. Fosdick* (1918), 172 N. Y. Supp. 273.

A general appearance is an appearance to deny jurisdiction over the subject matter of the action. In *re Stiller* (1916), 161 N. Y. Supp. 594.

Any irregularities or lack of jurisdiction over the person of the defendant are waived by a general appearance. *Hober v. Reikert* (1916), 162 N. Y. Supp. 328.

A special appearance is proper only when a party seeks to deny the jurisdiction of the court over his person, and an objection to jurisdiction over the person, to be availing, must not be raised in connection with a denial of jurisdiction over the subject matter. In *re Stiller* (1916), 161 N. Y. Supp. 594.

Subscription of defendant's attorney.—An attorney for a party, individually and as administrator, in which latter capacity he was in nowise a necessary party to the proceeding, having filed an affidavit upon the hearing of the motion contesting the jurisdiction of the court over his person and averring facts to defend against the petition on the merits and having filed a memorandum subscribed by him as attorney, as required by § 421 of the code of civil procedure, contesting the jurisdiction of the court over such person, as a jurisdictional defect and further defending against the petition on the merits, such action constituted a voluntary appearance on the part of such person and conferred jurisdiction on the court to proceed though no service of the papers was made upon such person either as an individual or as administrator. *Smith v. First National*

Bank (1918), 103 Misc. 274, 170 N. Y. Supp. 127.

In the absence of compliance with the

provisions of this section there is no general appearance. *De Veaux v. Pachinsky* (1918), 169 N. Y. Supp. 1039.

§ 422. When defendant must answer before time to appear expires.

Last day falling on Sunday.—Where the last of the twenty days within which a defendant must serve an answer falls on Sunday, due service may be made on the following Monday. As the defendant's right to make service on Monday is absolute and not a matter of discretion, where he is compelled to move to enforce such service

by the refusal of the plaintiff to accept the same, the order permitting service should not be conditioned on the payment of costs by the defendant, but on the contrary they should be charged to the plaintiff. *Gilbert v. Johnson* (1915), 169 App. Div. 840, 155 N. Y. Supp. 687.

§ 423. Notice of no personal claim; effect of service thereof.

General appearance.—Indorsing the name and the office address of the attorney for defendant upon a bond, filed to obtain the release of a levy of attachment, does not

constitute a general appearance in the action. *Engels Express Co. v. Ferguson* (1913), 79 Misc. 40, 138 N. Y. Supp. 1086.

§ 424. Summons, when and by whom served.

Summons signed by plaintiff; acts of defendant amounting to voluntary appearance.—Where a defendant has answered a complaint and also served an amended answer with counterclaim, has furnished a bill of particulars and admitted the plaintiff's service of notice of trial, his acts

are equivalent to a voluntary appearance, and he cannot thereafter have the service of summons set aside upon the ground that it was subscribed by the plaintiff in person and not by an attorney at law. *Jaworower v. Rovere* (1917), 177 App. Div. 740, 164 N. Y. Supp. 515.

§ 426. How personal service of summons made upon a natural person.

Personal service of the summons upon a defendant, being a natural person, must be made by delivering a copy thereof, within the state, as follows:

1. If the defendant is an infant, under the age of fourteen years, to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. If the defendant is an infant over the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. Where the defendant is an infant under the age of fourteen years, the court shall, in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete until it is so delivered. Where the defendant is an infant over the age of fourteen years a similar order may be made by the court in its discretion, with or without application therefor.

Subdivision 1 amended by L. 1913, ch. 279, in effect Sept. 1, 1913. The amendment of 1913 omitted from between the words "years" and "to" in line 8, the words "to the infant in person and also;" and added the last three sentences.

Subdivisions 2, 3 and 4 were not amended by the act of 1913. and are not here included.

Source.—Code of Proc., § 134, subd. 2-4.

Failure of order to designate person to receive service of summons for infant under fourteen.—Where, in an action for the foreclosure of a mortgage, an order appointing a guardian *ad litem* for an infant defendant under the age of fourteen years fails to designate the person to receive service of the summons on behalf of the infant, the court is without jurisdiction to render a judgment which will bar the infant from all interest in the property, and a motion to compel the purchaser at the foreclosure sale to take the title will be denied. *Pines v. Sullivan* (1918), 103 Misc. 443, 170 N. Y. Supp. 252.

Copy of summons entitled in county court instead of supreme court; it is not void under § 417, where defendants are not misled or prejudiced, but voidable;

and the supreme court can permit amendment under § 723. *Sivaslian v. Akulian* (1917), 166 N. Y. Supp. 535.

Service on infant alone gives the court no jurisdiction even though infancy was not pleaded. *Weiser v. Landers* (1918), 172 N. Y. Supp. 337.

Service upon nonresident while within state as witness.—A resident of a foreign state, who came into this state for the sole purpose of being a witness in an action pending before the court of claims, although he has an interest therein, cannot be served with process in another action, not brought in respect to a wrong which he has committed while here. *First Nat. Bank v. Di Martino & Musso Contg. Co.* (1917), 180 App. Div. 750, 168 N. Y. Supp. 310.

§ 427. Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.

If the court has, in its opinion, reasonable ground to believe, that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the court may, in its discretion, with or without an application therefor, and, in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete, until it is so delivered.

Amended by L. 1913, ch. 279, in effect Sept. 1, 1913. The amendment of 1913 omitted the words "If the defendant is an infant of the age of fourteen years, or upwards, or," from the beginning of the section.

Source.—New.

Appointment of special guardian in action for annulment of marriage when defendant is confined in state hospital for the insane, will not be granted. But where no order has been made requiring a copy of the summons to be delivered, in behalf of the defendant, to the person designated in the order, the plaintiff may

submit a proposed order for the appointment of a person to look after the interests of the defendant, said order to contain a provision that a copy thereof shall be served upon the defendant as well as upon the superintendent of the hospital. *Zalinsky v. Zalinsky* (1918), 103 Misc. 308, 170 N. Y. Supp. 1005.

§ 430. Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.

Proof of absence from state and failure to make designation.—An affidavit of attachment is insufficient where merely alleging that according to the county clerk's certificate he has not made a designation, still in force, within the six month's period of the certificate; the search of the county clerk's records must cover the period from the time of the

amendment of this section in 1899 (ch. 524), since a designation filed after that time might be still in force. If either the fact of absence from the state or the failure to file a proper designation is not properly alleged the process is void, and the defect is not merely an irregularity. *Griffin v. Griffin* (1912), 77 Misc. 468, 137 N. Y. Supp. 3.

§ 431. How personal service of summons made upon a domestic corporation.

Section cited.—*Planten v. National Nassau Bank* (1916), 174 App. Div. 254, 160 N. Y. Supp. 297.

§ 432. Service upon a foreign corporation.

Constitutionality.—This section is not unconstitutional in so far as it attempts to confer jurisdiction on the courts of New York over foreign corporations which are doing business within this state within the meaning of the term "doing business" as used in subdivision 4 of § 1780, and have not filed a designation pursuant to § 16 of the general corporation law, in cases where the cause of action did not arise within this state or out of any transaction carried on within this state by such foreign corporation. *Tauza v. Susquehanna Coal Co.* (1917), 220 N. Y. 259.

This section is constitutional in so far as it prescribes the method of making personal service of a summons upon a defendant foreign corporation doing business in the state of New York in an action in the New York supreme court wherein the plaintiff is a foreign corporation. *Robert Dollar Co. v. Canadian Car & Foundry Co.* (1917), 220 N. Y. 270; *Pomeroy v. Hocking Valley Railroad Co.* (1917), 220 N. Y. (mem.); *Higgins v. Hocking Valley Railroad Co.* (1917), 220 N. Y. (mem.).

Where the plaintiff is a resident of this state the service of a summons upon a designated agent for a cause of action arising in another state is valid and is not an invasion of the rights of the corporation guaranteed by the Federal Constitution. *Badgon v. Phil. & Reading C. & I. Co.* (1916), 217 N. Y. 432.

Service in action against receivers of foreign corporation.—In an action by a resident of this state against the receivers of a foreign corporation, service of summons in this state should be set aside, where it does not appear that at the time of the service the persons served were connected in any way either with the corporation or the receivers or that the corporation had property in this state, or that the receivers had designated a person upon whom service might be made. *Gursky v. Blair* (1914), 164 App. Div. 612, 150 N. Y. Supp. 422.

Service upon officer while passing through state cannot be made where the corporation was not doing business here. *Berner v. Collier Co.* (1917), 179 App. Div. 732, 167 N. Y. Supp. 39.

Service upon transient foreign corporation.—Service upon an officer of the defendant, a foreign corporation doing business even transiently within this state or service upon its managing agent, in case the cause of action arose within this state or the foreign corporation had property here, is regarded as affording basis for a default judgment which ordinarily is recognized as valid in the courts of this state. *Hochstein v. James W. Hill Co.* (1915), 153 N. Y. Supp. 899.

Cause of action arising within State.—A cause of action by a receiver, based upon

a wrongful and fraudulent scheme by a director and president of a New York corporation by and with the incorporation of two other New York corporations, to deprive the first corporation of its property rights, in performance of which he caused a foreign corporation to be formed, to which he assigned the first corporation's property rights, so that upon the strength of those rights the foreign corporation mortgaged them to another New York corporation, may be held to have arisen within this state within the meaning of this section, so as to make service of a summons upon a director of the foreign corporation valid. *Donohue v. City Water Power Co.* (1913), 159 App. Div. 776, 144 N. Y. Supp. 923.

Necessity that plaintiff show conditions authorising service.—Where service of a summons upon one of the directors of a foreign corporation alleged to have been made pursuant to this section is attacked, it is incumbent on the plaintiff to show not only that he has a cause of action but that it arose within this state. *Hansen v. American Security, etc. Co.* (1913), 159 App. Div. 801, 144 N. Y. Supp. 839.

Managing agent.—A representative of a foreign corporation who has no authority to accept orders, but simply obtains them and sends them to the foreign office for acceptance, and who has no discretion as to prices, and who acts in a similar capacity for various other corporations and maintains an office, the expense of which is borne in part by the corporation, is not a "managing agent," within the meaning of this section and the service of a summons upon him will be set aside. *Beck v. North Packing, etc. Co.* (1913), 159 App. Div. 418, 144 N. Y. Supp. 602.

Where it appears that a foreign corporation was the owner of certain property within the city of New York where it had an office occupied by one R. as sole representative of the corporation, having general charge of its business or affairs in the state of New York, that the corporation had no other place for the transaction of business or office or factory in said state, and it further appears that no person had been designated for the service of process upon said corporation in New York, it must be held that R. was "a managing agent." *Jackson v. Schulykill Silk Mills* (1915), 92 Misc. 442, 156 N. Y. Supp. 219.

Where a corporation maintains an office in this state under the direction of a sales agent, with a number of salesmen, and with clerical assistants, and through these agencies systematically and regularly solicits and obtains orders, such sales agent is a "managing agent." *Tauza v. Susquehanna Coal Co.* (1917), 220 N. Y. 259.

Before service of a summons may be made in this state upon the "managing

agent" of a foreign corporation it must appear affirmatively that the plaintiff used due diligence in an attempt to serve some of the officers of the corporation specified. *Karosas v. Susquehanna Coal Co.* (1916), 172 App. Div. 872, 158 N. Y. Supp. 1021; *Birkenwald v. May Co.* (1917), 179 App. Div. 658, 166 N. Y. Supp. 1073.

Where a Canadian corporation organized a new corporation in this state, retaining all the stock, and assigned to it contracts held by its factory in this state and guaranteed their performance, the new corporation was not an agent of the Canadian corporation, doing business in this state, so as to make service on it binding on the Canadian corporation. *Robert Dollar Co. v. Canadian Car & Foundry Co.* (1917), 166 N. Y. Supp. 34.

One who has carried on all the business of a foreign corporation preforming a construction contract in this state, who has signed its name to notes by himself as attorney, and in that manner finished the work, and to whom the corporation has assigned all moneys due or to become due under its contract, is a managing agent. *First National Bank v. General Construction Co.* (1917), 180 App. Div. 743, 168 N. Y. Supp. 305.

Service of a summons upon the managing agent of a foreign corporation in this state can only be resorted to and made effectual after diligent efforts to obtain personal service upon one of such officers has been made and failed. *Swift v. Matthews Engineering Co.* (1917), 178 App. Div. 201, 165 N. Y. Supp. 136.

Plaintiff must show that person served was the managing agent. *Joseph v. Kansas City, Mexico and Orient Railway* (1917), 180 App. Div. 313, 167 N. Y. Supp. 273.

Service on managing agent of receivers of foreign corporation.—Where a foreign corporation has property within this state and receivers have been appointed by the United States district court, and no designation has been made by the receivers upon whom service of process could be made, service of a summons in an action by a resident of this state against such receivers may be made upon their managing agent in this state, under the provisions of §§ 65 and 66 of the United States judicial code. *Jacobs v. Blair* (1913), 157 App. Div. 601, 142 N. Y. Supp. 897.

When service on agents of receivers not authorized.—Service upon the agents of the receivers of a foreign railroad corporation will be set aside where it is not shown that by the exercise of due diligence service on the receivers within the state might have been made. *Gursky v. Blair* (1916), 218 N. Y. 41.

Where a complaint states a cause of action in favor of a third party, the owner of the horses driven by the plaintiff, where it is alleged that the horses fell into an

excavation made by the defendant, it is clear that none is stated in favor of the plaintiff, there being no allegation that the negligence of the defendant was the approximate cause of his falling into the excavation. *Goldstein v. Rodgers & Hagerty* (1915) (App. Div.), 153 N. Y. Supp. 935.

In order to make the service of a summons upon the director of a foreign corporation, in an action by a resident of a foreign state against such corporation to recover damages for personal injuries sustained in such foreign state, valid, it must appear that there is no designation of a person to receive service as provided in § 16 of the general corporation law; that neither the person designated nor any of the officers specified in this section can be found with due diligence; and that the corporation has property within this state, or that the cause of action arose within this state. Where there is nothing in the record to show that defendant was doing business within the state the court is without jurisdiction to entertain such an action under § 1780, subdivision 4, and the summons itself should be set aside for lack of jurisdiction. *Kowalchek v. Buck Run Coal Co.* (1916), 173 App. Div. 653, 160 N. Y. Supp. 98.

When service under subdivision 3 valid.

—Where a designation of a person upon whom service of the summons in an action against a foreign corporation may be made as provided by § 16 of the general corporation law is not in force, or if neither the person designated nor an officer specified in subdivision 1 can be found with due diligence, and the corporation has property within this state, etc., personal service of the summons may be made by delivering a copy thereof to the cashier, a director, or a managing agent of the corporation within the state. *Jackson v. Schulykill Silk Mills* (1915), 92 Misc. 442, 156 N. Y. Supp. 219; *Norkus v. Pittsburgh Coal Company* (1915), 169 App. Div. 919, 153 N. Y. Supp. 935.

Doing business in state.—No precise rules can be formulated by which to determine in each case whether a foreign corporation is doing business in a state. This question must largely be decided by the particular facts in each case. But of course there are certain undisputed general principles which may be applied to the disposition of such a question. The fact that the corporation is conducting the principal part of its business in the state of its incorporation does not prevent it from so prosecuting its business in another state as to bring it within the character of a corporation doing business in the latter state. *Pomeroy v. Hocking Valley Ry. Co.* (1916), 218 N. Y. 530.

A Canadian corporation which maintained a factory in this state organized a new corporation therein, retained all of the capital stock and assigned to it all of

its contracts guaranteeing the completion thereof. *Held*, that New York corporation is not its agent and the Canadian corporation is not doing business in this state. *Dollar Co. v. Canadian C. & F. Co., Limited* (1917), 100 Misc. 564, 166 N. Y. Supp. 34.

Foreign hotel company advertising in state.—A foreign corporation organized to conduct a hotel in a foreign state is not engaged in doing business in this state merely because it advertises its business here, and, hence, service of summons in this state upon the treasurer of the corporation will be set aside where he is not engaged in any business of the corporation here, but is acting as treasurer of a railroad corporation which owns the stock of the hotel company. *Krakowski v. White Sulphur Springs, Inc.* (1916), 174 App. Div. 440, 161 N. Y. Supp. 193.

Service due process.—Controlling decisions establish the rule that service under this section and § 1780 upon a foreign corporation doing business within the state by delivery to the officer therein mentioned under the circumstances appearing in this case, is due process. *Pomeroy v. Hocking Valley Ry. Co.* (1916), 218 N. Y. 530.

Manner of delivery.—The fact that a summons when delivered to the managing agent of a corporation was inclosed in an envelope does not invalidate the service, where immediately upon its receipt such agent examined the envelope and found therein copies of the summons and complaint. *Jackson v. Schuylkill Silk Mills* (1915), 92 Misc. 442, 156 N. Y. Supp. 219.

Service in justice's court.—The word "corporation" in § 2879, includes a foreign corporation, and service of the sum-

mons in an action against it in a justice's court upon a manager of one of defendant's stores in the city where the court is located is sufficient to give the court jurisdiction without the necessity of complying with the provisions of this section. *Sautter v. Atlantic & Pacific Tea Co.* (1915), 92 Misc. 378, 156 N. Y. Supp. 992.

Service upon the secretary of state will be set aside when the designated agent for the service of process upon it in this state dies, and designates no other person and the defendant is not shown to have property in this state. *Eastern P. Corp. v. Tennessee C. I. & R. Co.* (1918), 102 Misc. 557, 170 N. Y. Supp. 100.

Waiver of defective service.—Where, in an action on fire insurance policies, the plaintiff served a summons on two agents of two of the defendants in the city of New York, which is insufficient because not within the requirements of this section, and subsequently served a summons on the superintendent of insurance, an appearance by the defendants in response to that service in order to plead the statute of limitations was not a waiver of the defective service of summons upon the agents, especially as it is contended that defendants had no knowledge of the attempted service upon the agents before the trial. *Gallin v. Allemannia Fire Insurance Co.* (1918), 184 App. Div. 876, 172 N. Y. Supp. 662.

Statute of limitations.—A foreign corporation, which has failed to file the designation of a person upon whom process may be served, cannot avail itself of the statute of limitations. *Garrett v. Locke Regulator Co.* (1917), 167 N. Y. Supp. 64.

§ 433. Service of process, etc., to commence a special proceeding.

Mere signing of an order in supplementary proceedings is not the commencement thereof. Such a proceeding is commenced

only by the service of papers. *Matter of Dorfman v. Jacobs* (1917), 100 Misc. 592, 166 N. Y. Supp. 403.

§ 434. Proof of service of summons, etc.; how made.

Effect of illegal service.—A defendant who wishes to contest the validity of the service of a summons and who does not wish to subject himself to the jurisdiction of the court, may either appear specially for the purpose of raising that issue by motion, or he may allow the plaintiff to take judgment by default, which judgment will not be binding if the service be defective. *McClure Newspaper Syndicate*

v. Times Printing Co. (1914), 164 App. Div. 108, 149 N. Y. Supp. 443.

Waiver of defect.—Any defect in the service of a summons is waived, where the defendant before the decision of his motion to vacate the service, interposed an answer. *McClure Newspaper Syndicate v. Times Printing Co.* (1914), 164 App. Div. 108, 149 N. Y. Supp. 443.

§ 435. Order for service of summons upon defendant residing in this state, upon what proof to be made.

Where a summons is issued in any court of record, an order for the service thereof upon a defendant, whether a domestic corporation, other than

a municipal corporation, a joint-stock or other unincorporated association or a natural person, residing within the state may be made by the court, or a judge thereof, or the county judge of the county where the action is triable upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where such defendant resides, or has its principal office or place of business, that proper and diligent effort has been made to serve the summons upon the defendant and that none of the persons mentioned in subdivisions three of section four hundred and thirty-one, nor the president or treasurer of such association, can be found, or if the defendant is a natural person, that the place of his sojourn cannot be ascertained, or if he is within the state, that he avoids service, so that personal service cannot be made.

Amended by L. 1877, ch. 416; L. 1880, ch. 535; L. 1913, ch. 230, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "whether a domestic corporation, other than a municipal corporation, a joint stock or other unincorporated association or a natural person," in lines 2, 3 and 4; the words "or has its principal office or place of business," in line 8. and the words "and that none of the persons mentioned in subdivision three of section four hundred and thirty-one, nor the president or treasurer of such association, can be found, or if the defendant is a natural person," in lines 10, 11 and 12.

Source.—L. 1853, ch. 511, in part.

Service on foreign corporation.—An order for the service of a summons by publication upon a foreign corporation not transacting business here cannot be made where the cause of action did not arise in this state, and the defendant has no property here upon which an attachment has been levied, and the court has no jurisdiction of the subject-matter of the action. *Rutkosky v. Public Service Railway Co.* (1913), 155 App. Div. 631, 140 N. Y. Supp. 821.

Substituted service is equivalent to service by publication. *Bentx v. Crotona Park Realty Co.* (1913), 81 Misc. 346, 142 N. Y. Supp. 193.

Substituted service is only permitted in certain cases. *Matter of Maltbie v. Lobnitz Mills Co.* (1918), 223 N. Y. 227.

Where personal service may not be made.—Where it appears that repeated efforts were made to serve a summons upon the president of a corporation who denied himself to process servers and avoided service, and that the corporation had no other office address other than that of its president, an order for substituted service may

be granted. *Bentx v. Crotona Park Realty Co.* (1913), 81 Misc. 364, 142 N. Y. Supp. 193.

A tenant in possession of real property is a necessary party defendant to an action for foreclosure, in order that the property may be sold free of all outstanding claims. This being so the action of foreclosure is begun when the tenant is served with the summons and complaint, and a tender made thereafter by the owner, even though she herself had not been served at the time, and service was not made before the beginning of the action. *Harvey v. Mooney* (1915), 168 App. Div. 169, 153 N. Y. Supp. 268.

Matrimonial actions.—This and the following section does not apply to matrimonial actions, for § 1774 only allows judgment by default upon personal service or upon service without the state by publication, and process should not issue when the defendant can render it nugatory by failing to appear. *Purvis v. Purvis* (1915), 167 App. Div. 717, 153 N. Y. Supp. 269.

§ 436. How service must be made.

The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, if the defendant is a domestic corporation or joint-stock or other unincorporated association at its principal office or place of business, or if a natural person at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's said place

of business or office, or of his residence, and by depositing another copy thereof, properly enclosed in a post-paid wrapper, addressed to the defendant at its said principal office or place of business, or to him at his place of residence, in the post-office at the place where he resides, or where said office, place of business or residence is located, or upon proof being made by affidavit that no such residence can be found, service of the summons may be made in such manner as the court may direct.

Amended by L. 1877, ch. 416; L. 1896, ch. 562; L. 1913, ch. 230, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "if the defendant is a domestic corporation or joint-stock or other unincorporated association at its principal office or place of business, or if a natural person," in lines 2, 3 and 4; the words "said place of business or office, or of his," in lines 8 and 9; the words "to the defendant at its said principal office or place of business," in lines 10 and 11, and the words "or where said office, place of business or residence is located," in lines 11 and 12. The word "affidavit" in line 14 formerly read "affidavits."

Source.—L. 1853, ch. 511, in part.

§ 437. Papers to be filed; proof of service.

Foreclosure sale.—Where in an action against several defendants for the foreclosure of a mortgage, one of them is served by substituted service but the court fails to take proof of the cause of action set forth in the complaint, as required by § 1216, a purchaser at the foreclosure sale may be relieved from his bid. *Lauder v. Messerole* (1912), 148 App. Div. 739, 133 N. Y. Supp. 340.

§ 438. Cases in which service of summons by publication, et cetera, may be ordered.

An order directing the service of a summons upon a defendant, by publication, may be made in either of the following cases:

1. Where the defendant to be served is a foreign corporation; or, is an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this state; or, being a domestic corporation, while after diligent effort, service cannot be made within the state upon the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent; or, being a natural person, is not a resident of the state; or, where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.
2. Where the defendant, being a resident of the state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent.
3. Where the defendant, being an adult, and a resident of the state, has been continuously without the state of New York more than six months next before the granting of the order, and has not made a designation of a person, upon whom to serve, a summons in his behalf, as prescribed in section four hundred and thirty of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.
4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.
5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real

or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property.

6. Where the defendant is a resident of the state or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto as fixed in that chapter; and the limitation would have expired, within sixty days next preceding the application, if time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint-stock company, and is authorized by a law of the state, and the defendant is a stockholder thereof.

When a copy of the summons is required by subdivision first or subdivision second of section four hundred and twenty-six of this act, or by section four hundred and twenty-nine of this act, to be delivered to a person other than the defendant, an order, directing the service of the summons upon such person by publication, may be made as prescribed in this section, as if such person was the defendant in the action, and upon a verified complaint and the same proof with respect to such person, as is required in the next succeeding section with respect to a defendant. And sections four hundred and forty to four hundred and forty-four, both inclusive, apply to the proceedings in like manner as if such person was a defendant.

Amended by L. 1879, ch. 542; L. 1884, ch. 399; L. 1899, ch. 301; L. 1909, ch. 492; L. 1913, ch. 179; L. 1914, ch. 346, in effect Sept. 1, 1914. The amendment of 1913 inserted in subdivision 1 the words "or, being a domestic corporation, where after diligent effort, service cannot be made within the state upon the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent." The amendment of 1914 omitted from between the words "service" and "of" in line 4 of the last paragraph, the words "of a copy," and from between the words "person" and "by" in line 5 of such paragraph, the words "without the state, or,"

Necessity that requirements be strictly complied with.—A substantial compliance with the requirements of the sections of the code of civil procedure relating to substituted service of process upon residents of the state is all that is necessary to give validity to proceedings under said sections. *Dennin v. Duffy* (1913), 83 Misc. 523, 145 N. Y. Supp. 354.

Effect of substituted service.—Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to the proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. *Grubel v. Nassauer* (1913), 210 N. Y. 149, affirming 148 App. Div. 891, 132 N. Y. Supp. 1131.

Action in personam.—An order for substituted service made upon proof that the

defendant resided in a foreign state should be vacated where the action is *in personam*, for the court can only acquire jurisdiction over the defendant by his voluntary appearance. *McLaughlin v. McLaughlin Real Estate Co.* (1913), 162 App. Div. 644, 147 N. Y. Supp. 959.

Where an action is brought against non-resident defendants to recover judgment for a sum of money only, and the plaintiff has not obtained an attachment, no jurisdiction is obtained by service of a summons without the state, pursuant to an order for publication, unless the defendant voluntarily appears. *Jacobs v. White* (1914), 164 App. Div. 111, 149 N. Y. Supp. 500.

Judgment in divorce action based on substituted service.—In a suit for divorce, a valid judgment *in personam*, so as to effect a dissolution of the marriage contract, which shall be prevalent everywhere, may be rendered against a defendant not within the territorial jurisdiction during the progress of the suit, if that be the place of his citizenship and domicile, though pro-

cess be served upon him only in some method prescribed by the laws of that jurisdiction as a substitute for personal service, and though he has not voluntarily appeared. *Gruebel v. Nassauer* (1913), 210 N. Y. 149 (quoting from *Hunt v. Hunt*, 72 N. Y. 217).

Action relating to real property.—Service of a summons by publication in an action relating to the title of real property within the jurisdiction of the court, when made in accordance with reasonable statutory regulations, is legal. *Hunt v. Hay* (1915), 214 N. Y. 578.

Sufficiency of affidavit upon which to base order of publication. *Middleton v. Montague* (1912), 152 App. Div. 702. 137 N. Y. Supp. 520.

Purpose of including defendant's street address in affidavit.—The only object of including defendant's street address among the other statements in the affidavit required by this section on a motion for an order for substituted service of a summons is to give the judge such information as will enable him to decide where mail addressed to defendant sought to be served would probably be received and to include in the order a direction accordingly. *Dennin v. Duffy* (1913), 83 Misc. 523, 145 N. Y. Supp. 354.

Necessity that affidavit state street address of defendant.—A motion to set aside an order of publication on the ground that the number of the defendant's street residence was not properly given should be denied as there is no requirement that an affidavit shall state the street and number of defendant's residence. *Dennin v. Duffy* (1913), 83 Misc. 523, 145 N. Y. Supp. 354.

Wrong reasons given for granting an order for service of summons by publication. where the judge has authority to grant the order, does not invalidate the order where sufficient facts have been shown to warrant a service by publication. *Peeling v. Peeling* (1916), 161 N. Y. Supp. 965.

Proof that defendant was not absent from state.—Where plaintiff obtains an order for substituted service of the summons on the ground that defendant, being an adult and a resident of the state, had been continuously out of the state more than six months next before the granting of the order and had not made a designation of a person upon whom a summons in his behalf might be served, and that personal service upon the defendant within the state could not, after diligent effort, be made, a motion to vacate the order will be granted where plaintiff presents proofs showing conclusively that he was not absent from the state on the day the order was made and had not been absent therefrom for ten weeks before. The essential fact stated in the affidavit upon which the order for substituted service was made was erroneously stated. *Clarkson v. But-*

ler (1916), 173 App. Div. 143, 159 N. Y. Supp. 343.

Concealment to avoid service.—Affidavit held to show facts sufficient to warrant the conclusion that the defendant was concealing himself to avoid service of summons. *Peeling v. Peeling* (1916), 161 N. Y. Supp. 963.

A stockholder's interest in the capital of a domestic corporation is property situated in this state, and an action affecting the apparent title and true ownership of that interest is one in the nature of a proceeding in rem which may be entertained by our courts and in which, under the provisions of subdivision 5, jurisdiction of a nonresident defendant may be obtained by service of a summons by publication. *Holmes v. Camp* (1916), 219 N. Y. 359.

Validity of order.—An order reciting the fact that the plaintiff has been unable, with due diligence, to make personal service upon the defendant, or to ascertain where the defendant is staying, is not, in and of itself, sufficient to give the judge jurisdiction to authorize the service of the summons by publication. *Peeling v. Peeling* (1916), 161 N. Y. Supp. 963.

When order vacated.—Where, in an action against a nonresident to recover for royalties upon sales, no attachment has been issued against the property of the defendant, and the complaint does not state facts upon which the court could render judgment "that the defendant be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined or limited; or otherwise affecting the title to such property," an order directing the service of the summons upon the defendant by publication should be vacated. *Westbrook v. Ward* (1916), 171 App. Div. 547, 157 N. Y. Supp. 755.

Unknown defendant.—Where jurisdiction to issue an order for service of a summons upon unknown defendants by publication depends upon an impossible or remote contingency or upon the construction of inconsistent, conflicting or ambiguous statements in the affidavits on an application for an order for service by publication the court will disregard the defect and will give the statements in the affidavits such a construction if possible as will sustain the proceedings rather than one which will invalidate them. *McKenzie v. Woodward* (1917), 101 Misc. 47, 166 N. Y. Supp. 485.

An action in the nature of equitable replevin to recover possession of the bonds deposited as collateral and of the notes as well, with incidental relief, is clearly one quasi in rem and the court by publication can obtain jurisdiction to determine the foreign corporation defendant's interest in and to award plaintiff possession of the

res provided that at the time of publication the court had jurisdiction over the res and in this respect the action comes within the provision of subdivision 5 of this section. *Hodgens v. Columbia Trust Co.* (1918), 103 Misc. 415, 171 N. Y. Supp. 235.

Where on motion to appoint a receiver, under § 714, no order for service of non-residents by publication was made, but personal service without the state was made, the court has no jurisdiction. *Finck v. Finck* (1918), 171 N. Y. Supp. 408.

§ 439. Papers upon which order for publication may be made.

A verified complaint is a prerequisite to an order for publication or for service without the state. *Fred S. James & Co. v. Commercial Nat. F. Ins. Co.* (1918), 170 N. Y. Supp. 402.

Failure to serve exhibit constituting material part of complaint is a fatal non-compliance with this section and subdivision 2 of § 443. *Fair v. Kenny* (1918), 103 Misc. 412, 171 N. Y. Supp. 694.

As a plaintiff in a divorce action cannot

personally serve the summons, and as the proof of jurisdiction cannot be given by him, it would seem to follow logically that the court cannot acquire jurisdiction of the case where the service of the summons is pursuant to an order of publication, if such order is based solely upon the affidavit of the plaintiff. For that reason the order of publication should not be made merely upon such proof. *Perweiler v. Perweiler* (1916), 160 N. Y. Supp. 785.

§ 440. By whom order may be made; contents of order.

The order may be made by the court or by a judge thereof or the county judge of the county where the action is triable. It must direct that service of the summons, upon the defendant named or described in the order, be made by publication thereof in two newspapers, designated in the order as most likely to give notice to the defendant, for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks. It must also contain, either a direction that, on or before the day of the first publication, the plaintiff deposit in a post-office, branch post-office or post-office station, one or more sets of copies of the summons, complaint and order, each contained in a securely closed post-paid wrapper, directed to the defendant, at a place specified in the order, or a statement that the court or judge, being satisfied, by the affidavits upon which the order was granted, that the plaintiff cannot, with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein. When it appears by the affidavits upon which the order was granted that the defendant is within a country with which the United States of America is at war, or in a place with which by reason of the existence of a state of war the United States of America does not maintain postal communication the order may dispense with the mailing of any papers to such defendant, and in lieu thereof shall direct that such papers be mailed to such officer as may have been appointed by the president of the United States of America to take possession of the property of alien enemies, at Washington, District of Columbia, on behalf of such defendant.

Amended by L. 1879, ch. 542; L. 1889, ch. 195; L. 1914, ch. 346; L. 1917, ch. 98; L. 1918, ch. 309, in effect April 23, 1918. The amendment of 1914 materially changed this section. The amendment of 1917 inserted the words "branch post-office or post-office station." The amendment of 1918 inserted the last sentence.

Source.—Substitute for a part of Code of Proc., § 135.

Effect of amendment of 1914.—This section as amended in 1914, provides for service without the state by publication only, and subdivision 2 of § 443 providing that

"in all cases when publication is ordered the personal service of the copy of the summons and complaint * * * out of the state is equivalent to publication and

deposit in the post office" may be invoked only "when publication is ordered." *Godfree v. Godfree* (1915), 166 App. Div. 694, 152 N. Y. Supp. 257.

Deposit in post office.—An order made in the alternative that the summons be published or that it be served personally without the state, which instead of requiring "that on or before the date of the first publication" plaintiff deposit in the post office, etc., used the words "third publication" is fatally defective. *Godfree v. Godfree* (1915), 166 App. Div. 694, 152 N. Y. Supp. 257.

Deposit in a branch post office of a summons, complaint and order of publication, instead of in the general post office, is sufficient. *Von Der Heyde v. Ditmars*

(1916), 174 App. Div. 390, 161 N. Y. Supp. 780.

Application to publication of citation in surrogate's court. *Matter of Wright* (1918), 183 App. Div. 266, 171 N. Y. Supp. 123.

Citation to unknown creditors issued by surrogate's court.—Decisions made under this section do not apply to service upon unknown creditors of a citation issued by the surrogate's court. Such citation is required to be published once in each of six successive weeks by § 2524, and service is good where there was a publication in each of six successive calendar weeks. *Matter of Reed* (1916), 171 App. Div. 21, 156 N. Y. Supp. 944.

§ 441. When publication must be commenced; when service deemed complete.

The first publication in each newspaper designated in the order, or personal service upon the defendant without the state in lieu thereof, must be made within three months after the order is granted. For the purpose of reckoning the time within which the defendant must appear or answer, service by publication is complete upon the day of the last publication, pursuant to the order.

Amended by L. 1877, ch. 416; L. 1914, ch. 346, in effect Sept. 1, 1914. The amendment of 1914 substituted the word "personal" for the word "the" in lines 1 and 2; inserted the words "in lieu thereof" in line 2, and omitted at the end of the section the words "and service made without the state is complete upon the expiration thereafter of a time equal to that prescribed for publication."

Source.—Code of Proc., § 135, in part, and § 137, in part.

§ 442. Papers to be filed; notice to defendant.

Failure to serve notice.—Where a plaintiff, after obtaining an order for the service of a defendant by publication, did not publish the order, but personally served the defendant with a copy thereof, and of the summons and complaint in the foreign state, and did not serve or attempt to serve the notice required by §§ 442 and 443, the attempted service should be set aside. *Hollender v. Wallace* (1915), 167 App. Div. 217, 152 N. Y. Supp. 647.

§ 443. Service without the state.

1. Where service is made without the state under an order for publication of the summons the papers specified in the last section must be previously filed; and a notice must be served with the summons, in all respects like the notice required by the last section, except that the words, "without the state of New York" must be substituted for the words, "by publication."

2. In all cases when publication is ordered, personal service of a copy of the summons and complaint and such notice, out of the state, is equivalent to publication and deposit in the post-office.

3. In the cases specified in subdivision five of section four hundred and thirty-eight the summons may be served without an order, upon a defendant without the state in the same manner as if such service were made

within the state, except that a copy of the complaint shall be annexed to and served with the summons.

4. Service without the state is complete ten days after proof thereof is filed.

5. When the summons is served personally without the state the affidavit of service must show that the person making it is a resident or citizen of the state of New York, or a sheriff, or under sheriff, deputy sheriff, constable of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, an attorney and counsellor-at-law duly qualified to practice in the state where such service is made or by a United States marshal.

When such affidavit is made by a resident or citizen of the state of New York, his place of residence, and street number, if any, shall be stated therein. The affidavit of service made without the state shall contain the official designation of the person making it and shall have annexed thereto a certificate of the proper official showing that the person before whom the affidavit was sworn to was, at the time of administering the oath, qualified to act.

6. A judgment shall be conclusive upon a defendant on whom the summons is personally served without the state, with respect to the property which is the subject of the action, or which is attached therein, to the same extent as if the service upon him were made within the state.

Amended by L. 1877, ch. 416; L. 1914, ch. 346; L. 1916, ch. 439, in effect Sept. 1, 1916. The amendment of 1914 materially changed this section. The amendment of 1916 inserted the last paragraph and the last two lines of the first paragraph of subdivision 5.

Source.—New.

Application.—*Marrone v. Tesoriere* (1915), 92 Misc. 602, 156 N. Y. Supp. 280.

Service by United States deputy marshal.—Personal service of a summons in an action pending in the supreme court of this state, made in the District of Columbia by a deputy United States marshal of the District of Columbia, where an order for service of the summons by publication was duly granted, does not constitute a valid service of the summons under subdivision 5, as it existed between September 1, 1914, and September 1, 1916. *Confeld v. Bliss* (1917), 220 N. Y. 121, 681.

Service by a deputy United States marshal of a summons without the state is not good. *Sexton v. Bernheimer* (1918), 104 Misc. 1, 171 N. Y. Supp. 696.

The word "state" refers to only one of the states of the United States, one of the territories of the United States or of the District of Columbia. *Fair v. Kenny* (1918), 103 Misc. 412, 171 N. Y. Supp. 694.

Failure to serve notice jurisdictional.—The requirement that when service is made without the state under an order for publication "a notice must be served with the summons in all respects like the notice required by the last section" is a require-

ment affecting the jurisdiction of the court, and the failure to serve such a notice constitutes a jurisdictional defect, and is not a mere irregularity. *Conklin v. Federal Trust Co.* (1917), 176 App. Div. 572, 163 N. Y. Supp. 570.

Option for personal service without state in order for publication surplusage.—Where the order for the service of summons on a non-resident defendant provided for publication in two newspapers, "or at the option of the plaintiff by service of the summons and of the complaint and of this order, without the state of New York, upon said defendant personally," and service of the summons and of the complaint was made personally outside the state, *held*, on motion by the defendant to set aside such service because made outside the state, that the clause in question was unnecessary and mere surplusage. *Banfield Co. v. Hollenbeck* (1918), 184 App. Div. 618, 172 N. Y. Supp. 377.

Failure to serve copy of exhibit constituting a material part of the complaint is a fatal noncompliance with subdivision 2 of this section and § 439. *Fair v. Kenny* (1918), 103 Misc. 412, 171 N. Y. Supp. 694.

§ 445. Defendant when allowed to defend.

Where the summons is served, pursuant to an order made as prescribed in this article, in any other manner than personally without the state and the defendant so served does not appear, he or his representatives, on application and sufficient cause shown, at any time before final judgment, must be allowed to defend the action; and, except in an action for divorce, or wherein the contrary is expressly prescribed by law, such defendant or his representatives, must, in like manner, upon good cause shown, and upon just terms, be allowed to defend, after final judgment, at any time within one year after personal service of written notice thereof; or, if such a notice has not been served, within seven years after the filing of the judgment roll. If the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled, as the court directs; but the title to property, sold, to a purchaser in good faith, pursuant to a direction contained in a judgment, or by virtue of an execution issued upon the same, shall not be affected thereby.

Amended by L. 1877, ch. 416; L. 1914, ch. 346, in effect Sept. 1, 1914. The amendment of 1914 inserted the words "in any other manner than personally without the state" in line 2, and substituted the word "such" for "the" in line 6.

Source.—Code of Proc., § 135, in part.

Vacation of default judgment against nonresident.—A nonresident defendant, served by publication, has the right, within the time prescribed, to have a judgment and other proceedings taken in an

action opened and vacated "upon just terms," which may include costs of the motion and taxable costs of the action. *McCurdy-Robinson Co. v. Leach* (1916), 161 N. Y. Supp. 411.

§ 446. Who may be joined as plaintiffs.

Owners in severalty.—In a suit by persons owning land in severalty, brought on behalf of themselves and all other residents or property owners similarly situated to enjoin the defendant who operated a factory from pouring refuse into the brooks or water-courses, and thereby disseminating odors that injuriously affected the plaintiff's property, the complaint alleged private injury and special damages to private property. Since the plaintiffs are proper parties to maintain the suit on behalf of themselves and others, and since the complaint states a cause of action, the defendant's demurrer should be overruled. *Greer v. Smith* (1913), 155 App. Div. 420, 140 N. Y. Supp. 43.

Who must and may be joined.—Reading together §§ 446, 488, we have the simple

rule that persons having an interest in the subject-matter of the action may join, and persons united in interest must be joined as plaintiffs. *Minion v. Warner* (1918), 185 App. Div. 246, 173 N. Y. Supp. 69.

Common interest of plaintiffs.—The code does not require that the parties joined as plaintiffs shall have a common or identical interest in the cause of action. *Metropolitan Trust Co. v. Stallo* (1915), 166 App. Div. 649, 658, 152 N. Y. 173.

Action to set aside conveyance.—Judgment creditors holding distinct and several judgments may unite in an action to set aside a conveyance by the common debtor made in fraud of their rights as creditors. *Cullen v. Walsh* (1916), 161 N. Y. Supp. 123.

§ 447. Who may be joined as defendants.

Entire damage.—While all engaged in the commission of a tort may properly be joined as defendants in an action to recover damages resulting therefrom, a separate action will lie against each tortfeasor for the entire damage. *Lane v. Fenn* (1912), 76 Misc. 48, 134 N. Y. Supp. 92.

Foreclosure of mechanic's lien; grantor

a proper party; demurrer.—Where real estate is conveyed just prior to the commencement of an action to foreclose a mechanic's lien thereon, the grantor is a proper but not a necessary party defendant. Where a defect of parties defendant appears upon the face of the complaint the remedy is by demurrer; otherwise it

must be pleaded in the answer, and, in the absence of either, the defect is waived. *Pierce v. Kinney* (1912), 75 Misc. 328, 135 N. Y. Supp. 537.

Corporation; action against stockholders.—While a trust company in an action to enforce the liability of its stockholders under § 196 of the banking law, may be a proper party defendant, it is not a necessary party, and a demurrer on the ground of failure to join the trust company cannot be sustained. *Van Tuyl v. Scharmann* (1913), 208 N. Y. 53.

Stockholder's action; corporation a proper party.—Where a stockholder on behalf of himself and other stockholders sues trustees to whom the control of the corporation has been given by a transfer of stock for the purposes of the trust, the corporation itself is a proper, if not a necessary, party, and it may be joined as a defendant in a suit in equity although as against it no relief is demanded. *Brock v. Poor* (1915), 167 App. Div. 798, 153 N. Y. Supp. 343.

In suit in equity.—It has always been held as a general rule in equity that all persons materially interested either legally or beneficially in the subject-matter of a suit are to be made parties to it, so that there may be a complete decree, which shall bind them all. In carrying out that rule it sometimes happens that a plaintiff knows the fact that a third person claims an interest in the subject-matter of the action but does not know the nature, extent or merits of the claim which cannot nevertheless, be entirely ignored without peril to the completeness of the remedy sought. In such an emergency the facts may be stated, the claimant be called in as a party, and required to disclose his alleged interest. *Delcambre v. Delcambre* (1914), 210 N. Y. 460. (Partition suit.) Reversing 149 App. Div. 952, 133 N. Y. Supp. 1118.

There is no rule of law which forbids the joinder in an equitable action of the

executrix of one who has been damaged by the acts of the defendant and the same person in her individual capacity when she has been injured by a continuance of the acts complained of, where the purpose of such joinder is to prevent a multiplicity of suits and the complete determination of the matters in controversy. *Gould v. Village of Fredonia* (1918), 104 Misc. 270, 171 N. Y. Supp. 949.

In action against cestui que trust on liability of donor.—In a suit against a widow and her daughter to recover on the liability of their testator on the bond of a guardian, a trustee of their testator holding property, the income of which is payable to the widow, is a proper party defendant. *Duck v. McGrath* (1913), 160 App. Div. 490, 145 N. Y. Supp. 1040.

Principal in joint and several bond as necessary party defendant.—Though a surety company bond for the faithful performance of another's contract is joint and several, the principal is not a necessary party defendant in an action on the bond. *Riehl v. Illinois Surety Co.* (1913), 85 Misc. 245, 148 N. Y. Supp. 339.

Joint conspirator.—One who, with full knowledge of a trust agreement executed by stockholders and of their rights thereunder, conspires and co-operates with the trustees in a violation of the trust, is liable with the trustees as a joint conspirator and may be joined as a defendant in a suit against them brought to compel an accounting. *Brock v. Poor* (1915), 167 App. Div. 800, 153 N. Y. Supp. 343.

Action to avoid fraudulent transfers.—In an action by a judgment creditor of an insolvent firm to avoid fraudulent transfers, in order to join several parties in one action the main issues of fact and law must be common to all, but it is not necessary that each transferee be privy to every transfer. *Hatch v. Heinze* (1916), 172 App. Div. 675, 158 N. Y. Supp. 385.

Section cited.—*Gano v. Potter* (1918), 105 Misc. 482, 173 N. Y. Supp. 528.

§ 448. Parties united in interest, when to be joined; when one or more may sue or defend for the whole.

Parties entitled to profits under contract.—Where two parties are entitled to share jointly in a designated percentage of the net profits under a contract, they must both join in a complaint to recover under the contract, otherwise a demurrer will be sustained for a defect of parties. *Natter v. Blanchard* (1912), 153 App. Div. 814, 139 N. Y. Supp. 859.

Ejectment.—When action by owners of distinct parcels of land to enjoin maintenance of various actions of ejectment cannot be maintained. *Prospect Park & Coney Island R. R. Co. v. Morey* (1913), 155 App. Div. 247, 140 N. Y. Supp. 380.

Legatees.—The legatees under the will of a testatrix need not be made parties to an action brought by her administrator with the will annexed to compel the executor of the deceased husband and executor of the testatrix to account for property of her estate which was unadministered. *Phillips v. Wisner* (1912), 75 Misc. 278, 132 N. Y. Supp. 1006.

Necessary parties; action to set aside separation agreement.—In a suit in equity brought by a wife to set aside a separation agreement, made between the husband and wife through a trustee, which agreement provided for the support of the wife

and infant son, the son and trustees are necessary parties. *Ducas v. Ducas* (1912), 150 App. Div. 397, 135 N. Y. Supp. 35.

Id.; cotenants in production of play.—Where several as tenants in common have an undivided interest in the production rights of a play, one tenant in common who does not claim sole ownership, cannot maintain a suit to enjoin the production of the play, for the defendant may have acted under the authority of plaintiff's co-owner; moreover, in such suit the co-owners are necessary parties. *Nillson v. Lawrence* (1912), 148 App. Div. 678, 133 N. Y. Supp. 293.

Action against officers of corporation.—An action by stockholders against the officers of a corporation is derivative, and the complaint must allege a demand that the corporation bring the action and its neglect or failure to do so, or the existence of such facts as would make the demand futile; the corporation is a necessary party. *Continental Securities Co. v. Belmont* (1912), 150 App. Div. 298, 134 N. Y. Supp. 631.

Suit to determine water rates.—A suit may be maintained by one of the customers of a water company for the benefit of all, to have the court determine whether or not the rates sought to be enforced are just. *Whitmore v. New York Inter-Urban Water Co.* (1913), 158 App. Div. 178, 148 N. Y. Supp. 1098.

Rates for gas.—In a suit by a gas company against the Public Service Commission to restrain enforcement of confiscatory rates representatives of the class of consumers, who will be bound by the decree, may be joined as defendants. *Municipal Gas Co. v. Public Service Comm.* (1919), 225 N. Y. 89.

Taxpayer's action.—A town is a necessary party to an action by a taxpayer to cancel a lease of town lands. *Bachia v. Piepenbrink* (1912), 77 Misc. 362, 126 N. Y. Supp. 401.

Form of judgment.—An action at law by representatives of holders of securities of a railroad in behalf of themselves and all others who shall come in and be made parties thereto against a banking company

to recover damages for its refusal to carry out a contract looking to the taking over of the railroad in which the plaintiffs were interested, is not a derivative action because each plaintiff sues in his own right and not in the right of another. In such a case, whether the action be deemed to be one in law or equity, while it may be permissible for one or more to sue in the first instance in behalf of all similarly situated, judgment can properly be rendered only in favor of those who originally sued or of those who, after the commencement of the action and before judgment, have caused themselves to be joined as plaintiffs. *Atkins v. Trowbridge* (1913), 162 App. Div. 629, 148 N. Y. Supp. 181.

Suit in the right of stockholders.—Where a complaint alleges that a great number of stockholders of a corporation and persons who had succeeded to their rights occupy a similar position and it clearly appears that the design is to plead a single cause of action not in the right of the corporation but in the right of the plaintiff on behalf of himself and the other stockholders, the allegations are not insufficient on the ground that the number of stockholders is not stated and it is not shown that it would be impracticable to bring them all in, or that the question at issue was for the general interest of all. *Brock v. Poor* (1915), 167 App. Div. 784, 153 N. Y. Supp. 332.

Joint guarantors.—In an action on a contract of guaranty signed by several persons which on its face appears to be the joint obligation of all of the signers they should all be joined as parties defendant unless it affirmatively appears that they cannot be joined. *Third Nat. Bank of St. Louis v. Graham* (1916), 161 N. Y. Supp. 159.

Objection to nonjoinder; how taken.—The objection to nonjoinder of necessary parties defendant may be taken by demurrer unless it is not disclosed by the complaint that there are omitted parties in which case the facts should be alleged in the answer. *Third Nat. Bank of St. Louis v. Graham* (1916), 161 N. Y. Supp. 159.

§ 449. Party in interest to sue; trustee, etc., may sue alone.

Goods sold.—Where a note was given by the defendant's testator to the plaintiff's local sales agent for goods sold for the plaintiff, plaintiff may maintain an action under § 449 as a person in whose name the contract is made for the benefit of another, where the plaintiff held title to the goods sold until the agent's obligations to it were met. *International Harvester Co. v. Champlin* (1913), 155 App. Div. 847, 140 N. Y. Supp. 842.

Trustee.—A person with whom or in whose name a contract is made for the

benefit of another is a trustee of an express trust within the meaning of § 449. *Symmers v. Caroll* (1913), 207 N. Y. 632.

Action by trustee of express trust in his own name. *Portoghese v. Illinois Surety Co.* (1913), 81 Misc. 211, 142 N. Y. Supp. 500.

One of two partners or joint adventurers, where the profits are to be shared jointly, although he be the manager for both, does not come within the provision authorizing the trustee of an express trust to sue alone, where it is not set up in the complaint

that he is such trustee, or that he sues in such capacity. *Natter v. Blanchard Co.* (1912), 153 App. Div. 814, 138 N. Y. Supp. 969.

The assignee of a mortgage is a "party in interest" within the meaning of this section and entitled to sue for foreclosure, although the assignment was made to him merely for this purpose. *Morrison v. Schmemman* (1915), 166 App. Div. 264, 151 N. Y. Supp. 607.

When transferee of overdue note not real party in interest.—Where an overdue promissory note was transferred for the purpose of allowing the transferee to bring an action thereon for the benefit of the transferor under an agreement that in case of recovery the transferee should receive a portion of the proceeds, there was never a *bona fide* assignment and the transferee was not the real party in interest and he is not entitled to maintain such action in his own name, at least without making his transferor a coplaintiff. *Clark v. Dada* (1918), 183 App. Div. 253, 171 N. Y. Supp. 205.

Right of syndicate managers to maintain an action as trustees of an express trust to recover subscriptions where at the time

of the trial they had possession of the syndicate agreement free of all liens. *Gallogly v. Whitmore* (1916), 172 App. Div. 381, 158 N. Y. Supp. 830.

The insured under an endowment policy who on maturity exercised a "life option," is entitled to sue the company, as trustee of an express trust, to recover the dividends due his wife, the beneficiary. But a recovery by the insured as trustee is unnecessary where the wife has appeared and answered. *Fuchs v. Mutual Life Ins. Co.* (1917), 164 N. Y. Supp. 105.

Where the plaintiff is a mere agent of the party of the first part to the contract, and its only interest in collections made thereunder being the stipulated percentage which it is entitled to retain, it is not "a person with whom or in whose name a contract is made for the benefit of another" so as to render it competent to sue. *Karczag Publishing Co. v. Shubert Theatrical Co.* (1918), 181 App. Div. 529, 169 N. Y. Supp. 1.

Section cited.—*Watson v. Chicago, Rock Island & Pacific R. R. Co.* (1915), 169 App. Div. 663, 155 N. Y. Supp. 808; *Leighton v. New York Railways Co.* (1915), 169 App. Div. 553, 155 N. Y. Supp. 444.

§ 451. Where defendant or his name is unknown.

Partition; disappearance of owner of an interest; sufficient designation.—In a partition action, where the owner of an interest in the property has disappeared and has not been heard of for several years, the joinder of his name with that of thirteen others recited as "being fictitious, and being intended to designate his wife, if any, and if he be dead, his widow, heirs at law, devisees, and their legal represen-

tatives, and their wives, widows, or husbands, if any, and the heirs at law, devisees and legal representatives of any who may be dead," is sufficient to designate the unknown owner or owners of such interest. *Snyder v. Parezo* (1912), 151 App. Div. 110, 135 N. Y. Supp. 960.

Section cited.—*Sherman v. Carman* (1915), 169 App. Div. 17, 154 N. Y. Supp. 484.

§ 452. When court to decide controversy; or to order other parties to be brought in.

Application.—*Leighton v. New York Railways Co.* (1915), 169 App. Div. 553, 155 N. Y. Supp. 444.

The antiquated and cumbersome proceedings provided in the code are not exclusive and do not restrict the common law powers of the court to bring in third parties when, as here, they appear on the face of the complaint to have an interest in the controversy. *Otis Elevator Co. v. Rochester Friendly Home* (1918), 103 Misc. 76, 169 N. Y. Supp. 389.

Intervention by bank in action by trustee in bankruptcy.—On the trial of an action by a trustee in bankruptcy to recover a balance due the bankrupt on a municipal contract, the court has no power over plaintiff's objection to grant a motion permitting a bank to which the bankrupt had duly assigned a portion of the money policy to his wife, if living, and if not, to

intervene. *Oppenheimer v. City of New York (Chelsea Bank)* (1912), 149 App. Div. 172, 133 N. Y. Supp. 741.

Suit to set aside separation agreement; trustee necessary party.—In a suit in equity brought by a wife to set aside a separation agreement, made between the husband and wife through a trustee, which agreement provided for the support of the wife and infant son, the son and trustee are necessary parties. *Ducas v. Ducas* (1912), 150 App. Div. 397, 135 N. Y. Supp. 35.

Children of decedent as necessary parties in action by widow on insurance policy.—In an action to recover the cash surrender value of a twenty-year endowment policy, payable to the assured, "his executors, administrators or assigns," upon which all the premiums have been paid, the fact that the assured had assigned the due or to grow due on the contract to in-

his children, does not entitle the defendants to an order requiring the plaintiff to bring in her two children as parties defendant. *Eisenbach v. Mut. Life Ins. Co.* (1914), 162 App. Div. 595, 147 N. Y. Supp. 962.

Suit to declare deed a mortgage; grantee necessary party.—In a suit to obtain a decree that a deed absolute upon its face is, in fact, a mortgage, and for an accounting and for a reconveyance of the premises upon payment of an amount due to the estate of the mortgagee, the right of the grantee of the mortgagee to be allowed to intervene as a party defendant is absolute under this section. *Mulholland v. Reid* (1914), 165 App. Div. 862, 150 N. Y. Supp. 784.

Partition; party interested in renewed term of lease.—Where, in an action for partition of realty and of a chattel real, it appears that one of the defendants has entered into an agreement to sell and to assign the renewed term of the lease if granted to parties unknown, the discretion of the special term in allowing a party which has identified itself with the other party to said agreement to intervene as a party defendant should not be disturbed. *Gleaser v. Burns* (1915), 170 App. Div. 321, 155 N. Y. Supp. 936.

In an action at law where the plaintiff seeks a money judgment only, he cannot be compelled to bring in as a defendant a third party on the application of the latter. *Brooklyn Cooperage Co. v. Sherman Lumber Co.* (1917), 220 N. Y. 642.

Motion to have third party made defendant.—In an action by one claiming to be the owner of and entitled to the possession of certain chattels which had been stored by a third party with the defendant to replevin the same, a motion cannot be made by either of the parties to the action to have said third party brought in as a defendant. The person who claims the interest in the property must make the motion under said section. *United Shoe R. M. Co. v. Dochtermann S. W. Co.* (1919), 186 App. Div. 359, 174 N. Y. Supp. 284.

Power of court to bring in necessary parties.—Where in a suit by judgment creditors to impress the lien of their judgment upon the proceeds of leases alleged to have been illegally executed by a corporation it appears that the presence of other parties is necessary to a complete determination of the controversy, the court should direct

that they be brought in and should not dismiss the complaint. *Larsen & Son v. Newmark & Davis, Inc.* (1918), 182 App. Div. 724, 170 N. Y. Supp. 268.

A third party may be brought in only when the controversy cannot be determined without the presence of such third party. *Lardizabal v. Valentine* (1918), 185 App. Div. 124, 172 N. Y. Supp. 863.

A third party seeking to be made a defendant must have such an interest in the subject of the action as to entitle him to be made a party defendant in order to take the case out of the general principle that the plaintiff may sue whom he pleases and cannot be compelled to bring in other parties. The interest in the subject of the action which is intended means a legal interest and not merely a casual or incidental interest in the outcome of the action. *Brooklyn Cooperage Co. v. Sherman Lumber Co.* (1916), 175 App. Div. 246, 161 N. Y. Supp. 514.

A third person cannot be said to have an interest in the subject of an action where it is not necessary to ascertain and settle his rights before those of the parties to the suit can be determined, where there is no injury or title to real property involved in the action in which he has an interest, where there is no cause of action stated in the complaint against him, where there is no recovery over against him by the defendant, or where the judgment is not a bar to any cause of action he may have against the defendant. *Touhey Co. v. Shongo Const. Co.* (1917), 100 Misc. 181, 165 N. Y. Supp. 420.

Action in equity.—Intervention at the instance of a third party will be ordered in an action in equity where a complete determination of the controversy between the parties cannot be had without it, or where the third party has an interest in real property for injury to which the complaint demands relief, or where he has an interest in real property the title to which will be affected by the judgment or where the third party has an interest in the subject of the action, but not otherwise. *Touhey Co. v. Shongo Const. Co.* (1917), 100 Misc. 181, 165 N. Y. Supp. 420.

Money judgment only sought.—In an action at law where the plaintiff seeks a money judgment only, he cannot be compelled to bring in as a defendant a third party on the application of the latter. *Brooklyn Cooperage Co. v. The A. Sherman Lumber Co.* (1917), 220 N. Y. (mem.).

§ 453. Supplemental summons.

Effect of previous attempt to serve amended summons and complaint.—An application for leave to serve a supplemental summons and complaint should not be denied because the plaintiff had previously attempted to serve an amended summons and complaint upon the defendant as ex-

ecutor without leave of court, which complaint was stricken out on motion, with leave to the plaintiff to move for an amendment of process *nunc pro tunc*. *Baum v. Stockell* (1915), 168 App. Div. 286, 153 N. Y. Supp. 1004.

Additional defendant.—There is no warrant in law for bringing in an additional defendant upon the trial without issuing a supplemental summons. *Graf v. Weinstein* (1916), 161 N. Y. Supp. 337.

Service of supplemental summons on non-resident administrator.—Where an action was brought against a nonresident for damages for an alleged illegal declaration of corporation dividends and he was personally served and appeared in the action but died before the issue raised by the demurrer to the complaint was decided, it was held that a supplemental summons could not be served by publication or personally without the state on his administrators because neither the defendant at the time of his death nor the administrators at the time of the service owned property in this state, and the court would not be authorized to render a personal judgment against them. *German-American Coffee Co. v. Johnston* (1915), 168 App. Div. 31, 153 N. Y. Supp. 866.

On a motion to serve a supplemental summons and complaint neither the sufficiency of the pleading nor the relevancy of its allegations nor defects of parties plain-

tiff or defendant will be considered. *Baum v. Stockell* (1915), 168 App. Div. 286, 153 N. Y. Supp. 1004.

Bringing in personal representative of defendant.—A stockholder suing on behalf of himself and other stockholders to compel the officers and directors of his corporation to account for mismanagement and waste who sets forth that one of the defendants, having qualified as executor of the chief stockholder, brought action in his representative capacity against the corporation pursuant to a conspiracy to dissipate its assets, which action has been abandoned, is entitled to bring in such defendant in his representative capacity by a supplemental summons. Such is the proper practice for adding a defendant not originally named in the summons, and not an application for leave to amend the original summons. *Baum v. Stockell* (1915), 168 App. Div. 286, 153 N. Y. Supp. 1004.

The joining of a party defendant in an action in the municipal court should be done in the manner provided by this section. *Barsotti v. Peirano* (1916), 157 N. Y. Supp. 844.

§ 454. When persons liable for the same demand may be sued together.

Effect on common law rule.—The general rule of the common law that persons only severally liable for the same injury could not be joined as defendants in an action for damages, except those liable upon the same written instrument, was not changed by § 454, providing that persons severally liable upon the same written instrument may be joined as defendants in an action thereon. *Lane v. Fenn* (1912), 76 Misc. 48, 134 N. Y. Supp. 92.

The liability of the successor to the defendant is as such successor, where the liability of the parties, if any, is upon the same written instrument. And the defendants and their successors are properly joined as defendants. *Automatic Strapp-*

ing M. Co. v. Twisted W. & S. Co. (1913), 142 N. Y. Supp. 6.

Bond; obligor and obligee as parties on assignment.—Where a bond under seal providing that the obligee may declare the whole amount due on default in payment of interest is assigned by the obligee who guarantees the payment thereof, the assignee on default of the obligor may not join the obligor and the assignor as parties defendant in an action upon the instrument, because the defendants are not liable upon the same instrument, within the meaning of this section. *Stein v. Whitman* (1913), 209 N. Y. 576, rev'g 156 App. Div. 861, 142 N. Y. Supp. 4.

§ 456. Proceedings in action against defendants severally liable.

Separate trial can be had only where separate judgments can regularly be entered on severance of the action. *Simon*

v. Gibraltar Construction Co. (1917), 179 App. Div. 273, 166 N. Y. Supp. 466.

§ 460. Parties prosecuting and defending as poor persons. When and how leave granted.

Order must assign attorney.—An order for leave to prosecute as a poor person is defective where it does not assign to that person an attorney to prosecute the action

without compensation. *Pankawicus v. Nichols Copper Company* (1915), 169 App. Div. 419, 155 N. Y. Supp. 123.

§ 461. Not liable for costs and fees.

Application.—*Monteforte v. Aetna Life Ins. Co.* (1917), 162 N. Y. Supp. 762.
Applicable to the municipal court code

of New York city by § 15 thereof. *Johnson v. Interborough Rapid Transit Co.* (1917), 164 N. Y. Supp. 23.

An order granting a stay until payment of costs awarded to defendant on dismissal of the complaint in a former action between the same parties involving the same cause of action, is unauthorized and will be reversed and the motion denied. The provisions herein are not inconsistent with those of the municipal court code of New York city. *Guttilla v. Engel* (1916), 95 Misc. 163, 158 N. Y. Supp. 773.

Effect of non-payment of costs of prior

action.—On a petition for leave to prosecute an action as a poor person, the fact that the complaint was dismissed in a prior action, with costs, which have not been paid, may be considered upon the question whether or not the petitioner has a good cause of action, but it is not a bar to a prosecution of the proposed action. *Pankawicus v. Nichols Copper Company* (1915), 169 App. Div. 419, 155 N. Y. Supp. 123.

§ 464. Contents of petition.

Objection not raised before judgment.—The fact that the objection to the jurisdiction of the court was not raised before judgment, does not estop the defendant

from raising it upon appeal. *Halpern v. Langrock Bros. Company* (1915), 169 App. Div. 464, 155 N. Y. Supp. 167.

§ 469. Guardian for infant plaintiff must be appointed.

Application.—*Dold v. Dold* (1918), 103 Misc. 86, 169 N. Y. Supp. 209.

Responsibility of guardian *ad litem*.—The defendants are entitled to have a guardian *ad litem* who is pecuniarily responsible appointed for an infant plaintiff, where it appears that if plaintiff is defeated the guardian *ad litem* would be responsible for costs. *Faulkner v. Brown* (1913), 143 N. Y. Supp. 791.

A guardian *ad litem* remains responsible for the costs of the action, notwithstanding the amendment of § 3268 taking away the defendant's right to require security to be

given. *Tropeano v. Grimaldi* (1916), 173 App. Div. 534, 159 N. Y. Supp. 1025.

Where the guardian *ad litem* for an infant plaintiff is incompetent and irresponsible, he may be removed or he may be permitted to continue upon giving security to protect the infant, but he cannot be required to give security for costs. *McCovern v. New York Telephone Co.* (1917), 100 Misc. 177, 165 N. Y. Supp. 480.

Right of infant plaintiff after verdict of jury in favor of defendant to appointment of guardian *ad litem* and dismissal of action. *Anderson v. Anderson* (1914), 164 App. Div. 812, 150 N. Y. Supp. 359.

§ 474. Guardian not to receive property until security given.

Reason for provision.—The reason for this legislation is to be found in the duty of the courts to protect those whom the law regarded as incompetent to look after their own interests. Infants are the wards of the courts, and our rules of practice abound in provisions of ancient origin designed to safeguard their legal rights. *Greenburg v. New York Central, etc. R. Co.* (1914), 210 N. Y. 505, affirming 160 App. Div. 888, 140 N. Y. Supp. 1118.

Effect of failure to give security.—Until the statutory guardian *ad litem* has qualified by giving his bond he is a mere *prochein ami*, or next friend, whose duty begins and ends with the prosecution of the infant's suit. At common law the next friend had no right whatever to receive the infant's property. *Greenburg v. New York Central, etc. R. Co.* (1914), 210 N. Y. 505, affirming 160 App. Div. 888, 140 N. Y. Supp. 1118.

Effect of § 1260.—Section 474 had its origin at an early day. It was first promulgated as a rule of court which still exists. The history of § 474 and § 1260

clearly shows that there is nothing new in either one, and that they have both been long known as component parts of our system of practice. Effect can be given to both by assigning to each its proper relation to the other. Section 474 is designed to protect the rights of infants. Its express command cannot be ignored. The guardian cannot legally receive the money or property of his ward until he has given the requisite bond. Section 1260, although apparently of general application, must be limited by the directions of § 474, where the judgment to be satisfied has been recovered on behalf of an infant. *Greenburg v. New York Central, etc. Co.* (1914), 210 N. Y. 505, affirming 160 App. Div. 888, 140 N. Y. Supp. 1118.

Justice's court action.—This section does not apply to a guardian *ad litem* appointed under § 2887 to bring an action in a justice's court, even though the judgment is subsequently appealed to the county court. *Short v. Corning & Painted Post St. Ry.* (1915), 154 N. Y. Supp. 236.

§ 477-a. Appointment of guardians ad litem and special guardians by supreme court without application.

The supreme court may appoint a guardian ad litem or special guardian for an infant or an incompetent person, at any stage in any action or proceeding, when it appears to the court necessary for the proper protection of the rights and interest of such infant or incompetent person and fix the fees and compensation of such guardians, except when it is otherwise expressly provided by law.

Added by L. 1916, ch. 440, in effect Sept. 1, 1916

Annulment of marriage.—In action for annulment of marriage a guardian *ad litem* will not be appointed for a defend-

ant confined in a state hospital for the insane. *Zalinsky v. Zalinsky* (1918), 103 Misc. 308, 170 N. Y. Supp. 1005.

§ 480. Copy complaint; consequence of failure to serve.

When remedy should be given.—While a defendant is given the right to make a motion to dismiss a complaint for failure to serve the same, the remedy was intended and should be given only in cases where the defendant has entered a general appearance. *Musluskys v. Lehigh Valley*

Coal Co. (1916), 96 Misc. 68, 159 N. Y. Supp. 571.

A defendant who has appeared specially for the purpose of obtaining a copy of the complaint is not in a position to move to dismiss the complaint if no complaint is served. *Musluskys v. Lehigh Valley Coal Co.* (1919), 225 N. Y. 584.

§ 481. Complaint; what to contain.

Application.—*Wright v. Larken* (1915), 91 Misc. 573, 154 N. Y. Supp. 961.

Construction.—*Spring v. Fidelity Mutual Life Insurance Co.* (1918), 183 App. Div. 134, 170 N. Y. Supp. 253.

Id.; requirements of complaint.—The rules of the code prescribing the requirements of a complaint in a civil action are simple and liberal. The right of a plaintiff to bring and recover in the action is constituted of certain facts—the facts which constitute the civil wrong he believed had been caused him by the defendant, and his claim for redress. He must state in his complaint plainly and concisely those facts. He need not classify or denominate the wrong nor ask for the precise relief which the law awards nor confine his statement to the facts which are essential to his claim. If the complaint, by giving to the language of it as liberal a construction in his favor as it will reasonably bear, states facts showing that a remediable wrong of a civil nature of some kind has been done him, and that some form and measure of judicial redress is due him, it states a cause of action. *Walrath v. Hanover Fire Ins. Co.* (1915), 216 N. Y. 220.

General provisions; necessity that facts be specifically alleged.—A fact essential to a cause of action is not alleged when it is only to be inferred from other facts specifically averred which are not inconsistent with the opposite fact. Hence where a corporation contract is not on its face necessarily beyond the scope of the power of the corporation, it will, in the absence of

an averment to the contrary, be presumed to be valid. *Jacobs v. Monaton Realty Invest. Corp.* (1914), 212 N. Y. 48, reversing 160 App. Div. 449, 145 N. Y. Supp. 611.

Id.; facts to be alleged.—A plaintiff should state the facts which constitute the cause of action and a pleading will not be sufficient which only states the evidential facts from which the trier of the facts is authorized to infer or deduce a liability. *De Cordova v. Sanville* (1914), 165 App. Div. 128, 135, 150 N. Y. Supp. 709.

Id.; facts may be stated in a pleading according to their legal effect. *Dobbins v. Delaware, Lackawanna & W. R. R. Co.* (1917), 177 App. Div. 132, 163 N. Y. Supp. 849.

Id.; plain and concise statement of facts.—*Dobbins v. Delaware, Lackawanna & W. R. R. Co.* (1917), 177 App. Div. 132, 163 N. Y. Supp. 849.

Id.; by requiring a plain and concise statement of the facts the code seeks to avoid both the evil of a statement in a complaint of conclusions of law and narrations of evidence and requires that the facts shall be plainly and concisely stated. A denial of a conclusion of law does not raise an issue and a pleader is not required to deny such a conclusion. On demurrer a legal conclusion is not admitted and may be treated both for purposes of answering and demurring as surplusage and may be ignored by the court. In a complaint for injuries caused by the defective condition of premises the plaintiff should allege by what right she is on the

premises. The use of the expression "lawfully" upon the premises gives no intimation whether plaintiff was there as a tenant, invitee or licensee. It does exclude a trespasser, but if the plaintiff were a mere licensee the defendant owed no duty to her except to abstain from any active or affirmative negligence. *Wagner v. Shoemaker* (1916), 97 Misc. 432, 161 N. Y. Supp. 376.

Id.; evidentiary facts.—The complaint should contain a statement of facts, and not the evidence of those facts. *Conner v. Bryoe* (1918), 170 N. Y. Supp. 94.

Id.; Bill of particulars to aid complaint.—On a motion to dismiss a complaint for insufficiency it cannot be defended on the ground that the complaint and bill of particulars, taken together, are sufficient to show a cause of action, if there is no cause of action stated in the complaint. *Peterson v. Eighmie* (1916), 161 N. Y. Supp. 1065.

Id.; conclusions not sufficient.—The allegation of conclusions is not sufficient to constitute a cause of action, and a motion for judgment on the pleadings will be granted. *Pfizer v. Wassermann* (1912), 77 Misc. 641, 138 N. Y. Supp. 566.

The allegation "for a valuable consideration" is not a statement of fact, but a conclusion of law. *White v. Western Union Telegraph Co.* (1912), 153 App. Div. 684, 138 N. Y. Supp. 598.

A mere charge that the defendants assaulted the plaintiff is a mere conclusion and a statement of facts sufficient to authorize a recovery. *Hendrix v. Manhattan Beach Development Co.* (1917), 181 App. Div. 111, 168 N. Y. Supp. 316.

Id.; plaintiff not required to set forth conclusions of law.—An order requiring plaintiff to make his complaint more definite and certain "by setting forth the facts of the remaining allegations with sufficient definiteness to enable it to be determined whether the plaintiff is relying for its cause or causes of action on actual or anticipatory breaches of the alleged contract therein set forth, or both," will be modified by striking out the portion quoted, on the ground that plaintiff cannot be required to set forth the conclusions of law deducible from the facts alleged and to elect upon what theory of law to proceed. *Import Chemical Co. v. Forster & Gregory* (1916), 172 App. Div. 406, 158 N. Y. Supp. 409.

Id.; construction of complaint.—In determining whether a complaint states a cause of action it should be liberally construed and should not be dismissed if any facts are alleged which justify a recovery. Nor should it be dismissed because the plaintiff has asked for too much, too little or for the wrong relief. *Powers v. Universal Film Mfg. Co.* (1914), 162 App. Div. 806, 148 N. Y. Supp. 114.

A complaint, when challenged for insufficiency,

is to be liberally construed, and the pleader is to be deemed to have alleged, not only facts set forth, but those, also, to be implied therefrom by reasonable intentment. *Peterson v. Eighmie* (1916), 161 N. Y. Supp. 1065.

Id.; sufficiency of allegations.—In considering the sufficiency of a complaint the court may consider, not only express allegations, but facts implied therefrom by reasonable and fair intentment. *Crotty v. Erie Railroad Co.* (1912), 149 App. Div. 262, 133 N. Y. Supp. 696.

Id.; irrelevant and redundant allegations.—A motion to strike out allegations as irrelevant and redundant may be denied where they are coupled with other material allegations. *Young v. White* (1913), 158 App. Div. 760, 143 N. Y. Supp. 931.

Id.; the allegations of the complaint control, not the prayer for relief. *Shalek v. Jetter Brewing Co.* (1915), 155 N. Y. Supp. 972.

Id.; judgment on pleadings.—A motion upon the pleadings for judgment dismissing the complaint cannot be granted if the complaint discloses any cause of action. An objection that the complaint does not state facts sufficient to constitute a cause of action may be raised upon a motion for judgment upon the pleadings, as it is a ground for demurrer expressly excepted from the provision of the code of civil procedure regarding waiver. *Hunt v. Armstrong* (1915), 166 App. Div. 311, 151 N. Y. Supp. 850.

Id.; recovery must accord with pleadings.—It is fundamental that in civil actions the plaintiff must recover upon the facts stated in his complaint, or not at all. In case a complaint proceeds on a definite, clear and certain theory, it will not support or permit of another theory because it contains isolated or subsidiary statements consistent therewith. A party must recover not only according to his proofs but according to his pleadings. *Walrath v. Hanover Fire Ins. Co.* (1915), 216 N. Y. 220.

Id.; theory of liability not required.—While a complaint must allege the facts constituting a cause of action the pleader is not required to state any theory of liability on which he relies. *Broadsky v. Hibel* (1916), 94 Misc. 312, 158 N. Y. Supp. 329.

Allegations in disjunctive.—Where the plaintiffs, suing to recover liquidated damages agreed upon in case the defendant solicited insurance business on behalf of a certain company, which business and the good will thereof the defendant had sold to the plaintiffs, allege in the disjunctive that the defendant in violation of its agreement solicited customers shown on books of the specified company, "or" on the books of another company, "or" on the books of still another company, etc., a demurrer to the complaint should be sus-

tained with leave to the plaintiffs to plead over. *Moffat v. Ainslie Co.* (1917), 181 App. Div. 37, 168 N. Y. Supp. 417.

Accounting; guaranty; return of collateral.—Where in a suit for an accounting the complaint contains allegations tending to establish a cause of action against the defendant on a guaranty without asking for relief on account of said guaranty, the plaintiff should not be required to separately state and number his alleged causes of action under the rule that such a motion does not involve the sufficiency of the allegations with respect to any cause of action attempted to be set forth. The allegations with respect to the guaranty should be regarded as superfluous and stricken out. A complaint in a suit for an accounting examined and held to also set forth allegations establishing a cause of action for the return of collateral security and that a motion to require the plaintiff to separately state and number such causes of action should be granted. *Huguley v. Gardner* (1913), 157 App. Div. 720, 142 N. Y. Supp. 660.

Id.; partnership.—A complaint which, in substance, alleges that the plaintiff and defendant entered into a partnership or joint adventure to purchase and sell certain specified goods and share equally the profits and losses, but that the defendant secretly purchased a portion of said goods in his own name and resold them for his own benefit, and refuses to account therefor, states a cause of action in equity for an accounting. *Lobsitz v. Lissberger Co.* (1915), 168 App. Div. 840, 154 N. Y. Supp. 556.

Administration; pleading representative capacity.—Mere description of the defendant in a complaint as administratrix of the estate of a decedent where no relief is demanded against her in her representative capacity, and where defendant could not bind the estate of her decedent, does not render the complaint demurrable. *Gatti-McQuade Co. v. Flynn* (1913), 79 Misc. 430, 140 N. Y. Supp. 135.

Agreement; how alleged.—It is not good pleading to set forth the evidence relied on to establish a fact, and it is enough to allege that the parties "mutually agreed" without alleging what each said in making the agreement, or that there was a promise by one party to the other. *Grossman v. Schenker* (1912), 206 N. Y. 466.

Attorney, action by a client against.—To recover damages alleged to have been sustained by reason of the negligence of the attorney in failing to prosecute a claim against a corporation which subsequently became insolvent, it was held that the complaint was insufficient as stating mere conclusions of law which merely alleged the retainer of the defendant to prosecute the action for a sum "due from said company to this plaintiff" and that the defendant "might, in case he had

prosecuted said action with diligence and skill, have obtained final judgment for the plaintiff." *Schmitt v. McMillan* (1916), 162 N. Y. Supp. 437.

Automobile; action for injuries.—Where in an action to recover for injuries sustained in being run over by an automobile, the complaint fails to connect the defendant with the ownership or control of the machine, no cause of action is stated. *Cullen v. Thomas* (1912), 153 App. Div. 797, 138 N. Y. Supp. 600.

Id.; negligence of driver.—Where a complaint alleged that the plaintiff was struck and injured in the public street by the defendant's automobile which was under his control and operated by him at the time and that her injuries "were caused solely by the negligence and carelessness of the defendant in charge of the aforesaid automobile," it was held sufficient to charge that the automobile was negligently operated by the defendant. *Peterson v. Eighmie* (1916), 161 N. Y. Supp. 1065.

Id.; negligence; liability of manufacturer of defective automobile.—A complaint which alleges the purchase from the defendant manufacturer by the plaintiff's assignor of an automobile, and the subsequent injury thereof by reason of the alleged negligence of the defendant in failing to equip such automobile with proper brakes, and in negligently assembling it, with the result that it could not be controlled and ran over an embankment, states a cause of action. *Quackenbush v. Ford Motor Co.* (1915), 167 App. Div. 433, 153 N. Y. Supp. 131.

Building loan; fraudulent statements.—A complaint which alleges that plaintiff, being desirous of conducting a building operation, contracted with defendant that if he would purchase a certain lot for any price up to \$17,500, and would make a building loan, it would give the defendant a profit of \$4,000 on his purchase: that the defendant falsely and fraudulently represented that he had paid \$17,500 therefor, when in fact he had paid but \$16,750; that the plaintiff, relying upon said false and fraudulent statements, purchased the premises from him and paid him therefor \$21,500; that said representations as to the price were false, and were known to him to be false, and were made with intent to deceive and defraud the plaintiff, states a cause of action for deceit. But where it appears that such false representations were made to the president of the plaintiff, which was not at that time incorporated, and that the cause of action has not been assigned to the plaintiff, the complaint should be dismissed. *Ettar Realty Co. v. Cohen* (1914), 163 App. Div. 409, 148 N. Y. Supp. 625.

Chattels; ownership and demand.—Where the plaintiff in an action to recover a chattel alleges ownership and right to possession, and to show that the defendant's de-

tention was wrongful alleges that he, the owner, with right to immediate possession, demanded the same and that the defendant refused to deliver, the complaint states a cause of action. *Wagman v. Raynor* (1914), 163 App. Div. 68, 148 N. Y. Supp. 471.

Checks; breach of agreement to procure indorsement and delivery.—A complaint which seeks a recovery, not on the theory of a sale and delivery of goods to the defendant, but on the ground that the latter was guilty of a breach of a contract to draw a check to the order of a contractor to whom the plaintiff delivered materials and to procure his indorsement and the delivery of the check to the plaintiff, need not allege to whom the plaintiff sold the material, and it is error to require the complaint to be made more definite in that respect. *Hungerford Brass & Copper Co. v. Brady & Co.* (1916), 172 App. Div. 641, 158 N. Y. Supp. 806.

Commissions; brokers' action.—A complaint in a broker's action for commissions setting out a contract whereby the broker was entitled to commissions "upon passing of title as agreed" fails to state a cause of action where it is not alleged that the title passed, or that it failed to pass by reason of some fault on the part of the defendant. *Reis Co. v. Zimmerli* (1913), 155 App. Div. 260, 140 N. Y. Supp. 3.

Id.; failure to allege essential facts.—Where the complaint in an action by a traveling salesman to recover for commissions lacks essential averments, and the defendant's motion to dismiss on the ground that the complaint failed to state a cause of action was denied, and the complaint was not amended nor the pleadings conformed to the proofs, a judgment in favor of the plaintiff should be reversed and the complaint dismissed. *Allerton v. Rhineland Machine Works Co.* (1914), 165 App. Div. 557, 150 N. Y. Supp. 265.

Conspiracy.—Where the complaint, in an action for damages for conspiracy to deprive plaintiffs, vaudeville actors, of their means of livelihood, alleges that defendants formed a conspiracy to control the vaudeville booking business and when plaintiffs refused to be bound by rules imposed by said defendants, defendants illegally and maliciously placed a ban on them and their sketch, but does not allege what the rules were, that they were improper, unlawful or unreasonable and that the plaintiffs had sought and been refused employment by reason of the alleged wrongful acts of defendant; the complaint is demurrable on the ground that it does not state facts sufficient to constitute a cause of action. *Amann v. United Booking Offices* (1912), 76 Misc. 5, 133 N. Y. Supp. 1076.

Contract.—In an action to compel an accounting between a contractor and subcontractor, plaintiff merely alleged that plaintiff entered into a contract with defendant

whereby plaintiff was to perform certain work, that plaintiff performed a large amount of work and is entitled to certain moneys due. The complaint was held fatally defective in that it merely made an allegation of indebtedness which is not an allegation of fact, but of a conclusion of law. The complaint should contain a statement of facts from which the conclusion may be drawn that the defendant is indebted to the plaintiff. The plaintiff failed to allege facts constituting a cause of action. *Clements v. W. S. Cooper Co.* (1912), 136 N. Y. Supp. 92.

Id.; nominal damages for breach.—An action for breach of contract is sufficient against a demurrer where it appears that the plaintiff is entitled to at least nominal damages. *Benequit v. N. Y. & N. J. Real Estate Imp. Co.* (1912), 143 App. Div. 628, 133 N. Y. Supp. 226.

Id.; allegation as to non-payment.—A complaint to recover liquidated damages on breach of a contract fails to state a cause of action if it fails to allege non-payment, but where non-payment is alleged, that allegation is not put in issue by a general denial; non-payment must be affirmatively pleaded and proved by the defendant. *Posner v. Rosenberg* (1912), 149 App. Div. 272, 133 N. Y. Supp. 704.

Where the complaint, in an action against an administrator to recover one-half of the purchase price of a cow, which amount it is alleged defendant's intestate on taking back the animal agreed to pay, did not allege non-payment, non-payment need not be proven. *Ives v. Male* (1912), 75 Misc. 387, 135 N. Y. Supp. 526.

Id.; necessity for alleging non-payment.—Under this section whatever facts are essential to be proved to entitle the plaintiff to recover upon the trial must be set out in the complaint. Upon a contract for the payment of money non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action, and being such, within the provision of the code, that fact must be alleged in the complaint. *Reis Co. v. Post* (1914), 162 App. Div. 463, 347 N. Y. Supp. 845.

Id.; allegation of happening of contingencies.—Where the written contract entitled the plaintiff to a sum of money when certain machines which were to be developed by him should be run under service conditions satisfactory to his employer, and when patents should have been granted thereon, a complaint which does not allege the happening of the contingencies upon which the payment became due or that the defendant is in any default in regard thereto, fails to state a cause of action. *Ainsworth v. Achison Harden Co.* (1916), 172 App. Div. 723, 158 N. Y. Supp. 630.

Id.; repurchase of stock; allegation of tender.—A complaint in an action to re-

cover damages for the breach of a contract to repurchase stock sold by defendant to the plaintiff, which alleges in substance that on a certain date the plaintiff and defendant entered into an agreement in writing (copy of which is annexed to and made a part of the complaint), by the terms of which the defendant agreed, at the option of the plaintiff, on a certain date to repurchase the stock; that on said date the stock remained in the hands of the plaintiff unsold, and he called upon defendant to repurchase; that the defendant failed to comply with the demand; that the stock is in plaintiff's possession and remains unsold, and that "the plaintiff has duly performed all conditions on his part to be performed." is defective, in that there is no allegation to the effect that the plaintiff at the time he demanded a repurchase tendered the stock to the defendant or offered to return it to him. *Ketchum v. Alexander* (1915), 168 App. Div. 38, 153 N. Y. Supp. 864.

Id.; allegation as to performance.—In an action on a contract performance may be sufficiently alleged either by setting out in detail what was done under the contract, or by alleging that the contract was "duly" performed. *Marcus Contracting Co. v. Weinbros Real Estate Co.* (1914), 162 App. Div. 495, 147 N. Y. Supp. 576.

Id.; compelling payment of additional sum by duress.—A complaint, which in substance alleges that the plaintiff, a general contractor engaged in the erection of a building, contracted with the defendant to install an automatic fire sprinkler system on the premises and paid in full therefor, but was wrongfully compelled to pay a further sum by reason of the duress of the defendant, consisting of a threat to replevin and remove the sprinkler if the sum was not paid; that the defendant subsequently was guilty of duress by claiming a lien on the sprinkler system and threatening both the owner and the plaintiff to remove the same by force does not state a cause of action. *McGuire & Co. v. Vogel Co.* (1914), 164 App. Div. 173, 149 N. Y. Supp. 756.

Contract; breach of; complaint to allege performance by plaintiff.—A complaint for a breach of contract to construct a manufacturing plant is bad where the plaintiff does not plead performance on his part. An allegation that the plaintiff "has fully and completely performed all the contract duties and obligations on his part to be performed and done," is insufficient. Where the plaintiff does not state the acts, he should plead that he has "duly" performed all the conditions on his part. A complaint which is silent as to restoration or offer of restoration, or does not properly plead performance, so as to bring the case within one of the three remedies aforesaid, does not state a cause of action. *Hedges v. Pioneer Iron Works* (1915), 166 App. Div. 208, 151 N. Y. Supp. 495.

Id.; performance or willingness to perform.—Where a complaint contains statements as to the making of a contract, the substance thereof, and that it is annexed to and made a part of the complaint, followed by an allegation that "there is now due and owing this plaintiff under the aforesaid contract, the sum of \$4,000, no part of which has been paid, although duly demanded," and no facts are stated from which it can be determined whether the plaintiff claims for a breach of contract, services rendered or commissions earned, or that the plaintiff has performed or was ready and willing to perform on his part, the allegation quoted is a mere conclusion of law, rendering the complaint insufficient. *Cash v. American Specialty Tailoring Co.* (1913), 157 App. Div. 729, 142 N. Y. Supp. 767.

Performance by the plaintiff of a contract specifically set forth in his complaint is not properly stated by a mere allegation that he "complied with all the terms and conditions of the said agreement" on his part to be kept and performed thereunder. The plaintiff must either plead the facts constituting performance, or avail himself of the provisions of § 533 by alleging that he "duly performed all the conditions on his part." *Ainsworth v. Acheson Hardin Co.* (1916), 172 App. Div. 723, 158 N. Y. Supp. 630.

Id.; rescission.—Complaint in a suit in equity, for the rescission of a contract for the purchase of corporate stock, upon the ground of innocent misrepresentations by the defendant inducing the plaintiff to purchase, examined, and held to state a cause of action. *Canadian Agency, Ltd. v. Assets R. Co.* (1914), 165 App. Div. 96, 150 N. Y. Supp. 758.

Id.; rescission; recovery of purchase price.—Complaint sufficient. *Buffalo Builders' Supply Co. v. Reeb* (1915), 166 App. Div. 969, 151 N. Y. Supp. 1107.

Id.; breach of contract and for fraudulent representation; joinder of causes of action.—A complaint which affirms a contract and demands damages for a breach thereof, and also sets up false and fraudulent representations, inducing the execution of the contract, and asks that it be declared null and void, states two inconsistent causes of action; one based upon affirmance and the other upon rescission of the contract, and where objection is not taken by demurrer or answer, it must be deemed waiver under section 499 of the code of civil procedure. *Hunt v. Armstrong* (1915), 166 App. Div. 311, 151 N. Y. Supp. 850.

Conversion of certificates of stock.—A complaint which alleges that the plaintiff delivered certain shares of stock to the defendant's testator, that she demanded their return without avail, and that since the testator's death she has made similar demands on the defendants and that either

the testator or the defendant disposed of the stock, sets out but one cause of action in conversion, except that it should state the date of the demands. *Noble v. Haff* (1915), 155 N. Y. Supp. 560.

Conveyances; action to set aside.—A complaint which in substance alleges that the plaintiff holds the record title to certain lands, and that a deed purporting to have been executed by her conveying the property to the defendants is a forgery, and asking that a subsequent conveyance of the lands made by the defendants without consideration be set aside, and that the plaintiff who is in possession be adjudged to have the superior right, that the forged deed be canceled of record, and the defendants restrained from asserting any claim to the property, and that the plaintiff be adjudged to be in lawful possession, and be put in full possession, with costs, states a cause of action to determine claims to real property under sections 1638 to 1650 of the code of civil procedure, although it contains superfluous allegations. *O'Brien v. Gill* (1915), 166 App. Div. 92, 151 N. Y. Supp. 682.

Corporations; stockholders' actions.—An action in equity cannot be maintained by individual stockholders for themselves and all others similarly situated, unless because of the neglect and refusal of the corporation to act; it is necessary, therefore, in such an action to set forth first, a cause of action in favor of the corporation as fully as if the action were brought by the corporation itself; and second, the facts which entitle the plaintiff to maintain the action in place of the corporation. *Continental Securities Co. v. Belmont* (1912), 206 N. Y. 7.

An action by stockholders against the officers of a corporation is derivative, and the complaint must allege a demand that the corporation bring the action and its neglect or failure to do so, or the existence of such facts as would make the demand futile: the corporation is a necessary party. *Continental Securities Co. v. Belmont* (1912), 150 App. Div. 298, 134 N. Y. Supp. 635.

In an action by a stockholder of a corporation to recover a penalty from its treasurer under § 69 of the stock corporation law, a complaint which fails to allege that the defendant has not delivered a financial statement to the plaintiff, or to some other stockholder, during the fiscal year within which the demand was made, is demurrable. *Troughton v. Grace* (1912), 151 App. Div. 655, 136 N. Y. Supp. 200.

Where a stockholder's cause of action is derivative and merely incidental to that of the corporation, an action thereon must be brought on behalf of the plaintiff and other stockholders similarly situated. The complaint in such an action must allege a cause of action in favor of the corporation with the same particularity as if it were

the plaintiff and, further, the facts, which entitle plaintiffs to maintain the action in place of the corporation and that it has refused to prosecute it, unless facts are alleged showing that a demand on the corporation to bring action would be futile. The assent or acquiescence of the plaintiffs or their predecessors in interest in the acts complained of is matter of defense; and the failure to negative it is not fatal to the complaint. *Continental Securities Co. v. Belmont* (1912), 75 Misc. 234, 133 N. Y. Supp. 650.

A complaint, in an action by stockholders of a corporation against its directors to compel them to account for losses claimed to have been sustained through their negligence, which alleges that subsidiary corporations which had contracted for the purchase of a superior quality of coal had been furnished coal of an inferior quality, although they had paid the contract price for the better coal; that the plaintiffs had demanded an investigation, and that steps be taken to recover the losses, but that no adequate investigation had been made, except as to the losses sustained by one of the companies; that the defendant directors have refused and have voted to make no further investigation, does not state a cause of action, as there are no allegations that the defendants in so voting acted other than for what they believed to be the best interests of the corporation, or which charge the directors with a breach of trust, or impose upon them the burden of defending their acts. *Holmes v. Saint Joseph Lead Co.* (1915), 168 App. Div. 685, 154 N. Y. Supp. 517.

Id.; action to recover proceeds of check.—A complaint, in an action by a corporation, the payee of certain checks, which alleges that on or about certain dates the plaintiff's president received said checks and indorsed thereon "E. Moch Company," and thereunder "Eugene Moch," and thereafter deposited said checks to his personal account in the defendant bank, which accepted them and placed them to the personal credit of said Moch, with notice that the proceeds belonged to the plaintiff and not to Moch individually, and misappropriated them to the personal use of Moch without authority, and which demands judgment for the proceeds of the checks, states a cause of action for money had and received, and not for conversion. *Moch Co. v. Security Bank* (1915), 166 App. Div. 121, 151 N. Y. Supp. 756.

Id.; action against directors; judgment creditor.—A complaint in a suit in equity brought under section 91 of the general corporation law, by a creditor of the corporation to compel directors or the corporation to account for their official misconduct and waste of corporate assets, which fails to show that the plaintiff is a judgment creditor, or that it would be impossible or useless to obtain a judgment

against the corporation itself, does not state a cause of action. *Steel v. Isman* (1914), 164 App. Div. 146, 149 N. Y. Supp. 488.

Id.; action against directors for failure to perform duties.—Complaint in an action by a corporation against a director to recover damages caused by the defendant's neglect or disregard of his duties in that he failed to advise the plaintiff that the general manager of another corporation, which plaintiff had organized as an aid to its business and practically owned, was misapplying the funds of his principal and using them for the benefit of defendant and his associates in a rival business, examined and held, to state a cause of action. *General Rubber Co. v. Benedict* (1914), 164 App. Div. 332, 149 N. Y. Supp. 880.

Id.; action by trustee to set aside transfers of assets.—The action need not allege that the corporation had defaulted on its notes and other obligations within the contemplation of §§ 66 of the Stock Corporation Law. *Sherwood v. Holbrook* (1917), 178 App. Div. 462, 165 N. Y. Supp. 514.

Id.; agreement to pay annuity to officer on severance of relationship.—A complaint states a cause of action when it sets out a written contract between the plaintiff and the defendant corporation, of which he was president, whereby the plaintiff agreed, if he severed his connection with the corporation, not to engage in a competing business for ten years, and further sets forth an agreement by the corporation, made in consideration of the fulfillment by the plaintiff of his part of the agreement, to pay him a certain sum of money annually so long as he should live, and further alleging that the relations of the plaintiff with the corporation having been severed, it made said payments for a certain time, but subsequently refused to pay installments which are now due and owing. The statute of frauds, being an affirmative defense, is not available to the defendant on a demurrer to said complaint. *Stover v. Gamewell Fire Alarm Teleg. Co.* (1914), 164 App. Div. 155, 149 N. Y. Supp. 650.

Creditor's action for discovery of property.—Where the complaint in an action to set aside as fraudulent certain distinct transfers of property by a judgment debtor, not only contains no allegations of fact to support its prayer for a discovery of any property of such debtor held in trust for him, except with respect to the particular property referred to, and alleges that the defendant has no other property out of which a satisfaction of plaintiff's judgment can be obtained, the court cannot declare void any transfers other than those set forth in the complaint. *Koelhoeffer v. Peterson* (1913), 82 Misc. 180, 143 N. Y. Supp. 353.

Decedent's estate; action for accounting.—Complaint in a suit by an administrator, both individually and in its represen-

tative capacity, against all persons having any claim against the estate for an accounting, and incidentally to procure the adjustment of conflicting claims to securities and the proceeds thereof in the possession of the plaintiff, examined and held, not to be demurrable, upon the ground of a misjoinder of parties plaintiff or of causes of action.

Although the complaint may contain material for more than one action, it is not demurrable, because they are not improperly united. *Metropolitan Trust Co. v. Stalle* (1915), 166 App. Div. 649, 152 N. Y. Supp. 173.

Id.; recovery of money due testator.—A complaint, alleging plaintiff's appointment as executrix; that the testator delivered to defendant a check, the proceeds of which he received; that said testator did not owe defendant any money and was not indebted to him at said time, and that plaintiff has demanded of defendant payment of said sum, but no part thereof has been paid, except a certain sum as interest, states a cause of action and raises a presumption of law in favor of the plaintiff that there was a promise to repay. It was not necessary for the plaintiff to expressly allege that the transaction was a "loan," or that defendant promised to repay. *De Cordova v. Sanville* (1914), 165 App. Div. 128, 150 N. Y. Supp. 709.

Deeds; breach of covenant.—A complaint in an action for breach of covenant in a deed of real property for failure to convey certain premises, is insufficient where there is no averment that the defendant agreed, or intended to, or that the parties understood that the defendant did, convey said premises. *Low v. Buttner* (1912), 151 App. Div. 705, 136 N. Y. Supp. 208.

Demurrage charges.—Where, in an action by a railroad company to recover demurrage charges on several cars at different times, the plaintiff intended to state but a single cause of action and it is "fairly doubtful" whether the complaint departs from this purpose, a motion to require the plaintiff to separately state and number the causes of action should be denied. *Erie Railroad Co. v. Hilton* (1916), 171 App. Div. 545, 157 N. Y. Supp. 733.

Easement; action to determine negative.—A complaint in an action to determine a defendant's claim to a negative easement, which alleges that plaintiff is the owner of the fee and has been in possession of the premises, and that the defendant unjustly made claim to an easement, consisting of a restriction upon the erection by the plaintiff and his successors, of buildings except as described in the complaint, is sufficient. *Dime Savings Bank v. Butler* (1915), 88 Misc. 698, 152 N. Y. Supp. 448.

Election of remedies.—Where a party has two or more methods of redress based upon inconsistent theories, either in the form or the forum of procedure, or the parties

to the several proceedings, then he is put to his election, and his choice of either is a bar to his resort to the other. Thus where a plaintiff had his election to make a claim against a bankrupt's estate for the money due to him upon a sale of machinery, or to follow the proceeds on the theory that title to the machinery did not pass to the export company and for that reason the proceeds were the property of the plaintiff, his choice of either was a bar to the other. *Ideal Concrete Machinery Co. v. National Park Bank* (1913), 159 App. Div. 344, 145 N. Y. Supp. 119.

Employee; allegation as to services.—A complaint in an action to recover for services rendered, which alleges that the plaintiff was employed under a contract containing an agreement to pay a specified sum; that he actually performed the services, and that defendants have failed to pay therefor, is sufficient, if unanswered, to entitle plaintiff to judgment. *Hipple v. Melachrino* (1913), 159 App. Div. 741, 144 N. Y. Supp. 966.

Id.; action against city to recover salary.—Although section 56 of the revised Greater New York charter (laws of 1901, chap. 466) provides that "all salaries as fixed on the first day of January, 1902, shall continue in force until fixed by the board of aldermen as in this section provided," a municipal employee, suing for back salary, cannot recover on a complaint which merely alleges that he "received from the defendant as compensation for his services" a certain annual sum. This, because in order to bring himself within the terms of the charter he must allege that upon and prior to the date aforesaid his salary had been legally fixed. A mere allegation that he had received a certain compensation is not equivalent to an allegation that he was entitled to receive it. *Hawes v. Board of Education* (1914), 160 App. Div. 516, 145 N. Y. Supp. 575.

Id.; wrongful discharge.—A complaint in an action by an employee to recover damages for a wrongful discharge, which alleges faithful and full performance on the part of the plaintiff, and discharge by the defendant without cause, before the expiration of the term of employment; that the plaintiff was employed pursuant to a written resolution which provided among other things for the term of employment and compensation, and "that if Oswald Maune or Unity Press refuse, neglect or fail to faithfully and truthfully perform any condition or conditions of this agreement, that it shall cease to be binding upon either party hereto," states a cause of action, and should not be dismissed upon the assumption that the provision quoted from the resolution had the effect of making the contract terminable at the will of either party. *Maune v. Unity Press* (1914), 160 App. Div. 778, 146 N. Y. Supp. 127.

Id.; damages for procuring master to discharge plaintiff.—A complaint in an action which sets forth circumstances showing an intentional and willful act, calculated to cause damage to the plaintiff, by depriving her of her lawful employment, done with the unlawful and unjustifiable purpose of causing such damage and loss, and resulting therein, states a cause of action. *Warschauser v. Brooklyn Furniture Co.* (1913), 159 App. Div. 81, 144 N. Y. Supp. 257.

Employer's liability.—Under a complaint alleging that the rope "was defective and was old and worn out," the plaintiff may recover upon evidence that the rope was in bad condition, although in fact it was comparatively new. *Summo v. Snare & Trust Co.* (1915), 166 App. Div. 425, 153 N. Y. Supp. 1146.

Id.; action within two years.—A complaint in an action brought under the employers' liability provisions of the labor law to recover damages for the death of plaintiff's intestate must allege that the action was brought within two years after decedent's death. *Shanon v. Inland Lines, Ltd.* (1913), 82 Misc. 482, 144 N. Y. Supp. 55.

Equitable cause of action.—Where the plaintiff in an action to have contracts declared void and to restrain defendant from harassing plaintiff by suits brought in other jurisdictions is absent from the state and the complaint does not allege when, if ever, he will return; that he has any property in this state or any property anywhere; or that he has any means of responding to possible judgment against him except his weekly earnings, upon which the contract indicates that defendant's compensation is predicated, he has not merely failed to show that it would be inequitable that defendant should sue him in foreign jurisdictions, but demonstrated affirmatively that it would be inequitable to prevent defendant from pursuing his rights under laws and practice of a sister state. For these reasons the complaint does not state a cause of action. *Miller v. Myers* (1912), 75 Misc. 297, 135 N. Y. Supp. 73.

Where a complaint states facts sufficient to show that plaintiff has no adequate remedy at law it is unnecessary to so allege in terms. *Pine Cliffs Farms, Inc. v. Collier* (1915), 92 Misc. 269, 156 N. Y. Supp. 293.

Id.; action at law stated; equitable relief asked.—A complaint stating a cause of action at law but praying for equitable relief is good as against a demurrer. *Laskey Feature Play Co., Inc. v. Fox Vaudeville Co.* (1916), 93 App. Div. 364, 157 N. Y. Supp. 106.

Exchange of property; contract for services.—In an action to recover upon an alleged contract for services in effecting the exchange of properties and for procuring a loan for one of the parties, the com-

plaint alleged the making of a written contract between defendant and one H. for an exchange of certain lands upon condition that H. procure a loan on the property of the defendant. The complaint was insufficient in that it failed to allege consideration and the rendition of services in reliance on the agreement. *Hevia v. Wheelock* (1913), 155 App. Div. 387, 140 N. Y. Supp. 351.

Foreign corporation; transaction of business; certificate of authority.—Where in an action by a foreign corporation for goods sold in another state, neither the complaint nor the answer alleges that the plaintiff was doing business in this state, or that the goods were sold or delivered therein, the dismissal of the complaint, on the ground that plaintiff was doing business within the state and had not obtained the certificate required by law, is error. *Stafford Mfg. Co. v. Newman* (1912), 75 Misc. 636, 133 N. Y. Supp. 1073.

Id.; failure to allege certificate to do business procured.—Where the complaint of a foreign stock corporation in an action on contract fails to allege as required by § 15 of the general corporation law that prior to the making of the alleged contract plaintiff procured a certificate of its compliance with all requirements of law to authorize it to do business in this state, a motion for the dismissal of the complaint should be granted. *Talmage's Sons Co. v. American Dock Co.* (1916), 93 Misc. 535, 157 N. Y. Supp. 445.

Id.; allegation as to doing business within state.—A complaint in an action by one foreign corporation against another foreign corporation which fails to allege that the defendant is doing business within this state, does not state a cause of action. *U. S. Asphalt R. Co. v. Comptoir Nat. D'Escompte* (1915), 166 App. Div. 64, 151 N. Y. Supp. 604.

Id.; action to recover for injuries to employee under foreign statute.—A complaint in an action against a foreign railway corporation to recover under the foreign statute for the death of an employee, a motor-man, which neither alleges that the defendant failed to use reasonable care to protect the deceased nor that it was negligent in the performance of its contract of employment, does not state facts sufficient to constitute a cause of action under the statute of the foreign state which provides, in substance, that recovery for homicide may be had by the mother, or, if no mother, the father of a child minor or *sui juris*, unless said child shall leave a wife, husband or child, and which defines such homicide to include all cases where the death of a human being results from a crime or from criminal or other negligence. Negligence is used in said statute in its ordinary legal sense. *Lichtenstern v. Augusta-Aiken R. & Elec. Corp.* (1914), 165 App. Div. 270, 150 N. Y. Supp. 992.

Fraud or conspiracy; allegations.—Although it is the rule that the mere general allegations of fraud or conspiracy are of no value as stating a cause of action, yet an intent to defraud is fairly to be inferred from an averment that claims knowingly false in respects stated were fraudulently presented to a state officer for payment. *People v. O'Brien* (1913), 209 N. Y. 366, modifying 157 App. Div. 119, 141 N. Y. Supp. 1046.

A complaint for conspiracy and fraud may state the fact of combination, its object, and its injury to plaintiff, without stating details of facts. *Conner v. Bryce* (1918), 170 N. Y. Supp. 94.

Fraud.—A complaint which in substance alleges that the defendant, with intent to cheat and defraud the plaintiff, stated that he was about to enter into a brokerage business with his brother, they to devote all their time to such business, and induced the plaintiff, who relied upon such representations, to become a silent partner and contribute \$25,000 for that purpose, while as a fact the defendant never entered or intended to enter into such business or carry on the same, but used said sum of money fraudulently obtained solely for his own use, states a cause of action for fraud. *Gabriel v. Graham* (1915), 168 App. Div. 845, 154 N. Y. Supp. 413.

Mere allegations of fraud and deceit without damages flowing therefrom do not state a cause of action. *Mahon v. Equitable Trust Co.* (1918), 181 App. Div. 335, 168 N. Y. Supp. 757.

Action to avoid fraudulent transfers.—See *Hatch v. Heinze* (1916), 172 App. Div. 675, 158 N. Y. Supp. 385.

A plain and concise statement of the facts constituting the fraud is required. *Hull v. Hull* (1916), 172 App. Div. 287, 158 N. Y. Supp. 743.

Fraudulent representations.—In an action to recover damages for fraudulent representations by which plaintiff was induced to purchase certain stock, an allegation of the complaint that the defendants falsely represented the stock to be of great value is demurrable, since a false statement of the value of property made by the vendor for the purpose of obtaining a higher price will not sustain an action for fraud. *Van Slochem v. Villard* (1913), 207 N. Y. 587.

A complaint by a purchaser of stock against the directors of a corporation to recover damages for fraud of such directors in representing that the stock was fully paid and of great value, that the representation was untrue, and that he relied on the representation to his damage states a cause of action. *Van Slochem v. Villard No. 1* (1912), 154 App. Div. 161, 138 N. Y. Supp. 852, *aff'd* 207 N. Y. 161.

Where a plaintiff, alleging that he has been deprived of property by fraud, seeks to have other property impressed with a trust he must show in his complaint a di-

rect and unbroken connection between the property of which he was deprived and that which he seeks to have impressed with a trust. *Jaffe v. Weld* (1913), 155 App. Div. 140, 139 N. Y. Supp. 1101.

Id.; future transaction.—A complaint in an action to rescind a contract by reason of fraudulent representations on the part of defendant, is demurrable where the representations relied on related solely to the future. *Wilson v. Meyer* (1912), 154 App. Div. 300, 138 N. Y. Supp. 1048.

Goods sold and delivered; nonpayment.—In the absence of an allegation of nonpayment, a complaint by an assignee of a claim for goods sold and delivered states no cause of action. But where nonpayment is proved before the close of plaintiff's case, the defect in pleading may be regarded as waived by defendant in the absence of a motion at the opening of the trial based on the insufficiency of the complaint. *Packard v. Automobile Club of America* (1915), 90 Misc. 642, 153 N. Y. Supp. 942.

Guaranty; allegations in complaint in action to recover money.—A complaint against a guarantor which in substance alleges that the plaintiff loaned certain sums of money to four persons named which are due, and sets forth a written contract whereby the defendant, having acknowledged that sums of money differing in amount from those alleged by the plaintiff had been loaned to five persons named and that these persons desired to borrow more money of the plaintiff up to a certain sum, guaranteed the payment of the loans already made and those which might be made to said five persons in the future, fails to state a cause of action to recover moneys subsequently loaned to four of the five persons named in the defendant's contract. *Hamilton Trust Co. v. Shevlin* (1913), 156 App. Div. 307, 141 N. Y. Supp. tract. *Hamilton Tr. Co. v. Shevlin* (1913), 156 App. Div. 307, 141 N. Y. Supp. 232.

Husband and wife; recovery for goods sold wife.—A complaint in an action to recover a balance due for goods sold and delivered to the defendant's wife, which alleges that between certain dates and at a certain place the plaintiff furnished to the wife at her special instance and request necessities for her use, specifying them, of a certain value, and that the same has not been paid, nor any part thereof, except a certain sum, leaving a balance due the plaintiff, for which judgment is demanded, states a cause of action. *Wickstrom v. Peck* (1913), 155 App. Div. 523, 140 N. Y. Supp. 570.

Indecent assault.—A complaint in an action for indecent assault, which alleges the use of force and violence, is sufficient, although it fails to allege that the "plaintiff resisted to the utmost of her ability." *Cholodnicka v. Gloniczek* (1912), 150 App. Div. 206, 134 N. Y. Supp. 650.

Injuries resulting in insanity.—Where

the plaintiff in an action for personal injuries sues as an incompetent person through her committee, and alleges that she has been rendered incompetent by the injury, and has been confined in an insane asylum as the result thereof, it is equivalent to alleging that she has been rendered insane by the injury, necessitating her confinement in an asylum, and it is proper to allow an answer to a hypothetical question as to whether or not the physical injuries sustained caused her mind to be affected. *Peck v. Burdick & Son* (1915), 166 App. Div. 362, 151 N. Y. Supp. 996.

Insane person; action on bond for release.—A complaint in an action for damages caused by an insane person discharged as not cured from a state hospital which alleges that as a condition of the release of the patient a bond was required, does not admit of proof of the various acts and conditions prerequisite to the giving of the bond, and the absence of an allegation that the superintendent certified in writing his unwillingness to discharge the patient, a condition precedent to the granting of the order of discharge, renders the complaint demurrable. *Nies v. Fancher* (1915), 88 Misc. 630, 151 N. Y. Supp. 155.

Insolvent bank; complaint of liquidator.—A complaint of a liquidator of an insolvent bank suing a corporation and persons alleged to have wrongfully disposed of the assets of a corporation, the stock of which has been transferred to him so that he holds legal title, is not subject to demurrer upon the ground that he sues by virtue of his office as liquidator. *Clarkson v. Walpole Rubber Co.* (1913), 156 App. Div. 869, 142 N. Y. Supp. 502.

Insurance; complaint in action to recover burglary loss.—A complaint in an action to recover loss by burglary under an insurance policy insuring against loss by burglary, larceny or theft, which fails to allege that the stolen property was the property covered by the policy, is insufficient. *Krickl v. Olean Accident & Guarantee Corp.* (1913), 82 Misc. 404, 143 N. Y. Supp. 750.

Id.; claim under an accident insurance policy for damages caused by two separate and successive accidents constitute separate and distinct causes of action which cannot be set out in a complaint as a single cause of action. *Barrows v. Fidelity & Casualty Co. of New York* (1916), 174 App. Div. 539, 161 N. Y. Supp. 203.

Id.; rights of beneficiaries.—Where the annual premiums in insurance companies and fraternal orders aggregate more than five hundred dollars, but the annual premiums in the insurance companies alone are less than that amount, a complaint in an action brought by the personal representative of the deceased under § 52 of the Dom. Rel. Law, which alleges these facts, is demurrable. *Dominick v. Stern* (1913), 79 Misc. 271, 139 N. Y. Supp. 59.

Insurance policy; pleading as defense facts alleged in complaint.—While it is true that a defendant may not offer affirmative evidence of a breach of a condition subsequent in a contract of insurance, without pleading it as a defense, such rule has no application where the facts relied upon as a defense are pleaded and proved by the plaintiff as a part of his own case. *Heffernan v. Prudential Insurance Co.* (1914), 88 Misc. 93, 150 N. Y. Supp. 644.

Interest coupon; allegation as to title.—An interest coupon not being negotiable, the complaint in an action thereon must allege the issuance and delivery of the bond and the lapse of time or other circumstances which would render the interest due. The allegation of lawful possession is not sufficient allegation of title. A defendant in the municipal court of the city of New York may appeal from the judgment entered upon overruling its demurrer though not availing itself of leave granted to serve an answer. *Apple v. National Automatic Weigh. Machine Co.* (1912), 76 Misc. 241, 134 N. Y. Supp. 582.

Libel; allegation as to name of plaintiff.—Where a complaint sets forth an alleged libelous article and asserts that the defendant maliciously published the same concerning plaintiff, the mere fact that the plaintiff says his name is "Bert L. Carpenter," whereas the name used in the article is "Sam Carpenter," is not a contradiction of the assertion that the article was published concerning the plaintiff. *Carpenter v. Glens Falls Post Co.* (1914), 164 App. Div. 396, 149 N. Y. Supp. 801.

Id. allegation as to infringement of patent right.—A complaint in an action for libel which alleged that the libelous article consisted of a statement that plaintiff had infringed on defendant's patent, and that those purchasing such infringement should protect themselves by a bond of a solvent concern or individual, is sufficient. *Wittman Bros. v. Wittman Co.* (1915), 88 Misc. 266, 151 N. Y. Supp. 813.

Id.; criticism of play; allegations as to damages.—A complaint in an action for libel by a corporation conducting a German theatre and depending for its patrons and income entirely upon German-speaking people against a publisher of German newspapers, which alleges that the defendant falsely, wickedly and maliciously composed, printed and published certain articles, which are set forth, criticising a German play produced by the plaintiff, and which was popular and largely attended by its German patrons until after the publication of which plaintiff complains, and which prevented the sale of the play to an English producer who withdrew an offer therefor, but which contains no allegations with respect to the amount offered to the plaintiff for the English rights, or with respect to the damages sustained by the withdrawal of such offer, or that any particular

patron or patrons of the theatre remained away on account of the publication, or that there was any particular loss of receipts on account thereof, does not contain a sufficient allegation of special damages. *Philipp Co. v. New Yorker Staats-Zeitung* (1914), 165 App. Div. 377, 150 N. Y. Supp. 1044.

Id.; moving picture film; allegations as to white slave traffic.—A complaint in an action for libel, based upon the production of a moving picture film, entitled "The Inside of the White Slave Traffic," in which the defendant shows a factory and building bearing the plaintiff's firm name, and from which it may be inferred that cadets and white slave traffickers ply their trade and obtain victims at the plaintiff's place of business, and use it as a rendezvous between them and their victims, with an innuendo that the plaintiff permits the traffic to proceed upon his premises, states a cause of action for libel of the plaintiff personally. *Merle v. Sociological Research Film Corporation* (1915), 166 App. Div. 376, 152 N. Y. Supp. 829.

Id.; fraudulent inducement to purchase stock.—In an action for libel based upon a letter alleged to charge that the plaintiff obtained moneys by false representations inducing the sale of stock, a defense that the money from the sale of the stock was obtained by reason of false and fraudulent representations to the effect that the plaintiff was engaged in the sale of the stock for the benefit of the corporation, and not for himself; that such statements were false and known to be such when made and were intended to and did deceive the defendant and another who relied upon them in making purchases, is good and a demurrer thereto should be overruled. *Block v. Nussbaum* (1914), 163 App. Div. 463, 148 N. Y. Supp. 594.

Id.; truth of article.—A complaint in an action for libel which shows that the alleged libelous article is true does not state a cause of action. *Maldonado & Co. v. Yglesias* (1913), 154 App. Div. 520, 139 N. Y. Supp. 102.

Id.; damage presumed.—In determining whether a newspaper article is libelous, its scope and object must be considered together and its language given a natural construction. If such alleged publication imputed to plaintiff a vicious act tending to diminish his respectability and impair his comfort by the attendant disgrace and contempt, damage will be presumed and complaint is good on demurrer. *O'Connell v. Press Publishing Co.* (1912), 77 Miss. 3, 137 N. Y. Supp. 332.

Id.; report of judicial proceeding.—Where the complaint in an action for libel admits that the article complained of and published in defendant's newspaper, charging the plaintiff with having been arrested and held for trial, was substantially a correct report of a judicial proceeding and, therefore, privileged, a demurrer to the com-

plaint for insufficiency will be sustained. *Smith v. New Yorker Staats-Zeitung* (1912), 77 Misc. 601, 138 N. Y. Supp. 557.

Id.; privileged article.—Plaintiff suing for libel need not allege that the article was not privileged, the defense of privilege resting upon the defendant. *Hinrichs v. Butts* (1912), 149 App. Div. 236, 133 N. Y. Supp. 769.

Mechanic's lien.—A complaint in an action to foreclose a mechanic's lien which fails to state whether any other action has been brought to recover any part of the debt for which the lien was filed is insufficient. *Bachman v. Spinghel* (1914), 164 App. Div. 725, 149 N. Y. Supp. 610.

Id.; allegation as to money due.—The complaint in an action by a sub-contractor to foreclose a mechanic's lien should allege that at the time the lien was filed or thereafter money was due from the owners to the contractor; but a motion at the opening of the trial to dismiss the complaint for failure to state a cause of action will not be granted unless it appears, after admitting all the facts alleged, that no cause of action whatever is pleaded. *Wood Man. & Realty Co. v. Johnstone* (1912), 148 App. Div. 747, 133 N. Y. Supp. 422.

Mortgage foreclosure; assignment of mortgage.—A complaint in a suit for the foreclosure of a mortgage upon realty alleged that the bond and mortgage had been assigned by the mortgagee to a title company, which had transferred the same to the plaintiff, who had elected, in accord with certain provisions of the mortgage, that the whole principal sum be immediately due and payable on account of the failure of the mortgagor to pay an installment of interest and certain taxes. A written agreement entered into by the mortgagee and the title company at the time of the assignment to the latter was set forth, which provided, among other things, that the title company owned said bond and mortgage to the extent of a certain amount, with interest, and that the mortgagee "is the owner of the balance of said mortgage debt remaining," but that the ownership of the title company is superior to that of the mortgagee, and that it should have the right to collect all interest, to accept payments, accounting to the assignor for her share and to foreclose the same. It also appeared on the face of the complaint that prior to the commencement of the suit the mortgagee, having refused plaintiff's request to join therein, was made a party defendant. Held, that the complaint stated facts sufficient to constitute a cause of action, and that a demurrer thereto was properly overruled. *Corporate Investing Co. v. Gracehull Realty Co.* (1913), 157 App. Div. 259, 142 N. Y. Supp. 131.

Money had and received; complaint to be made more definite.—Where a complaint contains allegations appropriate to an ac-

tion for money had and received, conversion, and fraud and deceit, and it is difficult to tell what cause or causes of action the plaintiff attempted to set forth, an order should be granted requiring the complaint to be made more definite and certain, and directing the plaintiff, if she seeks to plead alternative causes of action, to separately state and number them. *Michie v. Slayback* (1914), 163 App. Div. 407, 148 N. Y. Supp. 890.

Id.; irrelevant matter to be stricken out.

—Complaint in an action for money had and received, alleging, in substance, that by similar, separate, fraudulent representations and acts of duress, the evidence of which is pleaded at length, the defendants procured from the plaintiff and two others money, and that there remains due and owing to the plaintiff from the defendants a certain sum, examined, and held, that there is no such connection between the transactions alleged as renders the allegations with respect to the circumstances under which the moneys were obtained from the two others relevant or material as allegations of the plaintiff's cause of action, and that such allegations should be stricken out, with leave to plaintiff to serve an amended complaint. *Cleveland v. Boynton* (1914), 165 App. Div. 39, 150 N. Y. Supp. 477.

Negligence; violation of duty.—Where in a negligence action plaintiff claims that defendant violated some duty, facts showing the existence of the duty or obligation must be pleaded and proved, and a general averment that defendant owed a particular duty or that the deceased was lawfully on the premises is insufficient. *Fairchild v. Leo* (1912), 149 App. Div. 31, 133 N. Y. Supp. 572.

Id.; passenger on street railroad.—A complaint which alleges in substance that the plaintiff was a passenger on the defendant's car; that she signaled the conductor that she wished to alight; that the car stopped at the point named, where in the course of repairing the street a hole had been made; that as she was "about to alight" she stepped into a hole and sustained injuries, which were due to the carelessness and negligence of the defendant's officers and servants, and without any negligence on her part, states a cause of action. *Page v. United Traction Co.* (1914), 161 App. Div. 383, 146 N. Y. Supp. 530.

Assault.—Complaint not setting forth plain and concise statement of facts. *Hendrix v. Manhattan Beach Development Co.* (1917), 181 App. Div. 111, 168 N. Y. Supp. 316.

Negligence for assault.—Plaintiff will be required to make his complaint more definite and certain where in an action for negligence for an assault by defendant's servant he alleges that he was "willfully" struck by the servant, thus stating a fact

inconsistent with his theory of liability. *Easling v. Naylor* (1916), 96 Misc. 565, 160 N. Y. Supp. 845.

New York city; action for recovery of damages by injuries to fireman.—A complaint in an action against the city of New York by an engineer in the fire department to recover for personal injuries claimed to have been sustained by an explosion while examining the pipe projecting from a gasoline tank, which alleges the maintenance by the defendant below the surface of the ground of a tank for the storage of a limited quantity of gasoline, and also of a drain for surface water by absorption or percolation, does not state a cause of action for a nuisance. *De Moll v. City of New York* (1914), 163 App. Div. 676, 148 N. Y. Supp. 966.

Nuisance; action to restrain; loud and profane language.—A complaint by the lessee of a theatre building which alleges that the defendants, tenants of an adjoining building, frequently and almost daily, while in their apartments and on the street in front of the same, indulged in loud and profane swearing and vile and obscene talk, which can be clearly heard in the plaintiff's theatre by his family, employees and patrons, and that such conduct on the part of the defendants causes injury to his business, etc., and impairs his enjoyment of the premises, states a cause of action for a permanent injunction. The complaint need not allege that the injury is of a continuous character, or threatens to continue, for equity may issue an injunction if satisfied by the evidence that there is reasonable probability that a nuisance will continue. *Barnard v. Finkbeiner* (1914), 162 App. Div. 319, 147 N. Y. Supp. 514.

Partition; appointment of executor or administrator.—Where a partition action is brought within three years after the death of a decedent from whom plaintiff derived title and no executor or administrator has been appointed, a complaint which fails to allege that fact is demurrable. *Dueringer v. Klocke* (1912), 78 Misc. 417, 139 N. Y. Supp. 676.

Partnership.—A complaint by one partner against his co-partner and another, which alleges that the co-partner wrongfully transferred the entire partnership property to the other defendant and physically ejected plaintiff from the firm's place of business, states a cause of action in conversion of which the city court of the city of New York has jurisdiction. *Weiss v. Weiss* (1912), 75 Misc. 644, 133 N. Y. Supp. 1021.

Personal injuries; slipping on sidewalk.—A complaint which merely alleges that the defendants permitted heaps of ice to form on the sidewalk in front of their premises, with notice thereof, but without effort to arrest the accumulation or to remove the obstruction, and that the plaintiff slipped thereon and was injured, does not state a

cause of action. *Eldred v. Keenan* (1914), 164 App. Div. 63, 149 N. Y. Supp. 376.

Physicians and surgeons; action for services.—Allegations in a complaint to recover the reasonable value of service rendered by plaintiff as a surgeon, which disclosed information acquired by him while attending defendant and which was necessary to enable him to act as a surgeon, are improper and will be stricken out on motion before the service of the answer. *Schamberg v. Whitman* (1912), 75 Misc. 215, 135 N. Y. Supp. 262.

Complaint in an action brought by a patient against a physician examined, and held, not to state a cause of action for breach of contract but one for malpractice and negligence and that the complaint was properly dismissed as the statute of limitations had run upon the latter action. *Frankel v. Wolper* (1918), 181 App. Div. 485, 169 N. Y. Supp. 15.

Prayer for relief.—Where there is much in the complaint which affords no ground for a cause of action and the prayer for relief asks for results that cannot be granted, yet the plaintiff will be given such relief as the proof in its entirety will show it to be entitled to. *The Gutta Percha and Rubber Mfg. Co. v. Holman* (1913), 208 N. Y. 71.

Id.; effect of excessive demand for judgment.—The fact that a plaintiff claims more than he can prove he is entitled to recover does not make the complaint bad. *Chism v. Smith* (1914), 210 N. Y. 198, reversing 150 App. Div. 893, 133 N. Y. Supp. 1115.

Principal and agent.—A complaint, which shows an employment of the defendants by the plaintiff as his agent to sell real property, does not state a cause of action charging the defendants personally as agents of an undisclosed principal. *Hale v. Triest* (1912), 150 App. Div. 166, 134 N. Y. Supp. 673.

Private injury; refuse in streams.—In a suit by persons owning land in severalty, brought on behalf of themselves and all other residents or property owners similarly situated to enjoin the defendant who operated a factory from pouring refuse into the brooks and water-courses, and thereby disseminating odors that injuriously affected the plaintiffs property, the complaint alleged private injury and special damages to private property. That, since the plaintiffs are proper parties to maintain the suit on behalf of themselves and others, and since the complaint states a cause of action, the defendant's demurrer should be overruled. *Greer v. Smith* (1913), 156 App. Div. 420, 140 N. Y. Supp. 143.

Probate of will; complaint in action to determine validity.—A complaint in an action, under section 2653a of the code of civil procedure (repealed by Surrogate's Code), to determine the validity of the probate of a will which alleges that the

testator left him surviving no father, mother, brother, sister or widow, and that he left "him surviving as his only heirs at law and next of kin" all of the sixteen plaintiffs and the three infant defendants who were all related to him by blood, some as nephews and nieces, and others as grand-nephews, grandnieces and great grand-nephews and great grandnieces, and the descent of each from deceased brothers and sisters of the testator is set out in full and annexed to the complaint and made a part thereof in a statement alleged to be "the full line of descent of the heirs at law and next of kin" of the testator, showing the names of brothers and sisters and their descendants, and whether living or dead, sufficiently alleges that the plaintiffs are heirs at law of the testator. *Tuthill v. Debovoise* (1914), 164 App. Div. 728, 150 N. Y. Supp. 387.

Id.; allegations as to heirs.—The complaint in an action under section 2653a of the code of civil procedure to determine the validity of the probate of a will alleged among other things that the intestate left her surviving one F. and the defendants, "her next of kin and only heirs at law," and that after her death the said F. died intestate, and the plaintiffs are the administrators of his estate. The executor of the testatrix and another defendant answered, and, among other things, admitted that the decedent left her surviving the heirs at law and next of kin set forth in the complaint, but on information and belief denied that they are all the heirs at law and next of kin her surviving. Held, that the complaint stated a cause of action; that although the complaint should have stated whether F. left heirs other than the defendants in the action, the omission cannot be taken advantage of under an objection that the complaint does not state facts sufficient to constitute a cause of action. *Judson v. Staley* (1914), 163 App. Div. 62, 148 N. Y. Supp. 733.

Promissory note; allegation as to separate interests.—In an action at law based upon a promissory note the obligation of the defendant is single and cannot be divided into parts. Hence, a complaint which alleges that the defendant made a promissory note on a certain date, and that the payees thereafter and before maturity of said note indorsed a one-half interest therein and delivered the same to the plaintiff, who is now the owner and holder thereof, fails to state a cause of action at law. *Barkley v. Muller* (1914), 164 App. Div. 351, 149 N. Y. Supp. 620.

Id.; maker of note.—A complaint in an action upon a promissory note which in substance alleges that on or about a certain date the defendants made their promissory note whereby they promised to pay to the order of the plaintiff a certain sum of money on a certain date with interest at six per cent., but that no part thereof has

been paid, states a cause of action. The allegation that the note was "made" by the defendant is equivalent to an allegation that it was both signed and delivered to take effect as a negotiable instrument. The allegation that the note was made payable to the order of the plaintiff shows that delivery was made to him and also ownership. It is not necessary that the plaintiff further allege that he has not parted with possession or title. Nor is it necessary that the complaint allege that there was a consideration for the note, as that is presumed. Nor need the plaintiff, having demanded judgment for the fee of the note, with interest, allege the amount due where there is an allegation that no part of the note had been paid and that it is overdue. *First National Bank v. Stallo* (1914), 160 App. Div. 702, 145 N. Y. Supp. 747.

Id.; valuable consideration.—An allegation in a complaint in an action upon a non-negotiable note that the instrument was executed and delivered for a "valuable consideration" is a statement of fact and not a conclusion of law, and the complaint is not demurrable for failure to state facts constituting a cause of action. *St. Lawrence Co. Nat. Bank v. Watkins* (1912), 153 App. Div. 551, 138 N. Y. Supp. 116.

Id.; demand of payment.—A complaint against the maker of a non-negotiable promissory note which merely alleges that defendant's promise to pay was made for a valuable consideration, but alleged nothing further as to the consideration, is demurrable on the ground that it does not state facts sufficient to constitute a cause of action. *St. Lawrence County Nat. Bank v. Watkins* (1912), 76 Misc. 633, 135 N. Y. Supp. 461.

An allegation that a non-negotiable note had been given for a valuable consideration is a mere legal conclusion and not of a fact. *Kinsella v. Lockwood* (1913), 79 Misc. 619, 140 N. Y. Supp. 513.

A complaint in an action against the maker of an overdue promissory note, which alleges that it was indorsed by defendant in blank, that it was assigned and delivered to plaintiff for a valuable consideration before the commencement of the action, that plaintiff is the owner and holder thereof and that no part has been paid, is good; and a dismissal of the complaint for failure to allege a demand for payment, that the note was given for value, and that it was indorsed before maturity, is erroneous. *Beall v. Russell* (1912), 76 Misc. 244, 134 N. Y. Supp. 633.

Id.; guaranty for payment.—A complaint in an action upon a guaranty for the payment of a promissory note, which alleges the execution and delivery by the defendant company to plaintiff of its promissory note, accompanied by a written guaranty executed by the respondent and the defendant M., and sets forth said guaranty,

which, in addition to being a promise to indemnify plaintiff against loss or damage by reason of the non-payment of the note, is an absolute guaranty of its payment, and further alleges that, in consideration of the guaranty and in reliance thereon, the plaintiff indorsed the note for the accommodation and benefit of the maker, who thereupon procured its discount by the bank at which it was payable, and that the defendants failed to pay the note at its maturity, and have never paid it, and that the bank transferred to the plaintiff all sums due and to become due on the note, states a good cause of action against the guarantor. Since the guaranty accompanied the note, it was enforceable by any person who could enforce payment of the note, and it was not necessary to allege an assignment of the guaranty to the bank or its reassignment to the plaintiff, or that the transfer to the plaintiff was made upon its faith. Since the guaranty was for the payment of the note, it was not necessary to allege presentment, demand, protest or notice. *Westchester Mortgage Co. v. McIntire* (1915), 168 App. Div. 139, 153 N. Y. Supp. 437.

Purchase of land; advancement of money; consideration.—A complaint in an action at law, which alleges in substance that the plaintiff and his assignors, having agreed to advance money to the defendant to enable him to purchase land and convey to the plaintiff and his assignors, the defendant thereafter agreed to repay a sum greater than that advanced if the plaintiff and his assignors would release him from the contract aforesaid and allow him to become sole owner of the land, fails to state a cause of action. This, because there is no allegation that the plaintiff or his associates agreed to transfer their interest in the lands, or release the defendant, or had ever tendered a release, there being merely an allegation of an executory promise without consideration. *McCammon v. Kaiser* (1913), 157 App. Div. 519, 142 N. Y. Supp. 721.

Real property; injury by overflow of rain waters from roof.—A complaint in an action for injury to real property by the overflow of rain water collected on the roof of a building, which, in substance, alleges that the owner allowed the drainage pipe to become choked and clogged with refuse so that it failed to carry off the water, which overflowed to the injury of the adjoining property of the plaintiff, states a cause of action. *Treacy v. Realty Associates* (1915), 168 App. Div. 1, 153 N. Y. Supp. 796.

Recovery of money in action by state.—A complaint in an action by the People, which alleges, first, that the defendants, who furnished a certain quantity of coal to a state prison between certain dates, fraudulently represented to the warden of said prison and to the agents of the state

that the coal was pea coal, knowing that a certain quantity of it was not pea coal but of an inferior quality and worth less, and that the said agents, relying upon said false representations, made payments for pea coal; second, that the defendants, after their bid to furnish egg anthracite coal to a state prison had been accepted, with intent to defraud the People wrongfully induced the agents and wardens to enter into written contracts for the delivery of grate coal, which was inferior and cheaper than egg coal, and that, pursuant to said contracts, they delivered a certain quantity; that defendants wrongfully and unlawfully presented claims to the agents of said prison for coal so furnished and received pay therefor in excess of the value of the coal furnished, for which the plaintiff demands judgment; third, that between certain dates the defendants delivered to a state prison a certain quantity of grate coal, the same being of an inferior quality and of a value less than egg coal, and during said period presented to the agent and warden claims for egg coal, knowing that such claims were false and fraudulent, and that said defendants thereby obtained, without authority, money belonging to the state to a certain amount, states facts sufficient to constitute a cause of action, and an order granting an application by the defendants for judgment upon the pleadings should be reversed. *People v. O'Brien* (1913), 157 App. Div. 119, 141 N. Y. Supp. 1046.

In action by state against surety company on bond of contractor, complaint held to state a cause of action. *People v. Massachusetts Bonding & Insurance Co.* (1918), 182 App. Div. 122, 169 N. Y. Supp. 693.

Rent; action for.—Complaint sufficient. *Rosenblum v. Westin* (1916), 93 Misc. 125, 156 N. Y. Supp. 1044.

Rights under option, complaint in action to enforce.—Where the defendants by a written instrument gave the plaintiff an option to purchase one-half of their interest in certain real estate "at just what it costs, with interest and taxes," in consideration of services rendered and to be rendered by the plaintiff, the latter in order to enforce his rights under the option must allege facts showing that he elected to accept the same. In the absence of such allegations, he can not recover on a complaint which merely asks that he be informed of the cost of purchasing the half interest in order that he may determine whether he will exercise his option and that defendants be compelled to convey should he decide to tender the proper payment. *Stokes v. Carpenter* (1915), 166 App. Div. 441, 151 N. Y. Supp. 1000.

Services; action for.—A complaint which merely alleges the making of the contract, performance by the plaintiff and non-performance by the defendant, is in-

sufficient as it states conclusions instead of facts. *Hughes v. Eccles* (1916), 160 N. Y. Supp. 1013.

In an action at law against two defendants to recover for work, labor and services, the complaint must state a complete cause of action against each of the defendants named therein or it is demurrable as to the defendant against whom no action is stated. *Leszynsky v. Levinsohn* (1915), 170 App. Div. 514, 156 N. Y. Supp. 494.

Sale of mortgaged real property; retention of funds.—A complaint, alleging the sale of mortgaged real estate by defendant and retention by him after demand of surplus funds, after payment of incumbrances on property, where said real estate had been conveyed by plaintiff to defendant as security for money advanced to said plaintiff upon a written condition of its redelivery upon payment of the sum due defendant with interest, within a certain time, states an equitable cause of action. *Oest v. Hendrick* (1912), 76 Misc. 258, 134 N. Y. Supp. 900.

Separation agreement; action to set aside.—A complaint in a suit to set aside a separation agreement whereby the plaintiff, a wife, accepted a gross sum for her permanent support, which in substance alleges that she was induced to sign the agreement when in weak physical and mental condition, caused by the cruelty of the defendant, and that she was unable to comprehend the import of the agreement, and that it was not fully explained to her, etc., states a good cause of action. *Pelz v. Pelz* (1913), 156 App. Div. 765, 142 N. Y. Supp. 54.

Libel.—A complaint for libel which in substance alleges that the defendant published an article falsely stating that a case of infantile paralysis, which was then epidemic, existed in a house of a certain number on a certain street, being the same address at which the plaintiff was engaged in manufacturing and selling mattresses and bedding, whereby persons shunned and avoided the plaintiff's premises and certain customers refused to deal with him, resulting in certain losses of money, does not state a cause of action, there being no allegation that the publication was maliciously made and with a willful intent to injure the plaintiff's business. *Stanger v. Sun Printing & Publishing Assn.* (1917), 181 App. Div. 245, 168 N. Y. Supp. 266.

Slander.—A complaint in an action for slander which relies solely upon words which do not in themselves impute any criminal charge, is demurrable. *Gillespie v. Byrne* (1912), 151 App. Div. 703, 136 N. Y. Supp. 207.

Id.; particular words to be set forth.—A complaint in an action to recover both special and general damages on account of an alleged slander of the plaintiff by the defendant, which alleges that the plaintiff

a married woman, was employed as a clerk in a store conducted by L. and wife; that Mrs. L. attempted to commit suicide at such store; that thereafter the defendant falsely told many people, naming some of them, the others being unknown, in substance that the plaintiff had been caught in the cellar with Mr. L., and that Mrs. L. had attempted to commit suicide on account of the discovery of her husband and the plaintiff in the cellar together, and further alleges, as innuendo, that the defendant implied and charged that the plaintiff was guilty of adultery with Mr. L., does not state a cause of action, because the particular words constituting the alleged slander are not set forth. *Crowell v. Schneider* (1915), 165 App. Div. 690, 151 N. Y. Supp. 160.

Slander of title; damages.—A complaint in an action for slander of title to real estate in order to constitute a cause of action must allege not only that the statement complained of was false and published maliciously, but must set forth facts showing that pecuniary damage resulted to the plaintiff by reason thereof. *Felt v. Germania Life Ins. Co.* (1912), 149 App. Div. 14, 133 N. Y. Supp. 519.

Surrogate's decree; action by legatee to set aside.—A complaint in an action by a legatee and devisee to set aside decrees of the surrogate's court, judicially settling the accounts of executors and trustees, and to cancel and annul a deed and an assignment of a lease made by the executors to the widow, and a conveyance and an assignment by her, which alleges that the defendants, who acquired title through the widow or her daughter, relied upon the record title, but does not charge that they took the conveyance fraudulently or without consideration, or that they in any manner participated in the fraud and conspiracy alleged to have actuated the executor and the widow, fails to state a cause of action. *Davidson v. Buchanan* (1914), 164 App. Div. 352, 149 N. Y. Supp. 640.

Taxpayers' action.—A taxpayer in order to maintain an action against the supervisor and auditors of a town must specifically allege facts which entitle him to maintain the action under the provisions of the taxpayers' acts. *Daly v. Haight* (1914), 163 App. Div. 234, 148 N. Y. Supp. 42.

Id.; allegation as to fraud.—The complaint, in a taxpayers' action to cancel a lease of town lands by said trustees is insufficient if it contains no allegations that the lease was improvident, fraudulent or for an inadequate consideration. *Bachia v. Piepenbrink* (1912), 77 Misc. 362, 136 N. Y. Supp. 435.

Transfers on street railroads; action for penalty.—Where in an action to recover penalty for defendant's refusal to give transfer entitling plaintiff to a continuous trip over a line leased by defendant, the

plaintiff is entitled to show that said lease was made under the provisions of the railroad law, the complaint is not demurrable on the ground that it does not state a cause of action, though reference is made therein to an agreement between the city and the two railway companies for continuous passage over the lines. *Lowenstein v. International Railway Co.* (1912), 75 Misc. 357, 132 N. Y. Supp. 653.

Trust on proceeds of land.—The complaint in an action to impress a trust on the proceeds of land conveyed should set out the following matters with certainty: 1, the amount of the trust fund and the precise agreement out of which the alleged trust arose; 2, the terms of the agreement of the alleged trustee and whether the agreement was oral or in writing, or partly oral and partly in writing; 3, when the plaintiff made demand for the payment alleged to have been refused. *Driscoll v. Hammill* (1914), 162 App. Div. 475, 147 N. Y. Supp. 508.

Trust; action to enforce; allegation as to accounting.—A complaint in an action at law against executors and trustees to enforce a trust, which fails to allege that there has been an accounting and a promise to pay or the equivalent thereof, is de-

murrrable. *Batchis v. Leask* (1912), 149 App. Div. 713, 134 N. Y. Supp. 350.

Wills; construction.—A complaint which, after setting out a copy of the will of the testator, alleges among other things that his widow died without having remarried, leaving a will which was duly admitted to probate, but contains no allegation from which it can be inferred that she exercised the power of appointment given in her husband's will, does not state facts sufficient to constitute a cause of action for the construction of the will of the testator. *Von Meyer v. Lindemann* (1915), 167 App. Div. 353, 153 N. Y. Supp. 45.

Workmen's compensation; allegation as to place.—The provisions of the workingmen's compensation act of the state of New Jersey apply only where the contract of hiring is made in that state, and a complaint in an action under said statute which fails to allege a hiring made in the state of New Jersey is defective in so far as it is based upon the statute and a demurrer thereto should be sustained. *Pensabene v. Auditore Co.* (1913), 155 App. Div. 368, 140 N. Y. Supp. 266.

Section cited.—*O'Rourke v. Cunard Steamship Company, Ltd.* (1915), 169 App. Div. 943, 154 N. Y. Supp. 29.

§ 483. Causes of action to be separately stated.

Application.—*Hendrix v. Manhattan Beach Development Co.* (1917), 181 App. Div. 111, 168 N. Y. Supp. 316.

Complaint attempting to state two causes of action.—*Fleitmann v. United Gas Improvement Co.* (1916), 174 App. Div. 781, 161 N. Y. Supp. 650.

Causes to be separately stated and numbered.—Where two causes of action are properly stated in the complaint, but are not separately numbered, the court will require the complainant to state and number the causes on motion. *Agett v. Federal Telephone & Telegraph Co.* (1916), 160 N. Y. Supp. 843.

Single cause of action.—Complaint alleging plaintiff's right to office and the taking of it by defendant. *People ex rel. Flake v. Brush* (1918), 104 Misc. 708.

Accounting.—Where the complaint, in an action for an accounting, contains averments respecting breaches of agreement to indemnify and respecting alleged conversions of the defendant as agent and trustee of the plaintiff and, therefore relevant to the single cause of action for an accounting, the plaintiff should not be directed to separately state and number the causes of action. *Baruch v. Young* (1912), 149 App. Div. 466, 134 N. Y. Supp. 53.

Where in a suit for an accounting, the complaint contains allegations tending to establish a cause of action against the defendant on a guaranty, without asking for relief on account of said guaranty, the

plaintiff should not be required to separately state and number his alleged causes of action, under the rule that such a motion does not involve the sufficiency of the allegations with respect to any cause of action attempted to be set forth. *Huguley v. Gardner* (1913), 157 App. Div. 720, 142 N. Y. Supp. 660.

A complaint, alleging that the defendants loaned plaintiffs sums of money upon certain security, and that defendants have collected upon such security more than the amounts due upon the loans, which incidentally alleges that the agreement was usurious, states only one cause of action and that for an accounting. *Liebling v. Cohn* (1917), 179 App. Div. 766, 167 N. Y. Supp. 249.

Annulment of contracts on account of same fraud.—A complaint which in effect alleges that the defendant through false and fraudulent representations induced the plaintiff to execute four contracts for the purchase of an advertising flash display on an electric sign to be erected by defendant, all relating to the same premises and referring to the same scheme, and the contracts subsequent to the first merely extended the amount of service that the defendant was to render, and imposed upon the plaintiff the payment of additional sums of money, and asks that the four contracts be declared null and void, states but a single cause of action, and a motion to compel the plaintiff to separately state

and number his causes of action should not be granted. *Park & Tilford v. Realty Advertising, etc. Co.* (1913), 160 App. Div. 21, 144 N. Y. Supp. 907.

Commissions for effecting exchange of lands.—In an action on contract for services rendered, the complaint alleged the making of a written contract between defendant and one H. for an exchange of certain lands upon condition that H. procure a loan on the property of defendant; the cause of action for commissions for effecting an exchange and that for services in procuring a loan should have been separately stated. *Hevia v. Wheelock* (1913), 155 App. Div. 387, 140 N. Y. Supp. 351.

Moneys earned and prospective damages.—A complaint which seeks to recover moneys earned under a contract, the performance of which was prevented by the defendant, and also damages suffered and prospective profits lost by the defendant's breach, states two causes of action. *Dailey v. Standard Shipbuilding Corporation* (1917), 179 App. Div. 647, 167 N. Y. Supp. 38.

Contract; publication of list of polling places.—Where it is alleged that the defendant entered into a contract with the board of elections of the plaintiff to publish the designated list of polling places on certain specified dates; that the defendant has made false representations of full performance and has failed to perform its contract in that it did not publish said list on two specified dates, but one cause of action is stated and the plaintiff should not be required to serve an amended complaint separately stating and numbering all the facts relating to the failure to publish the notice on the two days specified. *City of N. Y. v. N. Y. Evening Post Co.* (1913), 155 App. Div. 530, 140 N. Y. Supp. 761.

Id.; fraudulent representations; action for amount paid.—Where the complaint alleges that the plaintiff purchased a quantity of graphite from the defendant in reliance upon representations as to quality by the defendant's president, which representations were false, and that the plaintiff has rescinded the contract after inspection of the graphite, and is entitled to the return of the amount paid, it states two causes of action, one on the theory that the alleged false representations were made to another with the intention that they should be reported to and acted upon by the plaintiff, and the second on the theory that the sale was made to the other person and that he had transferred all his rights to the plaintiff. *Northwestern Terra Cotta Co. v. Starkey & Co., Inc.* (1918), 182 App. Div. 665, 169 N. Y. Supp. 495.

Deceit.—An allegation, in an action for deceit, that plaintiff was induced by defendant's fraudulent representations, to en-

ter into a contract with it, that later he entered into a similar contract and that this contract, "was subsequently renewed for the years 1908, 1909 and 1910," is an attempt to set forth five separate causes of action, and plaintiff will be compelled to separately state and number them. *Fisher v. N. Y. Staats-Zeitung* (1912), 149 App. Div. 48, 133 N. Y. Supp. 497.

Different items of damages as separate causes of action.—A plaintiff cannot make separate causes of action out of different items of damages which he has sustained through the same fraudulent representation. *Chalmers v. Murphy* (1913), 159 App. Div. 810, 144 N. Y. Supp. 825.

Promissory note.—A complaint, in an action upon a promissory note, which, besides setting forth the consideration upon which the note was given, also contains allegations as to the circumstances under which it came into the plaintiff's possession, states only one cause of action and is not ambiguous or uncertain. *Peters v. Miller* (1912), 150 App. Div. 249, 134 N. Y. Supp. 881.

Public service corporation; allegations as to rates.—A complaint against a public service corporation furnishing water to a city, which alleges that the defendant has charged the plaintiff a higher rate than that allowed by the contract with the city, made for the benefit of its inhabitants, and further alleges that since the making of said contract the rates have become unreasonably high, etc., states two causes of action which should be separately stated and numbered. *Wood v. New York Inter-Urban Water Co.* (1913), 157 App. Div. 407, 142 N. Y. Supp. 626.

Real estate; injury to, by temporary and permanent acts.—A complaint alleging injury to realty by the temporary maintenance of engines in front of his premises and that defendants by permanent erections have injured his premises sets forth two causes of action which must be separately stated and numbered. *Stines v. City of New York* (1912), 154 App. Div. 276, 138 N. Y. Supp. 962.

Where the complaint shows: First, a primary right claimed by the plaintiff to remove the building owned by it from the premises which is alleged to have been breached; second, a right in the plaintiff under § 2256 to redeem the premises within a year after dispossession, which right the plaintiff alleges has been denied it by the defendant; third, a right in the plaintiff by reason of an alleged agreement to a lien upon the premises for the cost of the building erected by it thereon, which lien the plaintiff alleges has been denied and violated, it clearly sets forth three primary rights of the plaintiff, each of which has been violated, and demands relief for the violation of each of these rights, and it states three separate and

distinct causes of action which the defendant is entitled to have separately stated and numbered. *Brettholz-Krumholz Construction Co. v. Rosenthal* (1916), 176 App. Div. 118, 162 N. Y. Supp. 471.

Separate statement of causes of action against two defendants.—A complaint against two defendants to recover for the death of plaintiff's intestate is not demurrable on the ground that two causes of action have been improperly united, even though plaintiff has attempted to state a separate cause of action against each defendant, if in fact but a single cause of action is pleaded. *Sartori v. Litchfield Cons. Co.* (1912), 149 App. Div. 241, 133 N. Y. Supp. 720.

Specific allegation or reference.—Each cause of action stated in a complaint must, by specific allegation or by proper reference to and incorporation therein of other allegations of the complaint be complete in itself. *Daly v. Haight* (1914), 163 App. Div. 234, 236, 148 N. Y. Supp. 42.

Test for determining when more than one cause stated.—Where a recovery upon one cause of action would not bar a subsequent recovery upon the other and the evidence to establish each would be different from the evidence required to establish

the others, separate causes of action are stated. *Rafferty v. Carter* (1914), 152 App. Div. 17, 147 N. Y. Supp. 271.

The fact that the plaintiff is entitled to the same equitable relief either individually or as minority stockholder does not make two causes of action. *Tischner v. Sickinger* (1918), 182 App. Div. 816, 169 N. Y. Supp. 882.

Where, in an action by a tenant against his landlord for damages for wrongful eviction, and for moneys expended for improvements and for taking possession of a portion of the premises by the defendant, the plaintiff is ordered to state separately and number the causes of action, an amended complaint, containing two counts, the first for damages for final complete eviction and the second for expenditures incurred in making improvements, and also for the breach of a specific agreement to pay the plaintiff damages caused by the temporary interference with its possession, is not a compliance with the order of the court. *Fifteen Twenty Broadway, Inc. v. N. Y. Theatre Co.* (1917), 179 App. Div. 48, 166 N. Y. Supp. 107.

Section cited.—*O'Rourke v. Cunard Steamship Company, Ltd.* (1915), 169 App. Div. 943, 154 N. Y. Supp. 29.

§ 484. What causes of action may be joined in the same complaint.

Counterclaim.—In an action to recover for services rendered in searching defendant's title to certain real property, a cause of action for slander of defendant's title to said property, pleaded as a counterclaim, is properly stricken out; nor may the facts constituting such counterclaim be pleaded as an affirmative defense. *Title Insurance Company of New York v. Hawes* (1912), 76 Misc. 478, 135 N. Y. Supp. 608.

Annulment of deed and decree of surrogate's court.—A cause of action to have decrees of the surrogate's court set aside cannot be joined with a cause of action to cancel and annul a deed and assignment by executors. *Davidson v. Buchanan* (1914), 164 App. Div. 352, 149 N. Y. Supp. 640.

Breach of contract and conversion.—A plaintiff cannot unite in one complaint an action for breach of contract against a bank for its refusal to repay a deposit with a cause of action against the same defendant for unlawfully converting a check or the proceeds thereof and a third cause of action founded on the negligence of the defendant in employing an unfit and dishonest agent, who converted to his own use a check deposited by the plaintiff. *Salter v. Bronx National Bank* (1912), 150 App. Div. 639, 135 N. Y. Supp. 702.

Joinder of different causes of action contract.—A complaint alleging a contract of employment of the plaintiff as a salesman upon a commission basis; that the defendants furnished statements of commissions

and plaintiff accepted payments made upon the basis of their being true and accurate; that said statements were falsely made for the purpose of deceiving the plaintiff, and that upon the basis of true statements he would be entitled to receive a certain amount in excess of the sum paid him, states a cause of action upon contract and not for fraud and deceit and may be joined with a cause of action for the breach of another contract of employment. While it is permissible to join in one complaint different causes of action on contract, they must be consistent with one another. *Sternstein v. Heit* (1919), 186 App. Div. 45, 173 N. Y. Supp. 808.

Different causes of action on contract may be joined if they be consistent. So a traveling salesman may join action to recover commissions and for wrongful discharge. *Sternstein v. Heit* (1919), 173 N. Y. Supp. 808.

Rescission and breach of contract.—A cause of action by a vendee of property based on the rescission of the contract because of non-performance of a covenant for the recovery of payments made is not inconsistent with an action for damages for breach of the agreement, so as to prevent their joinder. *Menzies v. Tasker-Halsted Realty Co.* (1917), 164 N. Y. Supp. 403.

Alleging a breach of a contract and false representations in making it states two causes of action which cannot be united in the same pleading. *Agett v. Federal Tele-*

phone & Telegraph Co. (1916), 160 N. Y. Supp. 843.

Contract and tort.—Causes of action upon contract and for a tort cannot be joined. *Lord Electric Co. v. Barber Asphalt Paving Co.* (1914), 165 App. Div. 399, 150 N. Y. Supp. 1000.

Where two causes of action cannot be united in the same complaint, one being in tort and the other on contract, the plaintiff should be required to elect between them and amend his complaint accordingly. *Agett v. Federal Telephone & Telegraph Co.* (1916), 160 N. Y. Supp. 843.

Causes of action for the negligence of the driver and for the wrongful act of the defendant in maintaining and using on the public streets a vicious horse are not necessarily inconsistent. *Gropp v. Great Atlantic, etc. Tea Co.* (1914), 161 N. Y. App. Div. 859, 147 N. Y. Supp. 182.

Negligence and nuisance.—Where a plaintiff suffered personal injury by falling through an opening leading from a public street to an adjoining cellar, which was ordinarily covered by double doors level with the sidewalk but which had been left open by an employee of the lessee of the premises, it was held that she might unite in her complaint a cause of action for negligence and one for maintenance of a nuisance and recover upon whichever cause the proof warranted. *Schoenfeld v. Mott Avenue Realty Co.* (1915), 168 App. Div. 91, 153 N. Y. Supp. 745.

An injury to person and an injury to property, even if resulting from the same tortious act, give rise to two separate causes of action. *Fargo v. Village of Randolph* (1917), 163 N. Y. Supp. 1071.

Where a complaint, when stripped of improper allegations of matters which are evidentiary, is plainly intended to be based upon the breach of an express contract, it is error for the court to sustain the complaint on demurrer as one in tort based upon a breach of duty by the defendants as trustees. *Uhl v. Gayley* (1918), 181 App. Div. 802, 169 N. Y. Supp. 191.

Joinder of causes of action on contract in tort is not demurrable when not inconsistent. *Taft v. Bronson* (1917), 180 App. Div. 154, 167 N. Y. Supp. 433.

Action on contract and to restrain dissolution of corporation.—A complaint which seeks to compel a corporation to retain an officer in its employment pursuant to its agreement and which also seeks to restrain the dissolution of the corporation is not demurrable on the ground of misjoinder of causes of action. *Barcus v. Cooper* (1918), 184 App. Div. 111, 171 N. Y. Supp. 654.

Corporation; stockholders' action and action to dissolve.—A representative action by stockholders and an action to dissolve

the corporation cannot be joined, as they belong to different plaintiffs. *Dusenberry v. Sagamore Development Co.* (1913), 157 App. Div. 485, 142 N. Y. Supp. 595.

An action by a stockholder on behalf of the corporation against one of the directors charged with misconduct is improperly joined with one for conspiracy which affects as well three other defendants, as the two causes of action do not affect all parties. *Snyder v. Bender* (1919), 173 N. Y. Supp. 401.

Liability as directors directly and by way of estoppel.—The complaint in an action against defendants as directors of a limited corporation, for a first cause of action, alleged the recovery of a judgment against the corporation on its check, the return of an execution unsatisfied and that defendants were directors of the corporation within a period which would render them liable for the debt; a second cause of action was based on the same allegation, except as to defendants being actually directors of the corporation, and in place thereof it was alleged that they were with their own permission and consent held out by said corporation as being its directors and that credit for the indebtedness sued upon was extended on reliance of the fact of such holding out. It was held that taking the allegation that defendants were held out as directors, a legal conclusion, at its face value, the second cause of action alleged defendants' liability as directors by way of estoppel and that the complaint was good whether regarded as stating two causes of action or only two counts upon the same cause of action. *Davis v. Adler* (1915), 92 Misc. 458, 156 N. Y. Supp. 157.

Equitable actions.—In suits in equity, the joinder of defendants who are interested in some phase of the action and are proper or necessary for complete determination thereof, does not constitute a misjoinder of causes of action. *Colorado & Southern Railway Co. v. Blair* (1913), 81 Misc. 654, 659, 143 N. Y. Supp. 510.

It is not necessary in an action in equity that all of the causes of action shall belong to one only of the subdivisions of the code section where they fall within the language of subdivision 9 nor is it necessary that all of the defendants should be equally affected by the relief asked for. It is true even in equity that all of the defendants must be affected by the action but not that they shall be equally affected. *Mitchell v. Niagara, Lockport & Ontario Power Co.* (1917), 99 Misc. 366, 163 N. Y. Supp. 999.

Joinder of causes under subd. 9. It is true that causes of action cannot be united except as herein provided, but subdivision 9 is intended to include cases chiefly equitable where the causes of action arose out of the same transaction or out of transac-

tions connected with the subject of action and thereby permits the joinder of causes of action which otherwise would require separate suits. *Mitchell v. Niagara, Lockport & Ontario Power Co.* (1917), 99 Misc. 366, 163 N. Y. Supp. 999.

A complaint in equity which charges a defendant with false representations in obtaining a conveyance of land whereby more land was included in the conveyance than was agreed to be conveyed and with a failure to convey to plaintiff land which it agreed to convey, and which seeks to compel a conveyance to plaintiff of the latter land, subrogating him to a claim for compensation for a portion thereof appropriated by the state and making the owner a party to secure such conveyance and subrogation; to reform the deed of the first mentioned land; a reconveyance of the excess lands; damages caused during the occupancy of such excess lands under the alleged unlawful conveyance and the removal of structures on the property unlawfully conveyed, is not demurrable. *Mitchell v. Niagara, Lockport & Ontario Power Co.* (1917), 99 Misc. 366, 163 N. Y. Supp. 999.

A demurrer will not lie to a complaint in equity when the subject of the action is certain and the transactions involved in the action are connected therewith, although the complaint contains two or more causes of action, legal and equitable, where they all arose out of the same transactions, are embraced in one or more of the subdivisions of said section, are consistent with each other and the defendants are all interested in some part of the relief prayed for and different places of trial are not required. *Mitchell v. Niagara, Lockport & Ontario Power Co.* (1917), 99 Misc. 366, 163 N. Y. Supp. 999.

Different places of trial.—The fact that two causes of action stated in a complaint arose out of the same transaction is not sufficient against a demurrer for misjoinder unless it also appears on the face of the complaint that they do not require different places of trial. *Jacobus v. Colgate* (1916), 217 N. Y. 235.

Injury to property.—Where plaintiff complains of injury to his realty in that in the construction of additional stairways, exits and entrances to the subway, the defendants caused to be erected and maintained in front of and adjacent to plaintiff's premises structures, engines, tool sheds, etc., and that the defendants by the permanent erection and maintenance of such stairways, exits and entrances have injured his premises and his rights appurtenant thereto, he pleads two distinct and separate causes of action that may be properly joined. *Stines v. City of New York* (1912), 154 App. Div. 276, 138 N. Y. Supp. 962.

Libel.—An action for libel and the action under § 51 of the civil rights law may

be joined in one complaint, as both causes of action arise out of the same transaction. *d'Altomonte v. New York Herald Co.* (1913), 154 App. Div. 453, 139 N. Y. Supp. 200.

Mechanic's lien.—The complaint in an action by a sub-contractor to foreclose a mechanic's lien should allege that at the time the lien was filed or thereafter money was due from the owners to the contractor; but a motion at the opening of the trial to dismiss the complaint for failure to state a cause of action will not be granted unless it appears, after admitting all the facts alleged, that no cause of action whatever is pleaded. *Wood Man. & Realty Co. v. Johnstone* (1912), 148 App. Div. 747, 133 N. Y. Supp. 422.

Municipal court of the City of New York.—The provisions of this section are not applicable to such court under the provisions of § 3347, subd. 4 of the code of civil procedure. (See § 79 of the New York city municipal court code, L. 1915, ch. 279.) *Mackey v. Royal Bank* (1912), 78 Misc. 145, 137 N. Y. Supp. 929.

By § 3347 (4), § 484, relating to the joinder of causes of action in the same complaint, is inapplicable to the municipal court of the city of New York. *Mackey v. Royal Bank of New York* (1912), 78 Misc. 145, 137 N. Y. Supp. 929.

Trustee and executor; suit in both capacities.—A plaintiff cannot sue individually, as executor and as trustee, to recover for alleged misrepresentations of the defendant whereby he was induced either individually, as executor or trustee, to sell certain stocks for an inadequate consideration. *Taggart v. Draz & Co.* (1914), 168 App. Div. 381, 150 N. Y. Supp. 41.

Where there is a series of fraudulent transfers, although no privity exists between the transferees, the transaction is considered as a single cause of action. *Block v. Amaden* (1918), 171 N. Y. Supp. 790.

Action to avoid fraudulent transfers.—See *Hatch v. Heinze* (1916), 172 App. Div. 675, 158 N. Y. Supp. 385.

Action to set aside conveyance.—Causes of action are not improperly united where the holders of two judgments against a common debtor unite in an action to reach a fund in the hands of the administrator of the debtor and to restrain him from paying it over to the holder of another judgment in alleged fraud of the rights of the plaintiff. *Cullen v. Walsh* (1916), 97 Misc. 177, 161 N. Y. Supp. 123.

The test to be applied to a complaint on a demurrer for misjoinder of causes of action is whether or not the several causes of action set up in the complaint arose out of the same transactions and are connected with the same subject of action and have a common point of litigation. *Sherwood v. Holbrook* (1917), 98 Misc. 668, 163 N. Y. Supp. 326.

The objection that a proposed amendment of the complaint would be in violation of the section, can only be raised by answer or demurrer under § 499. *Doty v. Doty* (1918), 171 N. Y. Supp. 852.

Two separate and independent causes of action in neither of which all of the defendants are interested and liable to any extent, are improperly joined in a single complaint. *Foxall v. Search* (1917), 162 N. Y. Supp. 588.

Each cause of action must be complete in itself.—*Wright v. Larken* (1915), 91 Misc. 573, 154 N. Y. Supp. 961.

Misjoinder.—To make out a misjoinder it is not necessary that the separate causes of action should have been well stated. It

is enough that there was an attempt to state them. *Jacobus v. Colgate* (1916), 217 N. Y. 235.

Waiver of objections.—Where an order permitting a defendant in default in pleading to serve an answer upon payment of costs does not reserve to him the right to move for an order requiring plaintiff to separately state and number the causes of action set forth in the complaint, or to elect on which cause of action he will proceed, and no such right was given by stipulation, there is a waiver of all objections to the complaint which is a bar to the making of such motion. *Mulino v. Walkoff* (1916), 93 Misc. 189, 156 N. Y. Supp. 1032.

§ 487. Defendant must demur or answer.

A demurrer admits the facts, not the conclusions of law. *Menzies v. Tasker-Halsted Realty Co.* (1917), 164 N. Y. Supp. 403.

Motion to dismiss as equivalent to demurrer.—A motion to dismiss a complaint upon the ground that it does not state facts sufficient to constitute a cause of action is equivalent to a demurrer for insufficiency, and where a complaint in ejectment alleged that plaintiff was seized of the land described therein and was entitled to the immediate possession thereof, which was withheld by defendant, a motion to dismiss at the opening of the trial was improperly granted. *Chism v. Smith* (1914), 210 N. Y. 198, reversing 150 App. Div. 893, 133 N. Y. Supp. 1116.

Proper order on overruling demurrer.—On a motion for judgment on the pleadings after demurrer, an order that the plaintiff have judgment overruling the demurrer, with leave to defendant within twenty days after service of a copy of said judgment to withdraw said demurrer and answer, and that in case of a failure of defendant to serve an answer within that time plaintiff have final judgment for the relief demanded, that the plaintiff's damages be assessed by a jury and that a writ of inquiry issue for that purpose, is now proper and takes the place of an interlocutory judgment which would have been entered under the former practice. *Shiffner v. Beck* (1913), 159 App. Div. 821, 145 N. Y. Supp. 27.

§ 488. When he may demur.

A demurrer may be disposed of by a trial of an issue of law before a judge at a term without a jury followed by findings and judgment, by a trial at any term under § 976, or on a motion for judgment on the pleadings under § 547. *Palito v. New York State Railways* (1915), 91 Misc. 674, 155 N. Y. Supp. 926.

Banking law.—An action brought by the superintendent of banks under § 19 of the banking law to collect debts due to a delinquent bank must be brought in the name of such bank and not in the name of the superintendent. *Van Tuyl v. New York Real Estate Security Co.* (1912), 153 App. Div. 409, 138 N. Y. Supp. 541.

Another action pending.—Where a party has obtained a judgment against another for goods sold upon the representations of solvency by the purchaser, and supplementary proceedings thereon reveal the fact that the purchaser is and was insolvent at the time of the purchase, the plaintiff may, without discontinuing his first action, bring another against the defendant for false representations, and such a complaint is not demurrable on the ground

that there is another action pending. *Russell v. Wilber* (1912), 150 App. Div. 52, 134 N. Y. Supp. 463.

A demurrer on the ground of another action pending cannot be sustained where the previous action is only between some of the same parties. *Foxall v. Search* (1917), 162 N. Y. Supp. 588.

Bill of particulars not part of pleadings.—On a demurrer to a complaint upon the grounds of insufficiency a bill of particulars served by the plaintiff should not be considered as part of the pleading. *Kaufman v. Hopper* (1912), 151 App. Div. 28, 135 N. Y. Supp. 363.

Complaint and answer defective.—Where in an action to recover moneys alleged to have been paid under duress, both the complaint and the answer are defective, and the plaintiff demurs to one of the defenses, the defective complaint cannot be made the basis of a successful demurrer. *Title Guarantee & Trust Co. v. City of N. Y.* (1912), 205 N. Y. 496.

On a demurrer to an answer for insufficiency the complaint may be attacked on the ground that it fails to state facts suf-

sufficient to constitute a cause of action. *Delafield v. London & Lancashire Fire Ins. Co.* (1917), 177 App. Div. 477, 164 N. Y. Supp. 221.

Conclusions averred.—While a demurrer to a complaint admits facts alleged it does not admit conclusions averred. *Pollak v. Dodge Manufacturing Co.* (1912), 78 Misc. 350, 138 N. Y. Supp. 429.

The allegation of conclusions is not sufficient to constitute a cause of action, and a motion for judgment on the pleadings will be granted. *Pfizer v. Wassermann* (1912), 77 Misc. 641, 138 N. Y. Supp. 566.

A conclusion of law is not a statement of fact upon which a liability can be predicated. *Mayor, Lane & Co. v. Weinstein Co.* (1914), 87 Misc. 150, 155, 149 N. Y. Supp. 1045.

The allegation "for a valuable consideration" is not a statement of fact but a conclusion of law. *Ahite v. Western Union Telegraph Co.* (1912), 153 App. Div. 684, 138 N. Y. Supp. 598.

Conspiracy.—Where the complaint, in an action for damages for conspiracy to deprive plaintiffs, vaudeville actors, of their means of livelihood, alleges that defendants formed a conspiracy to control the vaudeville booking business and when plaintiffs refused to be bound by rules imposed by said defendants, defendants illegally and maliciously placed a ban on them and their sketch, but does not allege what the rules were, that they were improper, unlawful or unreasonable and that the plaintiffs had sought and been refused employment by reason of the alleged wrongful acts of defendants; the complaint is demurrable on the ground that it does not state facts sufficient to constitute a cause of action. *Amann v. United Booking Offices* (1912), 76 Misc. 5, 133 N. Y. Supp. 1076.

Corporations.—To maintain an action under § 66 of the stock corporation law, the plaintiff must allege such facts as will bring himself within its provisions; a failure to do so renders the complaint demurrable. *Ginsberg v. Automobile Coaching Co.* (1912), 151 App. Div. 627, 136 N. Y. Supp. 354.

The treasurer of a corporation, suing a former treasurer to recover moneys belonging to the corporation, is not a manager or other officer "having a general superintendence of its concerns," within the meaning of § 91 of the general corporation law, and hence such an officer cannot maintain the action. *Loughlin v. Wocker* (1912), 152 App. Div. 466, 137 N. Y. Supp. 257.

Id.; actions by stockholders.—An action in equity cannot be maintained by individual stockholders for themselves and all others similarly situated, unless because of the neglect and refusal of the corporation to act; it is necessary, therefore, in such an action to set forth first, a cause

of action in favor of the corporation itself, and second, the facts which entitle the plaintiff to maintain the action in place of the corporation. *Continental Securities Co. v. Belmont* (1912), 206 N. Y. 7.

An action by stockholders against the officers of a corporation is derivative, and the complaint must allege a demand that the corporation bring the action and its neglect or failure to do so, or the existence of such facts as would make the demand futile; the corporation is a necessary party. *Continental Securities Co. v. Belmont* (1912), 150 App. Div. 298, 134 N. Y. Supp. 635.

In an action by a stockholder of a corporation to recover a penalty from its treasurer under § 69 of the stock corporation law, a complaint which fails to allege that the defendant has not delivered a financial statement to the plaintiff, or to some other stockholder, during the fiscal year within which the demand was made, is demurrable. *Troughton v. Grace* (1912), 151 App. Div. 655, 136 N. Y. Supp. 200.

A demurrer to the complaint in an action brought by a stockholder of a holding corporation in his representative capacity should be sustained upon the ground that there is a misjoinder of parties plaintiff because one of the plaintiffs is a stockholder in the holding corporation while the other plaintiffs are stockholders in the subsidiary corporation. *Holmes v. Camp* (1917), 180 App. Div. 409, 167 N. Y. Supp. 840.

Deaf mutes; action by institution for care and instruction.—Complaint in action against a county by the Western N. Y. Institution for deaf-mutes which fails to allege the making of a certificate by the state board of charities that the plaintiff has been duly organized as a charitable corporation is not demurrable. *Western N. Y. Inst. for Deaf Mutes v. County of Broome* (1913), 82 Misc. 63, 143 N. Y. Supp. 241.

Deceit.—In an action to recover damages for deceit, the failure to allege an offer to restore all that plaintiff had received from the defendant does not render the complaint demurrable. *Stirrup v. Trafton* (1912), 77 Misc. 437, 136 N. Y. Supp. 1052.

Executors and trustees; failure to allege accounting.—A complaint in an action at law against executors and trustees to enforce a trust, which fails to allege that there has been an accounting and a promise to pay or the equivalent thereof, is demurrable. *Batchis v. Leask* (1912), 149 App. Div. 713, 134 N. Y. Supp. 350.

Facts implied from allegations may be considered.—In considering the sufficiency of a complaint the court may consider, not only express allegations, but facts implied therefrom by reasonable and fair intendment. *Crotty v. Erie Railroad Co.*

(1912), 149 App. Div. 262, 133 N. Y. Supp. 696.

Guaranty.—The contract of guaranty having been set forth at length in the complaint, a demurrer does not admit any construction put upon it by the pleader. *Hamilton Trust Co. v. Shevlin* (1913), 156 App. Div. 307, 141 N. Y. Supp. 232.

Improper parties.—Where in a suit to compel individual defendants to account to the plaintiff for secret profits on the sale of the capital stock of a corporation, no misconduct on the part of the purchaser of the stock is alleged other than a general statement that it "is chargeable with knowledge of and responsibility for" the particular misrepresentations practiced upon the plaintiffs, a demurrer to the complaint by the purchaser should be sustained on the ground that there was no authority for making it a party defendant. *McManus v. Durant* (1912), 151 App. Div. 663, 136 N. Y. Supp. 223.

A cause of action against one defendant for breach of a contract to convey free of water rents and tenement house violations may not be united in the same complaint with a cause of action for breach of covenant in the deed of the premises delivered by said defendant and the other defendant, who was not a party to the contract to convey. *Friz v. Pfaff* (1912), 78 Misc. 121, 137 N. Y. Supp. 886.

A defect of parties as ground of demurrer under subd. 6 means a non-joinder, not a misjoinder, of parties; a complaint is not demurrable for too many parties defendant. *Kramer v. Barth* (1913), 79 Misc. 80, 139 N. Y. Supp. 341, 345.

Where a defect in parties plaintiff appears upon the face of the complaint, objection should be taken by demurrer. *Rosenbloom v. Maryland Casualty Co.* (1912), 153 App. Div. 23, 137 N. Y. Supp. 1064.

Indefiniteness.—A complaint is not demurrable merely for indefiniteness; such a defect should be cured by motion. *Jococks v. Morrison* (1912), 149 App. Div. 558, 133 N. Y. Supp. 1002.

Judgment.—Where a decision sustaining a demurrer to the complaint, in an action brought in the city court of the city of New York, was affirmed by the appellate term of the supreme court, with leave to plaintiff to plead over on payment of costs, and plaintiff neither serves an amended complaint nor pays the costs within the time limited by the order of affirmance, defendant's motion to amend the interlocutory judgment by inserting therein "judgment in favor of defendant upon the merits" will be granted, and a motion for final judgment on the demurrer will also be granted. *Pollak v. Dodge Mfg. Co.* (1913), 80 Misc. 182, 141 N. Y. Supp. 1104.

Jurisdiction.—A complaint does not state facts sufficient to constitute a cause of action, where it appears upon the face thereof that the court has no jurisdiction.

Hackett v. Strumpf (1913), 156 App. Div. 58, 141 N. Y. Supp. 172.

Landlord and tenant; payment of taxes.—Where a tenant agreed to pay the taxes as part of his rent, and a final order in summary proceedings after service of a statutory notice to quit was obtained, but no warrant of removal was issued, and the tenant continued to hold over, his liability for the taxes still continued; and an interlocutory judgment sustaining a demurrer to the complaint in an action to recover said taxes will be reversed and the demurrer overruled. *Hinton v. Bogart* (1912), 78 Misc. 46, 137 N. Y. Supp. 697.

Leave to plead over after a demurrer has been sustained is not a matter of absolute right but of favor, and it is not an abuse of discretion to deny such leave where the plaintiff has already twice attempted to state a cause of action without success. Especially is this so where an action on the instrument in suit is not barred by the statute of limitations, and the judgment sustaining the demurrer is not upon the merits. *Hamilton Trust Co. v. Shevlin* (1913), 156 App. Div. 307, 141 N. Y. Supp. 232.

The fact that a defendant demurs to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action does not, where such demurrer is withdrawn and leave to answer is given, preclude the defendant from setting up any facts which he might originally have set up by way of answer. *McCargo v. Jergens* (1912), 206 N. Y. 363.

Id.; amended complaint.—Where a complaint alleges separate and distinct causes of action against one only of two defendants, a demurrer on the ground that causes of action have been improperly joined cannot be disposed of by the service of an amended complaint setting up but one of the two original causes of action. *O'Connor v. Christopher* (1915), 90 Misc. 77, 152 N. Y. Supp. 955.

Matter of defense.—The assent or acquiescence of the plaintiffs or their predecessors in interest in the acts complained of is matter of defense; and the failure to negative it is not fatal to the complaint. *Continental Securities Co. v. Belmont* (1912), 75 Misc. 234, 133 N. Y. Supp. 560.

Misjoinder; action on contract and for conversion.—A plaintiff cannot unite in one complaint an action for breach of contract against a bank for its refusal to repay a deposit with a cause of action against the same defendant for unlawfully converting a check or the proceeds thereof and a third cause of action founded on the negligence of the defendant in employing an unfit and dishonest agent, who converted to his own use a check deposited by the plaintiff. *Salter v. Bronx National Bank* (1912), 150 App. Div. 639, 135 N. Y. Supp. 702.

Joinder of surviving and deceased defendants.—There is a misjoinder of causes

of action where an action seeks to hold joint tort feorsors for fraud and misrepresentation where the survivors are joined with the representatives of those deceased. *Dennin v. Woodbury* (1916), 96 Misc. 247, 160 N. Y. Supp. 647.

A demurrer for misjoinder of causes of action will lie despite the fact that they are blended in one count. It is not necessary that the causes of action should be separately stated to make the complaint demurrable on this ground. *Fargo v. Village of Randolph* (1917), 163 N. Y. Supp. 1071.

Causes of action improperly united.—A complaint in an action at law to recover for work, labor and services which is good as against members of a partnership named as defendant, for which the plaintiff performed the services, is demurrable as against a defendant corporation where it merely alleged that the corporation has taken over the liabilities of the partnership, because, although said allegation be interpreted to mean that the corporation assumed the obligation of the firm to the plaintiff, yet there were two separate and distinct causes of action improperly united. *Leszynsky v. Levinsohn* (1915), 170 App. Div. 514, 156 N. Y. Supp. 494.

Mutually agreed.—It is not good pleading to set forth the evidence relied on to establish a fact, and it is enough to allege that the parties "mutually agreed" without alleging what each said in making the agreement, or that there was a promise by one party to the other. *Grossman v. Schenker* (1912), 206 N. Y. 466.

Necessary parties.—While a trust company in action to enforce the liability of its stockholders under § 196 of the banking law, may be a proper party defendant, it is not a necessary party, and a demurrer on the ground of failure to join the trust company cannot be sustained. *Van Tuyl v. Scharmann* (1913), 208 N. Y. 53.

Where in a suit to compel individual defendants to account to the plaintiff for secret profits on the sale of the capital stock of a corporation, no misconduct on the part of the purchaser of the stock is alleged other than a general statement that it "is chargeable with knowledge of and responsibility for" the particular misrepresentations practiced upon the plaintiffs, a demurrer to the complaint by the purchaser should be sustained on the ground that there was no authority for making it a party defendant. *McManus v. Durant* (1912), 151 App. Div. 663, 136 N. Y. Supp. 223.

A cause of action against one defendant for breach of a contract to convey free of water rents and tenement house violations may not be united in the same complaint with a cause of action for breach of covenant in the deed of the premises delivered by said defendant and the other defendant, who was not a party to the contract

to convey. *Friz v. Pfaff* (1912), 78 Misc. 121, 137 N. Y. Supp. 886.

Where several as tenants in common have an undivided interest in the production rights of a play, one tenant in common who does not claim sole ownership, cannot maintain a suit to enjoin the production of the play, for the defendant may have acted under the authority of plaintiff's co-owner; moreover, in such suit the co-owners are necessary parties. *Nillson v. Lawrence* (1912), 148 App. Div. 678, 133 N. Y. Supp. 293.

In a suit in equity brought by a wife to set aside a separation agreement, made between the husband and wife through a trustee, which agreement provided for the support of the wife and infant son, the son and trustees are necessary parties. *Ducas v. Ducas* (1912), 150 App. Div. 397, 135 N. Y. Supp. 35.

Where real estate is conveyed just prior to the commencement of an action to foreclose a mechanic's lien thereon, the grantor is a proper but not a necessary party defendant. Where a defect of parties defendant appears upon the face of the complaint the remedy is by demurrer; otherwise it must be pleaded in the answer, and, in the absence of either, the defect is waived. *Pierce v. Kennedy* (1912), 75 Misc. 328, 135 N. Y. Supp. 537.

A demurrer by one codefendant, in an action to foreclose a mechanics lien, to the counterclaim of the other is unauthorized. *Joseph Joseph & Bros. Co. v. Marva Realty Corp.* (1917), 166 N. Y. Supp. 506.

Partition; failure to allege possession.—A complaint in an action for partition which sets forth the chain of title from a person named and alleges that he was seized and possessed of the premises upon a certain date, and that he died twenty-one years later, but fails to allege that he was seized or possessed of the premises at any time subsequent to the date named, or at the time of his death, or that any of the alleged heirs at law or devisees of the person named have since been seized or possessed of the premises, and also fails to state any reason why certain defendants are made parties, is insufficient, and a demurrer thereto should be sustained. *Martin v. Palmer* (1913), 156 App. Div. 327, 141 N. Y. Supp. 396.

Id.; appointment of executor or administrator.—Where a partition action is brought within three years after the death of a decedent from whom plaintiff derived title and no executor or administrator has been appointed, a complaint which fails to allege that fact is demurrable. *Dueringer v. Klocke* (1912), 78 Misc. 417, 139 N. Y. Supp. 676.

Prayer for relief; effect.—A demurrer upon the ground that a complaint states no cause of action cannot prevail if there be any cause of action stated, even if it

be for a less amount than that for which plaintiff demands judgment. *Hearn v. Schuchman* (1912), 150 App. Div. 476, 135 N. Y. Supp. 52.

An erroneous prayer for relief does not condemn a complaint if it states facts entitling the plaintiff to any relief at all. *Hochstein v. Schlanger* (1912), 150 App. Div. 124, 134 N. Y. Supp. 704.

Promissory note; facts constituting cause of action.—An allegation in a complaint in an action upon a non-negotiable note that the instrument was executed and delivered for a "valuable consideration" is a statement of fact and not a conclusion of law, and the complaint is not demurrable for failure to state facts constituting a cause of action. *St. Lawrence Co. Nat. Bank v. Watkins* (1912), 153 App. Div. 551, 138 N. Y. Supp. 116; rev'g 76 Misc. 633, 135 N. Y. Supp. 461.

In an action on a promissory note against the maker allegations of plaintiff's breach of an agreement to operate a certain hotel rented of defendant for a term at the agreed rental of ten per cent. of all gross receipts by plaintiff, pleaded as a counterclaim, states a cause of action. *Fuller v. Queens Land and Title Co.* (1913), 79 Misc. 617, 140 N. Y. Supp. 574.

An allegation that a non-negotiable note had been given for a valuable consideration is a mere legal conclusion and not of a fact. *Kinsella v. Lockwood* (1913), 79 Misc. 619, 140 N. Y. Supp. 513.

Supplemental complaint.—No separate demurrer lies to a supplemental complaint not served in the place of an amended complaint but merely alleging a conclusive adjudication of the issues since the commencement of the action. *Bilder v. Ellis* (1912), 148 App. Div. 647, 133 N. Y. Supp. 425.

Taxpayer's action.—The complaint, in a taxpayer's action to cancel a lease of town lands by said trustees, is insufficient if it contain no allegations that the lease was improvident, fraudulent or for an inadequate consideration. *Bachia v. Piepenbrink* (1912), 77 Misc. 362, 136 N. Y. Supp. 435.

If any cause of action is well stated in its facts, a mere error of the plaintiff as to the relief to which he is entitled, does not render the pleading demurrable. *Sims v. Farson* (1913), 157 App. Div. 38, 141 N. Y. Supp. 673.

Trustee; privity of contract.—Where the complaint, in an action to recover for the value of stock, plus dividends thereon, claimed to be held by the defendant as trustee, does not allege that the promise of the defendant to deliver the stock to the plaintiff was made upon consideration, and fails to show that there was any privity of contract between the plaintiff and the defendant, a demurrer should be sustained. *Sloan v. Mitchell* (1914), 164 App. Div. 687, 149 N. Y. Supp. 1015.

Demurrer to answer in mechanic's lien action.—In a suit against the owner and a subsequent lienor for the foreclosure of a mechanic's lien, a demurrer by the owner to the answer of the subsequent lienor on the ground that it did not state facts sufficient to constitute a cause of action, or ground for affirmative relief, is unauthorized. *Albright v. Trinity Presbyterian Church* (1915), 170 App. Div. 70, 157 N. Y. Supp. 79; *Joseph Joseph & Bros. Co. v. Marva Realty Corp.* (1917), 166 N. Y. Supp. 506.

Uniting causes of action against two defendants.—A complaint against two defendants to recover for the death of plaintiff's intestate is not demurrable on the ground that two causes of action have been improperly united, even though plaintiff has attempted to state a separate cause of action against each defendant, if in fact but a single cause of action is pleaded. *Sartori v. Litchfield Cons. Co.* (1912), 149 App. Div. 241, 133 N. Y. Supp. 720.

Waiver.—The objection of a misjoinder of parties plaintiff must be distinctly specified as a ground of demurrer, or it is waived. *Trustees of Sailors' Snug Harbor v. Carmody* (1912), 77 Misc. 494, 137 N. Y. Supp. 968.

§ 490. Demurrer to complaint must specify grounds of objection.

Waiver.—The objection of a misjoinder of parties plaintiff must be distinctly specified as a ground of demurrer, or it is waived. *Trustees of Sailors' Snug Harbor v. Carmody* (1912), 77 Misc. 494, 137 N. Y. Supp. 968.

Sufficiency of demurrer as to misjoinder of causes of action.—A demurrer to a com-

plaint on the ground that causes of action arising in tort have been united with causes of action arising on contract is not good if the specific defect is not pointed out. *Hevia v. Wheelock* (1914), 162 App. Div. 759, 148 N. Y. Supp. 165; *Holmes v. Camp* (1917), 180 App. Div. 409, 167 N. Y. Supp. 840.

§ 493. Defendant may demur to reply.

New matter insufficient in law.—Where the first three paragraphs of a reply to a counterclaim contain mere denials, and the

fourth paragraph begins, further replying to the defendant's counterclaim contained in her amended answer, and states new

matter clearly inconsistent with the matter alleged in the complaint, in violation of § 514, the defendant may demur to the paragraph containing the new matter, upon the ground that it is insufficient in law upon the face thereof, although the plaintiff has not specifically alleged that the new matter is stated to be a separate traverse to or avoidance of the counterclaim of the defendant. *Streeter v. Clouck*

(1916), 171 App. Div. 572, 157 N. Y. Supp. 698.

Separation.—In an action for separation, where the defense is abandonment, a reply which alleges defendant's adultery as a justification, is not inconsistent with the complaint and a demurrer thereto will be overruled. *Brownrigg v. Brownrigg* (1912), 78 Misc. 108, 140 N. Y. Supp. 778.

§ 494. When plaintiff may demur to answer.

The rule is that on demurrer to an answer for insufficiency the defendant may attack a complaint on the ground that it does not state facts sufficient to constitute a cause of action. A demurrer searches the record for the first fault in pleading and reaches back to condemn the first pleading that is defective in substance, because he who does not so plead as to invite an issue cannot compel his adversary so to plead as to accept it. *Chelsea Exchange Bank v. Travelers' Insurance Co.* (1916), 173 App. Div. 829, 160 N. Y. Supp. 225.

Where a complaint does not allege facts sufficient to constitute a cause of action a demurrer to the answer for insufficiency will not lie. *Lindebauer v. Weiner* (1916), 94 Misc. 612, 159 N. Y. Supp. 987.

Where a plaintiff demurs to an answer the defendant may test the sufficiency of the complaint. *Hull v. Hull* (1916), 172 App. Div. 287, 158 N. Y. Supp. 743.

Denials in an affirmative defense are not demurrable. *Black v. Gibbs* (1915), 158 N. Y. Supp. 69.

Demurrer to defense which includes denials of material allegations of complaint.

—It is well settled that a demurrer to a separate defense does not lie where there is included therein a denial of material allegations of the complaint. Hence, where a defendant alleges certain facts as a separate defense in which are incorporated denials contained in a prior defense which put in issue substantially all of the facts upon which the plaintiff claims to be entitled to recover, a demurrer to the defense should not be sustained. If a plaintiff is aggrieved by denials set out in a defense demurred to, the same may be stricken out on motion, but so long as they remain a demurrer will not lie even though the other matters pleaded do not constitute a defense. *Truax v. Rothschild* (1916), 171 App. Div. 509, 157 N. Y. Supp. 634.

Corporation; denial of information by officer.—Where a verified complaint alleges goods sold and delivered to the defendant corporation, an answer verified by the defendant's treasurer denying any knowledge or information sufficient to form a belief as to the allegations of the complaint is good. *Scranton Lehigh Coal Co. v. Hetkin*

& Co. (1912), 78 Misc. 512, 138 N. Y. Supp. 617.

Amended answer.—The validity of a second amended answer may be tested by demurrer. *Block v. Nussbaum* (1914), 163 App. Div. 463, 148 N. Y. Supp. 594.

Service of amended answer.—Where the legal conclusions arising from the allegations of a complaint are met by denials in the answer and a demurrer to a separate defense is sustained, the plaintiff is entitled to judgment on the complaint with leave to defendant to serve an amended answer. *German Savings Bank v. Dunn* (1912), 75 Misc. 251, 135 N. Y. Supp. 56.

Complaint and answer defective.—Where in an action to recover moneys alleged to have been paid under duress, both the complaint and the answer are defective, and the plaintiff demurs to one of the defenses, the defective complaint cannot be made the basis of a successful demurrer. *Title Guarantee & Trust Co. v. City of N. Y.* (1912), 205 N. Y. 496.

Effect of demurrer.—On demurrer to a separate defense, the allegations of the complaint to which the defense is pleaded, as well as the allegations of the defense, are to be taken as true. *Berg v. Bates* (1912), 152 App. Div. 12, 137 N. Y. Supp. 1032.

Material allegations contained in a complaint must be taken as true upon demurrer to separate defenses, where such defenses do not deny such allegations. *Colwell Lead Co. v. Home Title Ins. Co. No. 1* (1913), 154 App. Div. 83, 138 N. Y. Supp. 738.

Where plaintiff inadvertently omitted to renew a demurrer until his time had elapsed by a few days, he should be allowed to open his default, where he had demurred to a counterclaim and thereafter defendant served an amended answer containing the same identical counterclaim; and the sufficiency of the counterclaim should not be definitely passed upon. *De Moro v. Tull* (1917), 178 App. Div. 17, 165 N. Y. Supp. 93.

Legal conclusion.—The allegation in an answer of a legal conclusion does not limit the effect of the allegations of fact. *International Trust Co. v. Caroline* (1912), 78 Misc. 179, 137 N. Y. Supp. 932.

Information or knowledge, denial of.—A pleading which sets out that "The defendant * * * for an answer to the amended complaint herein states: 1. That the defendant herein denies that he has any knowledge or information sufficient to form a belief as to the allegations," etc., is sufficient. Where such denials are not addressed to any specific allegations of any paragraph of the complaint nor to each and every allegation thereof, but "to the allegations contained" in a specified paragraph, it is not good pleading. *Kirschbaum v. Eschmann* (1912), 205 N. Y. 127.

Right to attack defense.—Where a plaintiff has been ordered by the court to reply to a defense by way of avoidance, his failure to do so merely admits the facts set forth in the defense; there is no waiver of his right to attack the defense as insufficient in law. *Humboldt Exploration Co. v. Fritsch* (1912), 150 App. Div. 90, 134 N. Y. Supp. 747.

Bail bond; defense of satisfaction.—In an action to recover against the surety on a bail bond, a defense that all proceedings under which the bond was given had been vacated upon condition of the payment of certain costs, and that the amount thereof had been tendered and refused, is not demurrable. *Battle v. National Surety Co.* (1912), 78 Misc. 253, 138 N. Y. Supp. 46.

Divorce; defense of pending action for separation.—In an action for an absolute divorce the defense of another action pending between the same parties for separation on the ground of abandonment and non-support is demurrable for insufficiency. *Hall v. Hall* (1912), 150 App. Div. 688, 135 N. Y. Supp. 741.

Forged check; defense of knowledge by plaintiff of forgery.—In an action by the payee of a check to recover the amount of such check paid by the drawee bank, upon which the payee's signature was forged, a defense that plaintiff "knew or had means of ascertaining, or notice or knowledge of facts sufficient to put them upon inquiry" as to the facts of the forgery before the check was presented is demurrable for insufficiency. *Schnabel v. Hanover National Bank* (1912), 78 Misc. 35, 137 N. Y. Supp. 727.

Employee; injuries, action for; defense of statute.—In a common law action by an employee to recover damages for injuries sustained while employed in New Jersey, a demurrer to a separate defense setting up the Workmen's Compensation Act of that state will be overruled. *Albanese v. Stewart* (1912), 78 Misc. 581, 138 N. Y. Supp. 942.

Libel; answer pleading justification.—In an action for libel, an answer pleading justification, need not meet the immaterial and irrelevant facts alleged in the libel. *Tully v. New York Times Co.* (1912), 78 Misc. 165, 137 N. Y. Supp. 962.

Necessity that partial defense be pleaded as such.—Where a defense set out is a partial defense only, to be good it should be pleaded as such, and if not then it is demurrable on the ground that it is insufficient in law on its face. A complete defense when pleaded as such must go to the entire cause of action. *Levitt v. O'Rourke Engineering Constr. Co.* (1913), 160 App. Div. 869, 144 N. Y. Supp. 474.

Non-joinder or parties defendant, pleaded as a complete defense, is demurrable where the facts alleged are effective only as a partial defense. *Pollitz v. Wabash Railroad Co.* (1912), 150 App. Div. 709, 135 N. Y. Supp. 785.

Other matters.—If the facts alleged in an answer constitute a defense, the fact that it also contains other matters does not render it demurrable. *Gibbs v. Knickerbocker Savings & Loan Co.* (1912), 153 App. Div. 369, 138 N. Y. Supp. 515.

Plain statement of facts.—Although a plaintiff in framing a demurrer has not complied literally with the provisions of this section, the pleading may be deemed sufficient where the grounds are so plainly stated that they may be clearly understood. *Compagnie Generale v. Herzig & Sons Co.* (1915), 89 Misc. 573, 153 N. Y. Supp. 717.

Promissory note; false representation and conclusions of law, as defenses.—In an action upon a note a defense containing nothing but conclusions of law is insufficient; so, too, is a defense that plaintiff made false representations, unaccompanied by an allegation that plaintiff knew them to be false when made; the same is true of a defense alleging an extension of time for payment, where there is no allegation of a valid agreement, supported by a consideration, to that effect. *Hodgens v. Jennings* (1912), 148 App. Div. 879, 133 N. Y. Supp. 584.

In an action on a promissory note against the maker allegations of plaintiff's breach of an agreement to operate a certain hotel rented of defendant for a term at the agreed rental of ten per cent. of all gross receipts by plaintiff, pleaded as a counterclaim, states a cause of action. *Fuller v. Queens Land and Title Co.* (1913), 79 Misc. 617, 140 N. Y. Supp. 574.

Reformation of deed; mutual mistake.—Where a plaintiff brings an action to reform a deed on the ground of mutual mistake, a counterclaim showing that no mutual mistake existed, tends to diminish or defeat plaintiff's recovery and is not demurrable. *Stolitzky v. Linscheid* (1912), 150 App. Div. 253, 134 N. Y. Supp. 805.

A demurrer to a defense which alleges that the Workmen's Compensation Commission has disallowed a claim should be sustained, where the complaint states a good cause of action and some of its allegations are germane to a claim under the Work-

men's Compensation Law, but it does not appear affirmatively by the complaint as a whole that the claim is of that character. *Naud v. King Sewing Machine Co.* (1917), 178 App. Div. 31, 164 N. Y. Supp. 200.

§ 495. Demurrer to counterclaim, when defendant demands an affirmative

Overruled.—A demurrer to a whole of the counterclaims be proper. *Fliess v. Hoy* (1912), 150 App. Div. 555, 135 N. Y. Supp. 44.

§ 496. Demurrer to counterclaim must specify grounds of objection.

Motion for judgment on pleadings.—The requirement as to specifying the grounds of objection to a counterclaim upon demurrer thereto, does not apply to a motion for judgment on the pleadings. *Desaar v. Gunther* (1917), 98 Misc. 319, 162 N. Y. Supp. 794.

§ 497. Amendments in certain cases after decision of demurrer.

Application.—*Leszynsky v. Levinsohn* (1915), 170 App. Div. 514, 156 N. Y. Supp. 494.

Acceptance of amended complaint after expiration of time; terms.—Where a plaintiff is ordered to serve an amended complaint making allegations more definite and certain, the court should not require the defendant to accept service of an amended complaint after the twenty days set for said service have expired without imposing terms. *Palma v. Town of North Hempstead* (1915), 170 App. Div. 512, 156 N. Y. Supp. 468.

It is in the discretion of the court to allow amendment upon sustaining a demurrer, and a plaintiff will not be permitted to amend his complaint so as to evade the issues tendered by the original complaint. *Otis Elevator Co. v. Rochester Friendly Home* (1918), 171 N. Y. Supp. 463.

Effect of appeal from order overruling demurrer.—Where a defendant, after an order has been entered overruling his demurrer and granting him leave to answer, appeals from the order and then serves an answer within the time limited, the answer supersedes the demurrer and the appeal will be dismissed. *Keepers v. Hartley Co.* (1912), 150 App. Div. 252, 134 N. Y. Supp. 896.

Leave to plead over after a demurrer has been sustained, is not a matter of absolute right, but of favor, and it is not an abuse of discretion to deny such leave, where the plaintiff has already twice attempted to state a cause of action without success.

Hamilton Trust Co. v. Schevlin (1913), 156 App. Div. 307, 141 N. Y. Supp. 232.

A complaint cannot be amended by dropping a defendant and a cause of action with leave of the court after a demurrer thereto. *O'Connor v. Christopher* (1915), 90 Misc. 77, 152 N. Y. Supp. 955.

Finality of judgment sustaining demurrer without leave to amend.—Where the appellate division reverses an order of the special term overruling the demurrer and denying a motion for judgment on the pleadings but does not grant leave to amend, the judgment entered upon its decision is necessarily final and upon the merits in favor of the appellant. *Maldonado v. Yglesias* (1914), 162 App. Div. 1, 147 N. Y. Supp. 2.

Service of amended answer.—Where the legal conclusions arising from the allegations of a complaint are met by denials in the answer and a demurrer to a separate defense is sustained, the plaintiff is entitled to judgment on the complaint with leave to defendant to serve an amended answer. *German Savings Bank v. Dunn* (1912), 75 Misc. 251, 135 N. Y. Supp. 56.

A second application to serve an amended complaint should be denied where the proposed complaint does not state a cause of action in that it does not seek to reform the contract of guaranty upon which the suit is brought, and which has been held to be insufficient to charge the defendant with liability. *Hamilton Trust Co. v. Schevlin* (1913), 156 App. Div. 307, 141 N. Y. Supp. 232.

§ 498. When objection may be taken by answer.

Foreign corporation; certificate of authority.—Where in an action by a foreign corporation for goods sold in another state, neither the complaint nor the answer alleges that the plaintiff was doing business in this state, or that the goods were sold or delivered therein, the dismissal of the complaint, on the ground that plaintiff was doing business within the state and had not obtained the certificate required by law, is error. *Stafford Mfg. Co. v. Newman* (1912), 75 Misc. 636, 133

N. Y. Supp. 1073. See *Singer Sewing Mach. Co. v. Foster* (1912), 75 Misc. 641, 133 N. Y. Supp. 1072.

Defect in parties.—Where a defect in parties plaintiff appears upon the face of the complaint, objection should be taken by demurrer. *Rosebloom v. Maryland Casualty Co.* (1912), 153 App. Div. 23, 137 N. Y. Supp. 1064.

Statute of frauds.—The defense of the statute of frauds must be pleaded to be available. *Kelley v. Smith Co.* (1912), 150 App. Div. 428, 135 N. Y. Supp. 16.

Time to make objection to jurisdiction.—Objection of want of jurisdiction of the subject matter may be raised at any time.

Bandler v. Hill (1914), 84 Misc. 359, 146 N. Y. Supp. 98.

Waiver.—Defendants waive any objection to the joinder of two causes of action by not demurring, where the defect appears upon the face of the complaint. *Berg v. Bates* (1912), 153 App. Div. 12, 137 N. Y. Supp. 1032.

Objection not taken until trial.—An objection, that a recovery has been granted against the defendants jointly on causes of action on which they are respectively liable in different senses, not having been taken until the trial, is waived. *Ridley v. Sudbrink* (1918), 105 Misc. 52, 172 N. Y. Supp. 517.

§ 499. Objection; when deemed waived.

Foreign corporation; certificate of authority.—Where in an action by a foreign corporation for goods sold in another state, neither the complaint nor the answer alleges that the plaintiff was doing business in this state, or that the goods were sold or delivered therein, the dismissal of the complaint, on the ground that plaintiff was doing business within the state and had not obtained the certificate required by law, is error. *Stafford Mfg. Co. v. Newman* (1912), 75 Misc. 636, 133 N. Y. Supp. 1073.

Parties; defect in; failure to plead or demur.—Where real estate is conveyed just prior to the commencement of an action to foreclose a mechanic's lien thereon, the grantor is a proper but not a necessary party defendant. Where a defect of parties defendant appears upon the face of the complaint the remedy is by demurrer; otherwise it must be pleaded in the answer, and, in the absence of either, the defect is waived. *Pierce v. Kennedy* (1912), 75 Misc. 328, 135 N. Y. Supp. 537; *Larsen & Son v. Newmark & Davis, Inc.* (1918), 182 App. Div. 724, 170 N. Y. Supp. 268.

Failure to state a cause of action.—Where in an action to recover upon a policy of insurance on an automobile upon the ground that it was stolen, and while being illegally used by the person taking it was destroyed, it appeared both from the complaint and the evidence that the alleged loss occurred before the policy became effective, and hence that the complaint failed to state a cause of action and

the proof followed the pleading, the objection was not waived by failure to raise it more definitely than by a general motion to dismiss on the ground that the complaint does not state and the evidence does not establish a cause of action. *Troy Automobile Exchange v. Home Ins. Co.* (1917), 221 N. Y. 58.

Waiver.—Defendants waive any objection to the joinder of two causes of action by not demurring, where the defect appears upon the face of the complaint. *Berg v. Bates* (1912), 153 App. Div. 12, 131 N. Y. Supp. 1032.

Want of capacity to sue.—Where the superintendent of banks brings an action to enforce a bond and mortgage held by a delinquent corporation in his own name, instead of in the name of the delinquent corporation as required by the banking law, the fault with the pleading is not that it does not set forth a cause of action, but that the superintendent of banks has not the legal capacity to sue. This defect appearing on the face of the complaint is waived by failure to demur. *Van Tuyl v. New York Real Estate Security Co.* (1912), 153 App. Div. 409, 138 N. Y. Supp. 541.

The objection of lack of capacity to sue must be raised by demurrer if the defect appears on the face of the complaint, otherwise by a defense set forth in the answer, or it will be waived. *Boffe v. Consolidated Telegraph & Electrical Subway Co.* (1916), 171 App. Div. 392, 157 N. Y. Supp. 318.

§ 500. Answer; what to contain.

An affirmative defense is regarded as a separate plea, and in determining its sufficiency all of the allegations of the complaint not denied in the separate defense, even though elsewhere denied by the answer, are deemed admitted. *Mendelson v. Margulies* (1913), 157 App. Div. 666, 142 N. Y. Supp. 825.

An affirmative statement in an answer inconsistent with an allegation of the com-

plaint is not a denial of such allegation. Principle applied in a case where a complaint alleged certain facts in respect to a claim for articles taken by the defendants after they had completed certain plumbing and heating work on a building, and the answer alleged that the work was completed for a definite sum. *Lord v. Woolley* (1913), 82 Misc. 656, 144 N. Y. Supp. 385.

Denials; affirmative defense.—A denial has no place in an affirmative defense, except when it becomes necessary to deny the existence of some fact alleged in the complaint in order to perfect the answer as a complete affirmative defense. *Einstein v. Einstein* (1913), 158 App. Div. 498, 143 N. Y. Supp. 706.

A denial of the material allegations of a complaint in an action for goods sold and delivered is insufficient. *New York Coach & Auto Lamp Co. v. Brown* (1913), 82 Misc. 92, 143 N. Y. Supp. 100.

Denials essential to affirmative defense should not be stricken out. *Socurbee, Inc. v. Jatison Construction Co.* (1918), 181 App. Div. 662, 168 N. Y. Supp. 842.

Insufficiency of denial on information and belief. *Kneuper Specialty Co. v. Kneuper* (1916), 171 App. Div. 555, 157 N. Y. Supp. 395.

Knowledge or information; denial.—A denial of "any knowledge or information sufficient to form a belief" does not meet the requirements of section 2938 relating to proceedings in the justice's court. *Thornton v. Bell* (1914), 164 App. Div. 580, 150 N. Y. Supp. 39.

Where a verified complaint alleges goods sold and delivered to the defendant corporation, an answer verified by the defendant's treasurer denying any knowledge or information sufficient to form a belief as to the allegations of the complaint is good. *Scranton Lehigh Coal Co. v. Hetkin & Co.* (1912), 78 Misc. 512, 138 N. Y. Supp. 617.

A pleading which sets out that "the defendant * * * for an answer to the amended complaint herein states: 1. That the defendant herein denies that he has any knowledge or information sufficient to form a belief as to the allegations," etc., is sufficient. Where such denials are not addressed to any specific allegations of any paragraph of the complaint nor to each and every allegation thereof, but "to the allegations contained" in a specified paragraph, it is not good pleading. *Kirschbaum v. Eschmann* (1912), 205 N. Y. 127.

An answer of a corporation, which denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs, naming them, of the complaint, is good, and a motion by plaintiff for judgment on the pleadings must be denied. *Jacobs v. Wanamaker* (1912), 77 Misc. 563, 138 N. Y. Supp. 387.

In condemnation proceedings brought by a railroad company, an answer which merely denies any knowledge or information sufficient to form a belief as to plaintiff's incorporation, raises no issue, for the provisions of § 1776 apply to condemnation proceedings. *Long Island Railroad Co. v. Jones* (1912), 151 App. Div. 407, 135 N. Y. Supp. 954.

Denial upon information and belief is permissible, although not expressly au-

thorized by this section. *Cook v. Broughton* (1918), 183 App. Div. 46, 171 N. Y. Supp. 28.

As to denial of knowledge of information of foreign statute, see note to section 514.

Sufficiency of denial of knowledge or information is question of law.—Whether the denial of any knowledge or information is sufficient is a question of law to be determined upon the trial, and is not properly to be tested by a motion to make definite and certain. *Lasher v. McDermott* (1914), 162 App. Div. 232, 147 N. Y. Supp. 446.

A denial of knowledge or information sufficient to form a belief with respect to matters which are unmistakably within the knowledge of the defendant who interposes such an answer is insufficient to put any of the averments of the complaint in issue. *Bank of Long Island v. Schildhrant* (1916), 162 N. Y. Supp. 699.

Denial of knowledge or information as to matters of public record; method of testing defect.—While a denial of knowledge or information of the allegations of a complaint as to matters of public record, open by law to everybody, is presumptively false or frivolous, a defendant should have an opportunity of disclosing to the court the circumstances and conditions, if existing, which give his answer of such a nature validity. A motion to strike out the answer, under section 538 of the code of civil procedure, is the proper method of testing an alleged defect of that description rather than a motion for judgment on the pleadings under section 547. *Harley v. Plant* (1914), 210 N. Y. 405, reversing 149 App. Div. 719, 134 N. Y. Supp. 122.

Denial of knowledge or information; matters of public record.—A denial of knowledge or information sufficient to form a belief as to matters of public record of which the defendant is capable of informing herself is insufficient. *Kingsbury v. Anderson* (1917), 162 N. Y. Supp. 730.

Denial of knowledge or information sufficient to form belief as to non-payment of taxes.—Where the plaintiff positively alleges non-payment of the taxes due on the property, as required by the city charter, the defendant may traverse the same by an allegation that he has no knowledge or information sufficient to form a belief as to the truth of the allegation. *Altman v. Bungay Co.* (1914), 161 App. Div. 583, 146 N. Y. Supp. 949.

A denial "upon information and belief" is not expressly authorized by the code of civil procedure, but may be treated as a "denial of knowledge or information thereof sufficient to form a belief." *Childs v. Childs* (1912), 150 App. Div. 656, 135 N. Y. Supp. 972.

A denial upon information and belief, even as to matters unquestionably within the defendant's knowledge, cannot be stricken out as sham. *Rockowitz v. Siegel*

(1912), 151 App. Div. 636, 136 N. Y. Supp. 192.

Denials of knowledge or information sufficient to form a belief.—Where a complaint alleges that the plaintiff rendered certain work, labor and services and furnished materials to the defendant at its special instance and request and for which it agreed to pay a certain amount as the fair and reasonable value, and the answer denies any knowledge or information sufficient to form a belief as to the allegation that the defendant agreed to pay a stated amount, and also denies upon information and belief that said amount represents the fair and reasonable value of the work, services and labor performed and materials furnished, the sufficiency of such denials should be tested by motion in advance of the trial. *Little & Ives Co. v. Lecouver Press Co.* (1916), 171 App. Div. 233, 157 N. Y. Supp. 350.

Denial of allegations not admitted.—Where defendants admit and allege certain facts and then conclude, "except as so expressly admitted, said defendants deny the allegations and each of them in paragraph third of the said amended complaint contained," they should not be compelled to make a specific admission or denial of the facts set forth in the complaint. *Glenn v. Union-Buffalo Mills Co.* (1913), 154 App. Div. 513, 139 N. Y. Supp. 70.

Denial of material allegations of complaint, in an action for goods sold and delivered, in the language of the statute, is insufficient. The statute may not be construed to allow a denial qualified by the word "material." There must be a specific denial of each material allegation in language sufficient to show upon what part of the complaint the denial rests. *New York Coach and Auto Lamp Co. v. Brown* (1913), 82 Misc. 92, 143 N. Y. Supp. 100.

General denial.—A general denial in the answer in each and every other allegation of the complaint following an admission of the due presentation of plaintiff's claim and its rejection was insufficient to shift from defendant the burden of proof as to payment of plaintiff's claim. *Ives v. Male* (1912), 75 Misc. 387, 135 N. Y. Supp. 526.

Scope of proof under general denial.—Under a general denial the defendant may controvert by evidence anything which the plaintiff is bound to prove in the first instance to make out a cause of action. The defendant should never plead as a "defense" anything which is embraced within the general issue raised by the general denial. A defense can consist only of matter outside the scope of the general issue. *General Automobile Supply Co. v. Rockwell* (1916), 162 N. Y. Supp. 210.

Necessity for pleading facts.—If the defendant desires to plead that the court has no jurisdiction of his person, it is incumbent upon him to allege the facts which he claims establishes that the court is with-

out jurisdiction. *Bushansky v. Lantingberg* (1914), 84 Misc. 37, 145 N. Y. Supp. 898.

Necessity that defense be as broad as allegations of complaint.—In an action for libel, based upon a letter alleged to charge that the plaintiff obtained moneys by false representations and should be punished, etc., representations alleged to have been made by the plaintiff, which were promissory in their nature, cannot be set up as a complete defense and justification, as they are not as broad as the charge, and a demurrer to such complete defense should be sustained. *Block v. Nussbaum* (1914), 160 App. Div. 678, 146 N. Y. Supp. 55.

New matter; defense based on confession and avoidance.—Where a separate defense consists of a statement of new matter, a denial therein of the allegations of the complaint should be stricken out. The defense of new matter is based upon the theory of confession and avoidance. *Einstein v. Einstein* (1913), 158 App. Div. 498, 143 N. Y. Supp. 706.

When new matter in an answer by way of avoidance is such that, if true, it will constitute a complete defense unless in some manner avoided, the court will as a general rule order that a reply be made to the answer. *Schweitzer v. H. A. P. A. Gesellschaft* (1912), 149 App. Div. 900, 134 N. Y. Supp. 812.

A defense of new matter must be based on the theory of confession and avoidance and should not contain a denial except where a denial of the existence of some fact alleged in the complaint is necessary in order to perfect the answers as a complete affirmative defense; and in determining the sufficiency thereof all the allegations of the complaint not denied thereby are deemed admitted even though elsewhere denied by the answer. *Mulinos v. Walkof* (1916), 95 Misc. 165, 159 N. Y. Supp. 16.

A material fact alleged is not controverted or put in issue by a statement inconsistent with the facts alleged or from which a general denial may be implied or inferred. *Mayer v. Chamberlain* (1917), 178 App. Div. 326, 164 N. Y. Supp. 806.

Inconsistent allegations.—Material allegations of a complaint are not put in issue by inconsistent allegations in the answer even though the intention to deny them is plainly inferable or to be implied from the inconsistent allegations. *Strong v. Eckert* (1917), 180 App. Div. 526, 167 N. Y. Supp. 1069.

Pleading fact alleged in complaint.—An allegation of fact in the complaint need not be pleaded in the answer to enable the defendant to take advantage of it. *Heffernan v. Prudential Insurance Co.* (1914), 88 Misc. 93, 150 N. Y. Supp. 644.

Separate denial.—Where a complaint alleges that a certain person is the president of the defendant, an express company, and the answer does not deny the same, defendant should not be required to

"separately deny or admit" the allegation as it is already admitted. *Walsh v. Barrett* (1913), 154 App. Div. 461, 139 N. Y. Supp. 68.

Allegations of a complaint not denied in a separate defense will be regarded as admitted even though denied elsewhere in the answer. *Clarkin v. City of New York* (1915), 91 Misc. 98, 154 N. Y. Supp. 1019.

The sufficiency of a separate defense cannot properly be tested by a motion under this section to strike it out as irrelevant or redundant. *Plymouth Garage, Inc. v. Shanly* (1915), 170 App. Div. 61, 156 N. Y. Supp. 23.

Where a separate defense, though bad in itself, contains denials of material allegations of the complaint the defense is good against a demurrer so long as the denials remain. *Patten v. Harper's Weekly Corporation* (1916), 93 Misc. 368, 158 N. Y. Supp. 70.

Denial not an allegation.—The words "said defendant repeats all the allegations hereinbefore contained as if the same were here specifically repeated and realleged" placed at the beginning of several alleged defenses, do not bring into the defenses the denials previously written in the answer, because a denial is not an "allegation." *Dry Milk Co. v. Dairy Products Co.* (1916), 171 App. Div. 296, 156 N. Y. Supp. 869.

Unauthorized answer.—An answer which admits each allegation of the complaint and prays that plaintiff have the relief prayed for by him, and contains nothing more, is not such a pleading as is authorized by law or practice. *Eysaman v. Nelson* (1913), 79 Misc. 304, 140 N. Y. Supp. 183, aff'd 165 App. Div. 950, 150 N. Y. Supp. 1085.

Dismissal of complaint where defense established.—If a separate defense, complete in itself without a denial, is established, the defendant is entitled to a dismissal of the complaint though every allegation thereof be admitted or proved. *Clarkin v. City of New York* (1915), 91 Misc. 98, 154 N. Y. Supp. 1019.

No provision is made for an answer which admits each allegation of the complaint. No such pleading is authorized by law or by practice in this state. On such a pleading there is no issue to be presented to the court, much less an issue for trial. *Davidson v. Ream* (1916), 97 Misc. 89, 161 N. Y. Supp. 73.

Knowledge of facts unmistakably in knowledge of adverse party.—It is only where the truth or falsity of facts alleged is unmistakably in the knowledge of the adverse party that his denials of any knowledge or information sufficient to form a belief thereof can be treated as a nullity, and judgment on the pleading granted. *Halbe v. Adams* (1916), 172 App. Div. 186, 158 N. Y. Supp. 380.

Adequate remedy at law must be pleaded

as a defense. *Bloomquist v. Farson* (1915), 170 App. Div. 64, 156 N. Y. Supp. 47.

The proper procedure to test the sufficiency of a defense is to demur or to make a motion for judgment upon the pleadings. *Bradley v. McCutcheon* (1916), 161 N. Y. Supp. 394.

Matter not designated as a counterclaim must be assumed to have been intended as a defense. *Gruhn v. Eppig* (1916), 175 App. Div. 787, 161 N. Y. Supp. 629.

Pleas of cause as counterclaim and as separate action.—If the same person voluntarily and unnecessarily plead as a counterclaim a cause of action, and thereafter pleads the same cause in a separate action against the same defendant, the plea of another action pending is available to his adversary. *Cornell v. Bonsall* (1917), 176 App. Div. 798, 163 N. Y. Supp. 384.

When a defendant pleads a counterclaim, he virtually pleads it as a plaintiff. *Cornell v. Bonsall* (1917), 176 App. Div. 798, 163 N. Y. Supp. 384.

Where a counterclaim is based on a written contract, allegations of knowledge of special circumstances as a basis for special damage are relevant; but negotiations and conversations prior to the contract should be eliminated, as well as allegations relating to a breach of warranty, where the sole claim is one for damages for nondelivery. *T. H. Symington Co. v. John Thomson Press Co.* (1918), 172 N. Y. Supp. 677.

Counterclaim barred by statute of limitations.—A claim against a legatee which is barred by limitation cannot be set off against the legatee in an action to recover a legacy. *Kimball v. Scribner* (1916), 161 N. Y. Supp. 511.

A counterclaim which merely alleges that prior to the time stated in the complaint the plaintiff was indebted to a certain person in a specified sum for services rendered and that no part of the indebtedness has been paid and the whole amount is justly due and owing by the plaintiff and that the person to whom the debt is due has assigned it to the defendant, states merely conclusions of the pleader and is insufficient. *Groshut v. Kinetophote Corporation* (1915), 154 N. Y. Supp. 126.

Counterclaims and defenses should be separately stated. *Walker v. James J. Matchett Co.* (1917), 167 N. Y. Supp. 600.

Bill of particulars; proofs to establish counterclaim.—A bill of particulars will not be ordered on motion of the defendant, where, if granted, it would impose upon the plaintiff the burden of furnishing the facts upon which a counterclaim set up by the defendant rests. *Woodcock v. Corning* (1916), 162 N. Y. Supp. 258.

Arbitration; allegation as to agreement to arbitrate stricken out.—Where, in an action to recover the purchase price of merchandise, the plaintiffs, after the nec-

essary allegations, further allege that they have offered to arbitrate with the defendants, which offer has been rejected, and the defendants deny the same, statements in complete defense that the provisions for arbitration were in themselves null and void, and hence ousted the court of jurisdiction, and that the plaintiffs have failed to comply with the agreement for arbitration, are irrelevant and redundant, and should be stricken out. *Barry v. Silberstein* (1914), 164 App. Div. 220, 149 N. Y. Supp. 627.

Consideration; necessity for pleading lack.—A written instrument for the payment of money imports a consideration, and the defense of lack of consideration must be pleaded by answer; it cannot be raised by demurrer. *Seneca Falls v. Botach* (1914), 86 Misc. 481, 149 N. Y. Supp. 320.

Contract; non-payment not put in issue by denial.—A complaint to recover liquidated damages on breach of a contract fails to state a cause of action if it fails to allege non-payment, but where non-payment is alleged, that allegation is not put in issue by a general denial. *Posner v. Rosenberg* (1912), 149 App. Div. 272, 133 N. Y. Supp. 704.

Oral promise to pay amount due on contract.—The answer in an action to recover on an oral promise to pay plaintiff the amount due on a contract for the completion of a building which alleges that such promise was a promise to pay the debt of another and therefore void under the statute of frauds, is demurrable, since it appeared that the defendant had an interest in the building and was benefited by the promise. *Kleinman v. Auerbach* (1913), 82 Misc. 436, 143 N. Y. Supp. 1033.

Contributory negligence.—The requirement of section 202a of the labor law, that the defendant must allege contributory negligence, must be read in connection with this section. *Ithaca Trust Co. v. Driscoll Brothers & Co.* (1914), 163 App. Div. 54, 148 N. Y. Supp. 775.

Demurrer withdrawn; effect on answer.—The fact that a defendant demurs to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action does not, where such demurrer is withdrawn and leave to answer is given, preclude the defendant from setting up any facts which he might ordinarily have set up by way of answer. *McCargo v. Jergens* (1912), 206 N. Y. 363.

Estoppel in pais.—An estoppel *in pais*, like an estoppel of record, may be received as evidence of the fact in issue without being pleaded, and if proved is equally conclusive. *Feinberg v. Allen* (1913), 208 N. Y. 215.

Former judgment must be pleaded.—A former judgment in a suit between the same parties to be available as a bar or estoppel must be pleaded as a defense.

Westminster Presbyterian Church v. Presbytery (1914), 211 N. Y. 214, reversing 152 App. Div. 949, 137 N. Y. Supp. 1148.

Idem; necessity that parties be same in former action.—To render a plea of *res adjudicata* available the other action must be one in which the present plaintiff is the plaintiff and the present defendant is the defendant. If the party who interposes such defense is a plaintiff in such other action it is no defense although for the same cause. In respect to this question the court said:

"The very foundation of such a defence is the maxim '*nemo debet bis vexari*,' and manifestly this can have no application when the first suit is brought, not by, but against, the person who is plaintiff in the second action." *Westminster Presbyterian Church v. Presbytery* (1914), 211 N. Y. 214, reversing 152 App. Div. 949, 137 N. Y. Supp. 1148.

Insurance policy; defense of fraud.—An allegation in the answer of fraud, in an action to recover on a policy of burglary insurance, if established, is a defense. *Spingarn v. National Surety Co.* (1912), 76 Misc. 248, 134 N. Y. Supp. 817.

Landlord and tenant; breach of covenant.—In an action by a tenant against the landlord to recover money deposited to secure the faithful performance of the lease, the landlord may plead as a defense a breach of covenant contained in the lease; he is not bound to plead the breach by way of set-off or counterclaim. *Schattman v. Maze Realty Co.* (1912), 150 App. Div. 559, 135 N. Y. Supp. 47.

Separation agreement; defense of adultery of wife.—The adultery of a wife, established by competent proof, is such misconduct as constitutes a defense to an action by her to recover an installment due under a separation agreement providing for her support. *Roth v. Roth* (1912), 77 Misc. 673, 138 N. Y. Supp. 573.

In an action brought by a wife for separation, the husband cannot allege as a defense fraudulent representations by which he was induced to contract the marriage and which might warrant an action on his part for an annulment. *Ostro v. Ostro* (1915), 169 App. Div. 790, 155 N. Y. Supp. 681.

Libel; privilege should be pleaded.—Where it appears from the complaint in an action for libel that the publication is privileged, an allegation of privilege in the answer may become unnecessary, although, as a general rule, privilege is a matter of defense, and should be pleaded in order to be available. *Tierney v. Rupert* (1912), 150 App. Div. 863, 135 N. Y. Supp. 365.

Mortgage foreclosure; payment pleaded.—In an action to foreclose a mortgage, the defense of payment is an affirmative one and must be pleaded and proved. Red-

mond v. Hughes (1912), 151 App. Div. 99, 135 N. Y. Supp. 843.

Payment of note; specific denial.—Where the answer in an action on a promissory note pleads payment as a defense, there need be no specific denial of non-payment as alleged in the complaint. *Harris v. Striker* (1912), 77 Misc. 219, 135 N. Y. Supp. 762.

Payment as affirmative defense.—As a general rule payment is an affirmative defense and cannot be raised by a mere denial; but where the non-payment of a sum of money is a fact upon which the plaintiff bases his cause of action for the recovery of a separate and distinct sum of money, so that the burden of pleading non-payment is upon him, the fact of non-payment is put in issue by a denial. *Altman v. Bungay Co.* (1914), 161 App. Div. 583, 146 N. Y. Supp. 949.

Telephone service; denial of indebtedness.—Where, in an action to recover on a contract for telephone service, the mailing of the contract is admitted by the answer, allegations thereof that from and after a certain date the service was defective and of no value, and that the defendant could not use the same, are simply conclusions of law and raise no issue. A mere denial of indebtedness to the amount sued for is insufficient. *New York Telephone Co. v. Simon* (1912), 77 Misc. 192, 137 N. Y. Supp. 542.

Ultra vires.—The defense of *ultra vires*

is always an affirmative defense and must be pleaded. *Gordon Malting Co. v. Bartels Brewing Co.* (1912), 206 N. Y. 528.

A defense that a contractor for municipal work violated the labor law by requiring or permitting his employees to work more than eight hours a day must be pleaded as an affirmative defense, and the answer must negative the application of the exception in the statute with respect to extraordinary emergencies. *Molloy v. Village of Briarcliff Manor* (1916), 217 N. Y. 579.

Action against guarantor.—In an action on a guaranty to pay for certain merchandise if the plaintiff would deliver it the guarantor cannot avail himself of defects in the merchandise as a defense or off-set to the action if the merchandise was accepted by the buyer. *Werner v. Bochever* (1916), 162 App. Div. 297, 146 N. Y. Supp. 999.

In an action for goods sold and delivered a denial "that within six years past, or at any time, plaintiff sold or delivered to defendant any goods, wares, merchandise or labor, which remain unpaid for," is neither a denial of a sale and delivery nor an allegation of payment, and raises no issue. *J. W. Inman Co., Inc. v. Dix* (1917), 162 N. Y. Supp. 925.

Action on account.—Sufficiency of denials, see *J. W. Inman Co., Inc. v. Dix* (1917), 162 N. Y. Supp. 925.

§ 501. Counterclaim defined.

Application. — *Harrington v. Stallo* (1915), 169 App. Div. 786, 155 N. Y. Supp. 688.

Common-law recoupment and set-off are included within the code provisions relating to counterclaims. *Goodman v. Benjamin Rutchik, Inc.* (1918), 171 N. Y. Supp. 152.

A counterclaim in an equitable action was unknown at common law and, therefore, the issues raised thereby are not within the constitutional provision as to trial by jury. *Manhattan Life Ins. Co. v. Hammerstein Opera Co.* (1918), 184 App. Div. 440, 171 N. Y. Supp. 678.

Cause which defendant might have pleaded.—A counterclaim is properly pleaded if the cause of action in which it is pleaded might have been pleaded as a cause of action if the defendant had brought the action. *Stevenson v. Devins* (1913), 158 App. Div. 616, 143 N. Y. Supp. 916.

Complete cause of action.—A counterclaim must be a cause of action and it must be a complete cause of action existing in favor of the defendant where he asserts it. *American Ink Co. v. Riegel Sack Co.* (1912), 141 N. Y. Supp. 549.

Connected with subject of action; replevin.—In an action for replevin, the right

of the trustee in bankruptcy of the defendant to avoid a transfer to the plaintiff as a voidable preference is "connected with the subject of the action" within the meaning of subdivision 1. *Gleason v. Bush* (1915), 166 App. Div. 865, 152 N. Y. Supp. 54.

Idem; conversion.—A counterclaim in an action for the conversion of horses which arose out of the contract under which the horses were delivered and was connected with the subject of the action, was the subject of a counterclaim within this section. The fact that defendant did not comply with the lien law in selling the horses does not preclude her from proving the counterclaim. *Waters v. Lang* (1913), 79 Misc. 240, 139 N. Y. Supp. 844.

Diminishing or defeating recovery.—Where plaintiff brings an action to reform a deed on the ground of mutual mistake, a counterclaim showing that no mutual mistake existed, tends to diminish or defeat plaintiff's recovery and is not demurrable. *Stolitzky v. Linscheid* (1912), 150 App. Div. 253, 134 N. Y. Supp. 805.

In an action for the balance of deliveries of milk made to a third person under defendant's guaranty of payment, defendant's counterclaim, alleging that the guaranty was canceled for a valuable consider-

ation, and by mutual consent that plaintiff was to turn over to defendant the bond and mortgage securing it, but refused to do so, and praying that plaintiff be directed specifically to perform the agreement to reassign, is insufficient as neither tending to diminish or defeat plaintiff's recovery. *Keystone Dairy Co. v. Schaer* (1917), 166 N. Y. Supp. 450.

Allegation not tending to diminish or defeat recovery.—In an action by infant beneficiaries under a will for the construction thereof in which no other relief is asked, brought against trustees appointed to execute a trust, an allegation as a defense that the plaintiff's general guardian who administered the estate for sometime has never accounted, is not within the issues tendered by the plaintiffs, and neither constitutes a defense to their action nor is it a proper counterclaim thereto, for it does not in any manner tend to diminish or defeat the recovery or relief which the plaintiffs seek. *Marsh v. Woodworth* (1917), 180 App. Div. 604, 167 N. Y. Supp. 775.

Existence at time of commencement of action.—The provision of subdivision 2 of this section, that a cause of action interposed as a counterclaim must be in existence at the commencement of the action, does not apply to subdivision 1. *Caspry v. Hatch* (1913), 157 App. Div. 679, 142 N. Y. Supp. 785; *Pierce v. Massman* (1918), 168 N. Y. Supp. 1029.

Independent cause of action.—Facts to constitute a counterclaim must amount to an independent cause of action and the repetition of the allegations of the affirmative defense as a counterclaim is insufficient and calls for no reply. *McGee v. Felter* (1912), 75 Misc. 349, 135 N. Y. Supp. 267.

Idem; particularity of counterclaim.—A counterclaim must be a complete cause of action existing in favor of the defendant asserting it and must set forth an enforceable claim against the plaintiff with the same particularity as is required in a complaint for a like cause. *Pease Oil Co. v. Monroe Oil Co.* (1912), 78 Misc. 285, 138 N. Y. Supp. 177.

Same transaction.—Any matter which arises out of the same transaction as that stated in the plaintiff's complaint and which tends to diminish or defeat plaintiff's recovery may be set up as a counterclaim. *Fliess v. Hoy* (1912), 150 App. Div. 555, 135 N. Y. Supp. 44.

Idem; breach of contract in action for damages.—In an action for damages caused to plaintiff's assignor by false and fraudulent representations alleged to have been made to him by defendant to induce him to become an endorser on a promissory note made by defendant, a separate defense and counterclaim for breach of contract against plaintiff's assignor is not permitted by this section, as it is not a cause of action arising

out of the contract or transaction set forth in the complaint. *George v. Murray* (1914), 87 Misc. 175, 149 N. Y. Supp. 503.

Idem; stockholders' action, damages for failure to execute order.—In an action by a stockholder against a customer for whom he was carrying an account on short sales for a balance of account, a counterclaim for damages sustained through the failure of the plaintiff to execute an order to purchase stock to cover the short sales, which order is alleged to have been given after the plaintiff claims to have closed the account and after the commencement of the action, is proper under subdivision one of this section. *Caspry v. Hatch* (1913), 157 App. Div. 679, 142 N. Y. Supp. 785.

Test for determining whether pleading is counterclaim.—No particular form of words is necessary to make a pleading a counterclaim. The ordinary and most satisfactory method of giving this intimation, is by a statement that the pleading is a counterclaim, or by a prayer for relief. *Wise v. Wise* (1912), 159 App. Div. 575, 144 N. Y. Supp. 649.

What does not constitute a counterclaim.

—In an action authorized to be brought under § 1837 against the next of kin or legatees of a testator to recover on a promissory note made by him, upon a claim against him for rent and also upon a claim for money advanced, the right of the defendant, to whom upon the judicial settlement of the account of the executor was turned over certain real estate described in the complaint and also certain personal property, to recover damages sustained by defendant's testator by reason of certain fraudulent acts and representations of the plaintiff, which in no way included or related to the contractual obligations of defendant's testator set forth in the complaint and which occurred long after the transaction therein alleged, is not the proper subject of a counterclaim. *Haberle-Crystal Spring Brewing Co. v. Handrahan* (1917), 100 Misc. 163, 165 N. Y. Supp. 251; *Kneuper Specialty Co. v. Kneuper* (1916), 171 App. Div. 555, 157 N. Y. Supp. 395.

Test of proper pleading of counterclaim.

—A test is given in some of the authorities to determine whether a counterclaim is properly pleaded, that the rights of the parties in regard to presenting their respective contentions in the same action are reciprocal; that where a counterclaim is properly pleaded the cause of action to which it is pleaded might be pleaded as a counterclaim if the defendant had brought the action. *Haberle-Crystal Spring Brewing Co. v. Handrahan* (1917), 100 Misc. 163, 165 N. Y. Supp. 251.

A counterclaim is improperly alleged which does not in any manner state that the matters set forth arose out of the contract or transaction set forth in the com-

plaint as the foundation of the plaintiff's claim or are connected with the subject matter of the action. *Pierce v. Massman* (1918), 168 N. Y. Supp. 1029.

Necessity for characterizing pleading as counterclaim.—As a distinction exists between a defense and a counterclaim, when the defense is intended as a counterclaim it should be explicitly stated in the answer; so as to advise the opposite party, and in the absence of such an allegation, especially when the party defines and characterizes his answer as a defense, and it is uncertain whether a counterclaim is intended, such party is not in a position to insist that he has actually set up a counterclaim, and the answer should be construed and considered as a defense. *Wise v. Wise* (1913), 159 App. Div. 575, 144 N. Y. Supp. 649.

When matter denominated counterclaim should be so treated.—Where, in a suit to foreclose a mortgage, the defendants introduced their plea that the mortgage was the result of an usurious transaction, with the words "and as a separate and distinct defense and counterclaim thereto allege," etc., and demanded affirmative relief, and the plaintiff did not reply, the new matter denominated as a counterclaim should have been treated as such, and defendant's motion for judgment thereon granted. *Loew v. McInerney* (1913), 159 App. Div. 513, 144 N. Y. Supp. 546.

An alleged counterclaim by the husband and wife, stating that a codefendant had failed to account for rents and profits collected from the premises, does not state facts sufficient to constitute a cause of action as to the wife who was only entitled to an inchoate right of dower, but is sufficient as to the husband who was a tenant in common of the property and entitled to a proportionate share therein. In such an action brought by the plaintiff, individually, as owner in fee of an undivided interest in the premises affected, alleged counterclaims against the plaintiff as executrix in which capacity she had been made a defendant, stating a failure to account for the proceeds, rents and profits of property owned in common by the defendants, but having nothing to do with the property sought to be partitioned, are insufficient. *Moses v. Moses* (1915), 170 App. Div. 211, 155 N. Y. Supp. 1066.

The term "recoupment" is not so broad as the term "counterclaim" which authorizes resort by the defendant to causes of action by way of defense other than set-off and recoupment. Recoupment is limited to the amount of the plaintiff's demand and to the reduction or extinction thereof, and to the transaction or contract which was the basis of the plaintiff's claim, and contemplates no affirmative recovery against the plaintiff. *Peuser v. Marsh* (1915), 167 App. Div. 604, 153 N. Y. Supp. 381.

An assigned claim is subject to the right of the debtor to claim damages for a violation, prior to its enforcement, by the assignor of his obligation. The assignee, in suing the claim, stands in the place of the assignor, succeeding to the benefits it might bring, but chargeable to the extent of it with the liabilities of the assignor arising from his default, or in exact language the assignee represents the assignor in regard to the claim. *Seibert v. Dunn* (1915), 216 N. Y. 237.

Contract; action to annul on ground of fraud.—In an action to annul a contract on the ground of fraud, a defendant may properly interpose a counterclaim for moneys due under the contract. *Stevenson v. Devins* (1913), 158 App. Div. 616, 143 N. Y. Supp. 916.

Contract; breach of warranty as counterclaim.—A counterclaim alleging that goods bought and delivered were not according to sample alleges a cause of action arising out of the contract or transaction set forth in the complaint where the action is for the purchase price of the goods sold. But a second counterclaim arising out of an alleged breach of warranty not mentioned in the complaint and forming no part of plaintiff's claim is another cause of action. *American Ink Co. v. Riegel Sack Co.* (1912), 141 N. Y. Supp. 549.

Where the complaint alleges a contractual relationship between the plaintiff and defendant executor, and a breach thereof by the latter. The counterclaim states a cause of action on contract existing at the commencement of the action. It is error to grant judgment in favor of such defendant for the amount of the counterclaims. The only question presented by the demurrer was whether or not the counterclaims were properly alleged as such and of the character specified in the section. *Hull v. Hull* (1919), 225 N. Y. 342.

A tort which does not arise out of the contract, but which is merely a wrongful subsequent act which interfered with the contract, is not a proper counterclaim to an action on contract. *Turner v. Fuleher* (1917), 165 N. Y. Supp. 282.

Conversion; counterclaim based on indorsement of note.—In an action by a trustee in bankruptcy against a pledgee for conversion, counterclaim based upon the indorsement of notes by the bankrupt do not come within the classes enumerated by this section. *Morris v. Windsor Trust Co.* (1914), 213 N. Y. 27.

Foreign corporation; failure of defendant to comply with statute.—Where, in an action for goods sold and delivered to a foreign corporation doing business in this state, the answer pleads two counterclaims, one of which arose out of the contract sued on and the other did not, the failure of defendant to comply with § 15 of the general corporation law, providing for the certi-

ficate of authority to do business in this state, is not a defense to the first counterclaim, but defendant's failure to comply with § 181 of the tax law, providing for the payment of a license tax by a foreign corporation engaged in business in this state, is a defense to both counterclaims. *American Ink Co. v. Riegel Sack Co.* (1913), 79 Misc. 421, 140 N. Y. Supp. 107.

Mortgage; action to foreclose; damages for failure of title.—In a suit for the foreclosure of a mortgage in which a deficiency judgment is asked the court should not disregard a counterclaim by the defendant for damages based upon the ground that the title to the property at the time of the conveyance by the plaintiff to her was in the city of New York, and in the state, and a judgment for the plaintiff on the pleadings should be reversed. *Simon v. Neef* (1913), 160 App. Div. 46, 144 N. Y. Supp. 753.

Id.; counterclaim founded on breach of covenant by grantor.—Where a grantor of land sues to foreclose a purchase-money mortgage executed by the grantee, the latter, holding under a full covenant deed, cannot counterclaim damages sustained because of an alleged breach of covenant where there is pending and undetermined a legal action brought by the grantee against the grantor to recover damages for said breach of covenant if defendant neither asks nor offers to discontinue the prior action. Under the circumstances the defendant will be held to have elected to pursue his remedy in the prior action and thus to have waived his counterclaim in the suit of foreclosure. *Bailey v. Fear* (1918), 182 App. Div. 331, 169 N. Y. Supp. 581.

Negligence; counterclaim in action on contract.—Counterclaim founded upon separate transactions and based not upon contract but upon negligence. *Root Company v. New York Central & Hudson R. R. Co.* (1915), 166 App. Div. 137, 151 N. Y. Supp. 702.

Promissory note; excessive interest.—In an action on a promissory note, the defendant cannot counterclaim interest paid by him in excess of the rate allowed by law; his remedy is to bring an action to recover the penalty for taking illegal interest. *Carnegie Trust Co. v. Chapman* (1912), 153 App. Div. 783, 138 N. Y. Supp. 715.

Idem; sureties may set up counterclaim in favor of principal.—Sureties may plead a counterclaim in favor of their principal which grew out of the transaction which induced the giving of a note, where the maker of the note sets up the same counterclaim. *Iroquois Door Co. v. Leavenworth Apartment Co.* (1912), 77 Misc. 462, 137 N. Y. Supp. 122.

In an action upon promissory notes the defendant cannot counterclaim for a reformation of a contract for services and a re-

covery on the contract as reformed, as it does not arise out of the same transaction and the equitable claim for reformation of the contract is not an action on contract. *Dessar v. Gunther* (1917), 98 Misc. 319, 162 N. Y. Supp. 794.

Counterclaim for conversion of promissory note in action on independent contract. *Nugent v. Rowland* (1917), 175 App. Div. 454, 165 N. Y. Supp. 547.

A party when sued upon his obligation as surety cannot avail himself of the independent cause of action existing in favor of his principal against the plaintiff as a defense or counterclaim. *Ettlinger v. National Surety Co.* (1917), 221 N. Y. 467.

Purchase of real estate; specific performance.—In an action at law by a vendee to recover money paid under a contract for the purchase of real estate, the vendor may interpose an equitable counterclaim for specific performance, and may invoke the rule that it is a sufficient answer to a claim for rescission that the party is able to make his title good before decree. *Weinheimer v. Ross* (1912), 205 N. Y. 518.

Where a plaintiff sues to recover earnest money paid on a contract for the sale of real estate and the expense of searching title, the defendant having failed to perform because the title was unmarketable, a counterclaim, which seeks to recover broker's commissions and attorney's fees upon allegations that the original contract of sale was modified and that the defendant was ready and willing to perform the modified contract and tendered a deed in conformity therewith and that the plaintiff defaulted, is insufficient in law and a demurrer thereto should be sustained. *Bloom v. Sutton* (1917), 181 App. Div. 247, 168 N. Y. Supp. 403.

In an action for partition, allegations by a defendant and wife that no consideration for a mortgage on the premises passed to them or to the plaintiff, but was received and retained by the testatrix of certain codefendants for her sole use and benefit, which is a mere repetition of the allegations of the complaint, and is not alleged as a set-off or counterclaim, is demurrable as a complete defense, but may be sustained as a counterclaim. *Moses v. Moses* (1915), 170 App. Div. 211, 155 N. Y. Supp. 1066.

Replevin; cause of action arising out of contract.—In an action for replevin for a crop of tobacco where the complaint alleged that until a division of the crop the plaintiff was entitled to possession, a counterclaim alleging a cause of action arising out of the contract in that plaintiff violated the contract is not a proper counterclaim. Plaintiff's right to possession does not depend on the state of the account between her and defendant. The counterclaim interposed is not one that tends to diminish or defeat plaintiff's re-

covery. *Hooker v. Groom* (1914), 148 N. Y. Supp. 268.

In an action of replevin, the defendant may assert a counterclaim demanding a foreclosure of a lien upon the chattels, and judgment for sums due from the plaintiff. *Scognamiglio v. Passarelli* (1914), 210 N. Y. 550, rev'g 157 App. Div. 428, 142 N. Y. Supp. 382; *East Lake Lumber Co. v. Van Gorder* (1918), 169 N. Y. Supp. 266.

In an action of replevin, claims for services rendered and disbursements made by the defendants for the use of the plaintiff, relating to the subject matter of the action and occurring prior thereto, constitutes valid counterclaims. *Elevator Automatic Signal Co. v. Bok* (1916), 159 N. Y. Supp. 13.

Replevin; breach of warranty on sale of chattels.—Under § 150 of the personal property law, as added by laws of 1911, ch. 571, providing that where there is a breach of warranty by the seller the buyer may accept or keep the goods and set up against the seller the breach of warranty by way of recoupment, a buyer made a defendant in an action in replevin to recover the possession of property purchased under a conditional contract of sale may, after electing to accept and retain the property, plead a breach of warranty as a defense by way of recoupment, but cannot allege dam-

ages sustained by the breach of warranty as a counterclaim. *Peuser v. Marsh* (1915), 167 App. Div. 604, 153 N. Y. Supp. 381.

Set off of balance of deposit.—Right of endorser to set off amount of balance due him on a deposit account. *Carnegie Trust Co. v. Kistler* (1915), 89 Misc. 404, 152 N. Y. Supp. 240.

Taxes are not subject of counterclaim or set-off on the part of the taxpayer. *Village of Charlotte v. Keon* (1913), 207 N. Y. 346.

Counterclaim for taxes, assessments and disbursements are connected with the subject of an action for ejectment to recover possession of premises held by defendants under deeds of foreclosure, and tend to diminish or defeat the plaintiff's right to possession. *Kelly v. Struth* (1914), 164 App. Div. 705, 150 N. Y. Supp. 391.

Contract of employment; fraudulently induced purchase of assets.—A counterclaim based upon allegations that because of plaintiff's fraudulent representations defendant was induced to purchase the assets of a corporation is properly pleaded, although the cause of action alleged in the complaint was upon contract and the cause of action in the counterclaim was in tort, as both causes arose out of the same transaction. *Laska v. Harris* (1915), 215 N. Y. 554.

§ 502. Rules respecting the allowance of counterclaims.

Counterclaim against original debtor.—Where a counterclaim is not pleaded against the original debtor, it is available as against the plaintiff as assignee of the original debtor only "to the amount of the plaintiff's demand." *Rindskopf v. Zimmer* (1914), 84 Misc. 32, 145 N. Y. Supp. 984.

Assignment free from defenses.—Where an unpaid claim is assigned at a time when it is subject to no defense or counterclaim, the assignee holds free from defenses or counterclaims subsequently accruing in

favor of the debtor against the original assignor. *Siebert v. Dunn* (1913), 157 App. Div. 387, 142 N. Y. Supp. 253.

In an action upon a promissory note assigned to plaintiff by the payee after maturity and while he was not a holder in due course, a counterclaim in favor of the defendant maker against the payee existing at the time of the assignment must be allowed. *Woods v. Sizer* (1918), 102 Misc. 453, 169 N. Y. Supp. 86.

§ 503. Judgment, when demand and counterclaim are equal or unequal.

Right to costs.—This section does not give the defendant a right to costs, where the counterclaim established does not equal the plaintiff's demand. *Peck v. Haverstraw Water Supply Co.* (1913), 81 Misc. 428, 142 N. Y. Supp. 765.

In an action to foreclose a mortgage it appeared that the defendant was induced by fraud to exchange its property for the property of the plaintiff which was subject to the mortgage in suit. *Held*, that a counterclaim based on deceit in the contract for the exchange of property out of

which the mortgage arose may be pleaded, for it tends to defeat plaintiff's recovery and arises out of the transactions set forth in the complaint as the foundation of plaintiff's cause of action; that under the doctrine of recoupment it may reduce plaintiff's recovery on the mortgage, and that the defendant is entitled to judgment for the excess of its damages over plaintiff's claim. *Merry Realty Co., Inc. v. S. & H. R. E. Co., Inc.* (1919), 186 App. Div. 538, 174 N. Y. Supp. 627.

§ 506. Counterclaim, when plaintiff is an executor or administrator.

Application.—*Griggs v. Renault Selling Branch, Inc.* (1917), 179 App. Div. 845, 167 N. Y. Supp. 355.

Where the executors sue to recover damages for deceit practiced by defendant upon their testator, a demand arising out of the contract in question after the death of the testator may not be set up as a counterclaim. *Fletcher v. McGinniss* (1915), 168 App. Div. 225, 153 N. Y. Supp. 581.

§ 507. Defendant may interpose several defenses or counterclaims; rules relating thereto.

Available defenses.—Any defense which would be available to defeat and set aside an instrument in a suit in equity is equally available when the same instrument is set up as a defense in an action at law. *Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co.* (1912), 151 App. Div. 465, 135 N. Y. Supp. 990.

Failure to plead counterclaim; effect.—When a counterclaim is not specifically pleaded as such, plaintiff is not precluded from contesting it, although he has served no reply thereto. *Young v. Stillwater Crushed Stone Co.* (1912), 153 App. Div. 453, 138 N. Y. Supp. 539.

Inconsistent defenses; reliance on denial.—Defendant's answer, after denying the allegations of the complaint, pleaded an accord and satisfaction and cancellation, held, not an admission of liability. A defendant, though he pleads inconsistent defenses, may rely on his denial of the allegations of the complaint. *Isaacs v. Moll* (1912), 77 Misc. 180, 136 N. Y. Supp. 69.

Idem; bill of particulars.—Where, in an action against the guarantors of a loan, the defendant pleads several inconsistent defenses, the plaintiff is not entitled to a bill of particulars to ascertain the defense upon which the defendant will rely at the trial. *Kraus & Co. v. Mayer* (1912), 150 App. Div. 122, 134 N. Y. Supp. 694.

A defendant may set forth as many defenses and counterclaims as he has and the objection of inconsistency is not available to the plaintiff. Thus, where a defendant sued for the purchase price of goods sold, denies the sale and pleads a breach of warranty and a rescission of the contract as a separate defense, and also sets up a counterclaim for the breach of the warranty, it is error for the court to rule that the defendant had elected to stand upon the breach by offering to return the goods and, therefore, could not counterclaim for damages predicated upon a sale. *Putnam v. Interior Metal Manufacturing Co.* (1915), 169 App. Div. 248, 154 N. Y. Supp. 464.

Legal and equitable defenses.—A defendant in an action at law may plead both legal and equitable defenses. *Iroquois Door Co. v. Leavenworth Apartment Co.* (1912), 77 Misc. 463, 137 N. Y. Supp. 122.

Right to have defenses separately pleaded.—It is the right of the plaintiff, which cannot be overlooked or disregarded,

to have the defendants plead separately as defenses any new matter which they intend to use upon the trial as a defense. *Morrison v. Bryce* (1914), 162 App. Div. 466, 147 N. Y. Supp. 931.

When plaintiff entitled to have defenses and counterclaims separately stated and numbered.—Where, in an action for the breach of a contract under which the defendant employed the plaintiff as its sales agent, the answer under the heading "for a first, separate and distinct defense and by way of counterclaim" contains several paragraphs in which it is alleged that many of the covenants of the alleged contract are omitted from the complaint, and that two prior contracts were made between the parties, one of which had not expired when the contract in question was made, and various violations of the three contracts are alleged in general terms without specifying the particular contract violated, and there is no allegation that the terms of the contracts were the same or that the successive contracts constituted extensions of the contract in question, the plaintiff is entitled to have the defenses and counterclaims separately stated and numbered, and is also entitled to have the defenses so pleaded as to show under which contract they arise, unless facts are pleaded which render this immaterial. *Dixon & Co. v. Bronston Bros. & Co.* (1916), 171 App. Div. 552, 157 N. Y. Supp. 385; *Botts v. Mercantile Bank* (1917), 180 App. Div. 546, 167 N. Y. Supp. 1033; *Walker v. James J. Matchett Co.* (1917), 167 N. Y. Supp. 600.

Each separate defense must be complete in itself and cannot be fortified by borrowing a denial contained in some other part of the answer. *Hudson Building Co. v. Compagnie Generale Transatlantique* (1915), 169 App. Div. 600, 155 N. Y. Supp. 488.

Where the plaintiff attempted to state three or four alleged causes of action in a single account, it is not in a position to complain because the defendant did not state the particular cause of action to which the counterclaim was pleaded in compliance with this section. *Kneuper Specialty Co. v. Kneuper* (1916), 171 App. Div. 555, 157 N. Y. Supp. 395.

Set-off instead of counterclaim.—A defendant, sued as a maker of a promissory note, which sets up facts which would be a

good counterclaim on another promissory note made by the plaintiff's assignor to the order of the defendant, but designates the facts as a set-off rather than a counterclaim and asks a dismissal of the complaint, may on trial establish the set-off and is not barred because the facts were not designated as a counterclaim. *Lehman v. Cores-Martinez Co.* (1916), 171 App. Div. 852, 157 N. Y. Supp. 647.

Idem; noticing case for trial as waiver of right.—The right to have defenses con-

sisting of new matter separately stated and numbered is not waived by noticing the case for trial, where the motion for relief is noticed within the time required by rule 22 of the general rules of practice. *Morrison v. Bryce* (1914), 162 App. Div. 466, 147 N. Y. Supp. 931.

See *Morris v. Windsor Trust Co.* (1914), 213 N. Y. 27, 33.

Section cited.—*Lackomowitz v. Bates* (1915), 168 App. Div. 968, 153 N. Y. Supp. 1123.

§ 508. Partial defenses.

Where a complaint contains two causes of action a separate defense, not stated to be a defense to either cause of action separately, but as a defense to the complaint itself, must, on demurrer, be judged as a defense to both causes of action alleged by the plaintiff. *Meyer v. Central Railroad Co. of New Jersey* (1919), 185 App. Div. 812, 174 N. Y. Supp. 93.

Non-joinder of parties defendant, pleaded as a complete defense, is demurrable where the facts alleged are effective only as a partial defense. *Pollitz v. Wabash Railroad Co.* (1912), 150 App. Div. 709, 135 N. Y. Supp. 785.

Failure to set up as partial defense.—A

separate defense, alleging that plaintiff had elected to proceed at law by bringing a prior action, is demurrable where it is not set out as a partial defense. *Ward v. Chelsea Exchange Bank* (1912), 153 App. Div. 638, 138 N. Y. Supp. 720.

Erroneous statement as partial defense.—A complete defense is available as such, although erroneously stated to be a partial defense. *Vogel Co. v. Wolff* (1913), 156 App. Div. 584, 141 N. Y. Supp. 756, and 299 N. Y. 568.

Action by employer for breach of contract.—*Universal Audit Co. v. Cameron* (1915), 169 App. Div. 879, 155 N. Y. Supp. 1025.

§ 509. When defendant to demand affirmative judgment.

Counterclaim for defensive purposes.—Where a defendant seeks to avail himself of a counterclaim only for defensive purposes and not for aggression, he cannot be

prevented from proving it merely because of his failure to pay the costs of a prior appeal. *Rindskopf v. Zimmer* (1914), 84 Misc. 32, 145 N. Y. Supp. 984.

§ 514. Reply; what to contain.

Effect of reply.—The fact that a plaintiff puts in issue the allegations of a counterclaim by serving a reply, does not preclude him, on a motion for judgment on the pleadings, from asking that the counterclaim be dismissed. *Dessar v. Gunther* (1917), 98 Misc. 319, 162 N. Y. Supp. 794.

Denial of knowledge or information sufficient to form a belief as to facts which must necessarily have come to the knowledge of the plaintiff is not good pleading. *Halbo v. Adams* (1915), 155 N. Y. Supp. 995.

The service of a reply to a counterclaim precludes the plaintiff from successfully urging defects therein. *Dessar v. Gunther* (1917), 98 Misc. 319, 162 N. Y. Supp. 794.

When reply unnecessary.—Where matter pleaded is a denial and not a counterclaim. *Whitney v. Considine Investing Co.* (1918), 104 Misc. 688, 173 N. Y. Supp. 66.

Accounting; denial on information and belief.—Where, in an action for an accounting, the defense is a decree in surrogate's court, judicially discharging defendant, a

reply which admits the entry of the decree and that it has not been reversed, modified or discharged, but merely denies on information and belief certain allegation respecting the accounts settled, is frivolous. *Childs v. Childs* (1912), 150 App. Div. 656, 135 N. Y. Supp. 972.

Denial of knowledge or information as to foreign statute.—Where the defense in an employee's action for negligence is the workmen's compensation act of the state where plaintiff was injured, a reply denying knowledge or information sufficient to form a belief as to the foreign statute is good. *Van Tassel v. Manhattan Electrical Supply Co.* (1913), 83 Misc. 126, 144 N. Y. Supp. 793.

As to the denial of any knowledge or information sufficient to form a belief of allegations in the complaint, see notes to § 500.

Plaintiff's residence.—An allegation by the plaintiff in a reply denying upon information and belief his non-residence is sufficient to present an issue as to plaintiff's

residence. *Olsen v. Singer Manufacturing Co.* (1912), 151 App. Div. 516, 135 N. Y. Supp. 872.

Reference to allegations in answer.—Use of phrase "allegations of the third allegation of the answer" in a reply is permissible where the intent is plain. *Smith v. Metropolitan Life Insurance Co.* (1913), 79 Misc. 550, 140 N. Y. Supp. 327.

Separate defense; bill of particulars.—Where an answer, containing no demand for affirmative relief, prays simply for a dismissal of the complaint, plaintiff's motion for a bill of particulars relating only to matters set up as a separate defense will be granted. *Bowsky v. Schilichten* (1912), 76 Misc. 206, 134 N. Y. Supp. 600.

Reply to counterclaim; denials and inconsistent new matter.—Where the first three paragraphs of a reply to a counter-

claim contain merely denials, and the fourth paragraph begins, further replying to the defendant's counterclaim contained in her amended answer, and states new matter clearly inconsistent with the matter alleged in the complaint, the defendant may, under § 493, demur to the paragraph containing the new matter, upon the ground that it is insufficient in law upon the face thereof, although the plaintiff has not specifically alleged that the new matter is stated to be a separate traverse to or avoidance of the counterclaim of the defendant. *Streeter v. Cloud* (1916), 171 App. Div. 572, 157 N. Y. Supp. 698.

A tenant in a reply to a landlord's counterclaim for rent cannot set up a counterclaim for damages charged against the rent. *Baitzel v. Rhinelander* (1917), 179 App. Div. 735, 167 N. Y. Supp. 343.

§ 515. Judgment upon failure to reply.

Failure to reply to counterclaim; effect.—When a counterclaim is not specifically pleaded as such, plaintiff is not precluded from contesting it, although he has served no reply thereto. *Young v. Stillwater Crushed Stone Co.* (1912), 153 App. Div. 453, 138 N. Y. Supp. 539.

Matter pleaded as a counterclaim, but which in legal effect is not such, is not admitted by a failure to reply thereto. *McGee v. Felter* (1912), 75 Misc. 349, 135 N. Y. Supp. 267.

When a counterclaim has been pleaded, and no reply thereto served, no issue of fact is presented with respect thereto. *Blair v. Wagner* (1918), 170 N. Y. Supp. 547.

Contesting counterclaim in absence of reply.—The rule that a defendant in the absence of a reply cannot preclude the plaintiff from contesting a counterclaim unless it is distinctly named as such in the an-

swer does not apply where the plaintiff by serving a reply treats the answer as setting up a counterclaim. *It seems*, that the cases in which a plaintiff may contest a counterclaim where no reply has been served are those in which the facts constituting the counterclaim are not expressly designated as such. *Lehman v. Cores-Martinez Co.* (1916), 171 App. Div. 852, 157 N. Y. Supp. 647.

Burglary insurance; direction to reply to defense of breach of warranty.—A plaintiff suing on a policy of burglary insurance, should be directed by the court to reply to a defense setting up a breach of warranty as to previous application, and also to a defense alleging a breach of warranty with respect to a burglar alarm system. *Vanta v. Massachusetts Bonding & Ins. Co.* (1913), 158 App. Div. 502, 143 N. Y. Supp. 705.

§ 516. Cases where the court may require a reply.

A reply will be ordered where it is necessary to prevent surprise, narrow the issues, expedite the trial or where it is just and reasonable that such a reply should be made, depending upon the sound discretion of the court. *Barker v. O'Grady* (1916), 98 Misc. 42, 162 N. Y. Supp. 262.

Defense insufficient in law.—A reply may be required unless it is quite clear that the defense to which it is asked to be made is insufficient in law. *Gilbert v. Mechanics & Metals National Bank* (1916), 172 App. Div. 25, 157 N. Y. Supp. 953.

Avoidance.—When new matter in an answer by way of avoidance is such that, if true, it will constitute a complete defense unless in some manner avoided, the court will as a general rule order that a reply be made to the answer. *Schweitzer v. H. A.*

P. A. Gesellschaft (1912), 149 App. Div. 900, 134 N. Y. Supp. 812; *Goldberg v. Great Eastern Casualty Co.* (1918), 169 N. Y. Supp. 113.

Where a plaintiff has been ordered by the court to reply to a defense by way of avoidance, his failure to do so merely admits the facts set forth in the defense; there is no waiver of his right to attack the defense as insufficient in law. *Humboldt Exploration Co. v. Britsch* (1912), 150 App. Div. 90, 134 N. Y. Supp. 747.

Discretion.—Where in an action for malicious prosecution, the defendant alleges as a defense the immediate subsequent indictment of the plaintiff for the identical offense first charged, as a distinct and complete defense, the court should exercise its discretion by compelling the plaintiff to

reply thereto. *Weglein v. Trow Directory, P. & B. Co.* (1912), 152 App. Div. 705, 137 N. Y. Supp. 556.

The discretion of the court to compel a reply to new matter pleaded as a defense is freely exercised when it can be seen that the new matter if true is of such a character as may properly avoid surprise at, entirely prevent or shorten the trial. *Dittenfass v. Horsley* (1916), 171 App. Div. 507, 157 N. Y. Supp. 632. But granting or denial of a motion does not indicate opinion on the part of the court that the pleading is good or bad. *Federal Advertising Agency, Inc. v. Rubber & Celluloid H. T. Trimming Co.* (1918), 172 N. Y. Supp. 186.

Life insurance.—The plaintiff, in an action to recover on a policy of life insurance, may be required to reply to the affirmative allegations and defenses set up in the answer. *Smith v. Metropolitan Life Insurance Co.* (1913), 79 Misc. 550, 140 N. Y. Supp. 327.

Reply to new material.—The court can only require a reply to the whole affirmative defense; it cannot require a reply to the new material contained in one paragraph of a defense, for the plaintiff might have no reply to the new material contained in a single paragraph, but expect to meet the whole defense by denial of the other paragraphs entering into the defense. *Paterno Bros., Inc. v. Farzee* (1914), 146 N. Y. Supp. 1072.

Where an amended answer sets up new matter which may be a complete defense to the cause of action the new matter will not be stricken out and a reply will be directed whether the completeness of the defense can be determined by a motion on the pleadings or will require evidence to establish it upon the trial. *Joyce v. Eastman Kodak Co.* (1917), 99 Misc. 361, 163 N. Y. Supp. 623.

Reviewability of order denying motion to compel plaintiff to reply.—Where the defenses set up by a defendant are apparently good by way of avoidance the appellate division has power to review the

exercise of discretion by the court below denying defendant's motion to compel plaintiff to reply. *Linzee v. Frankfort Gen. Ins. Co.* (1914), 162 App. Div. 282, 147 N. Y. Supp. 606.

Stay; ordering case upon short cause calendar.—A motion to compel a plaintiff to reply does not of itself operate as a stay prohibiting a court from ordering the case upon the short cause calendar. *Polstein v. General Accident Fire and Life Assur. Co.* (1915), 90 Misc. 3, 152 N. Y. Supp. 906.

Personal injury action; separate defense of release.—Where in an action for personal injuries the answer is a general denial, and as a separate defense alleges that plaintiff for a valuable consideration executed a general release to defendant whereby she released and discharged defendant from the alleged cause of action set forth in the complaint and from any and all claims which she may have had against said defendant down to the day of the execution of said release, an order may be granted requiring plaintiff to serve a reply to said separate defense. *Writting v. N. Y. & Long Island Traction Co.* (1915), 91 Misc. 231, 153 N. Y. Supp. 1081.

Statute of frauds pleaded in answer.—A reply will be ordered to compel a plaintiff to state whether or not a contract sued upon is in writing where the defendant sets up the statute of frauds and the reply may enable the defendant to move for judgment on the pleadings and thus expedite the determination of the case without a trial. *Barker v. O'Grady* (1916), 98 Misc. 42, 162 N. Y. Supp. 262.

Where in a suit for the specific performance of a contract for the sale and delivery of certain shares of stock, allegations by the defendants, as a defense, that no stock transfer tax had been paid or canceled in connection with the agreement, are not frivolous, and the defendants are entitled to have the plaintiff reply, in order that they may by appropriate motion test the validity of the defense. *Dittenfass v. Horsley* (1916), 171 App. Div. 507, 157 N. Y. Supp. 632.

§ 517. Plaintiff may set forth several avoidances in reply.

Defenses to a counterclaim.—There is no provision that the different defenses to a counterclaim stated in a reply shall be separately stated and numbered. *Streeter v. Cloud* (1916), 171 App. Div. 572, 157 N. Y. Supp. 698.

Where there are two or more distinct avoidances of the same defense or counter-

claim they must be separately stated and numbered, but there is no requirement that where there is a single avoidance of the counterclaim alleged in an answer, the avoidance should be stated as a defense separate from the denials. *Streeter v. Cloud* (1916), 171 App. Div. 572, 157 N. Y. Supp. 698.

§ 519. Pleadings to be liberally construed.

Essential facts to be alleged.—While pleadings are to be liberally construed, it is necessary that all essential facts be alleged. *Fairchild v. Leo* (1912), 149 App.

Div. 31, 133 N. Y. Supp. 572.

Substantial justice between the parties means justice to both parties. *Queeney v. Willi* (1919), 225 N. Y. 374.

Facts implied.—In considering the sufficiency of a complaint the court may consider, not only express allegations therein, but such facts as may be implied therefrom by reasonable and fair intendment. *Crotty v. Erie Railroad Co.* (1912), 149 App. Div. 262, 133 N. Y. Supp. 696.

Liberal construction.—If, by a liberal construction, an answer presents a good defense, a motion for judgment on the pleadings will be denied. *The Met. Printing Co. v. O'Neill* (1911), 148 App. Div. 885, 131 N. Y. Supp. 1009.

Pleadings are not now to be strictly construed against the pleader and averments which sufficiently point out the nature of the pleader's claim are sufficient if, under them, upon a trial of the issues, he would be entitled to give all the necessary evidence to establish the claim. *Sultan of Turkey v. Tiryakian* (1915), 213 N. Y. 429.

Not applicable to denials.—The provision that the allegations of a pleading

must be liberally construed, does not apply to denials. *Pullen v. Seaboard Trading Co.* (1914), 165 App. Div. 117, 150 N. Y. Supp. 719.

Test of sufficiency of complaint.—According to our most recent authorities pleadings are not to be strictly construed against the pleader, and a good test is whether under the pleading can the plaintiff offer the necessary evidence to prove the charge he endeavors to make. *People v. American Sugar Refining Co.* (1914), 86 Misc. 78, 148 N. Y. Supp. 160.

A complaint, when challenged for insufficiency, is to be liberally construed, and the pleader is to be deemed to have alleged, not only facts set forth, but those, also, to be implied therefrom by reasonable intendment. *Peterson v. Eighmie* (1916), 161 N. Y. Supp. 1065.

Application.—*Troy Automobile Exchange v. Home Ins. Co.* (1917), 221 N. Y. 58.

§ 520. Pleadings to be subscribed; within what time to be served.

Where plaintiff did not allege performance of conditions of a contract on its part and objection was taken by the defendants by a motion to dismiss the complaint which was renewed at various times during the trial and constantly overruled, but at close of plaintiff's case the court reconsidered and allowed plaintiff to amend, the defendants were entitled to full twenty

days after such amendment within which to answer or demur. *Branower & Son, Inc. v. Waldes* (1916), 173 App. Div. 676, 160 N. Y. Supp. 168.

Municipal court.—The answer of a defendant in a municipal court action need not be subscribed by its attorney. *Perceval, Incorporated, v. Fleischmann Co.* (1912), 78 Misc. 252, 138 N. Y. Supp. 139.

§ 521. When defendant to serve copy on co-defendant.

Foreclosure of lien.—A suit to foreclose a lien will not be stricken from the calendar and the plaintiff's judgment delayed because a defendant by answer makes a claim against a co-defendant. *Mellen v. Athens Hotel Co.* (1912), 149 App. Div. 534, 133 N. Y. Supp. 1079.

Nuisance.—In an action brought against the receivers of two companies for the abatement of a nuisance, where the bondholders of the one company intervene and by answer demand an adjudication as to which of the companies shall abate the nuisance, the court need not delay judgment for plaintiff until the issue between the defendants is decided. *City of New York v. Montague* (1912), 149 App. Div. 475, 134 N. Y. Supp. 87.

In a mechanic's lien proceeding, priority cannot be claimed as between lienors who have failed to serve copy of answer on co-defendants. *Dearstine v. Carpenter* (1919), 173 N. Y. Supp. 875.

Settlement of controversy between defendants.—The only purpose of this section is to bring in all parties who are to be affected by the judgment which the plain-

tiff seeks and to readjust the controversy as between all the parties thereto. And where the plaintiff fails to set up a good cause of action, the court is not in a position to go forward with the trial of the action for the purpose of determining the issues attempted to be raised by the several defendants as between themselves. *Leake v. Wolf* (1912), 154 App. Div. 233, 138 N. Y. Supp. 859.

Sufficiency; when determined; cross complaint.—Whether or not service of an answer was made within twenty days of the trial can be determined only when the case comes on for trial; the question may not be considered on a motion to strike out the answer. That a defendant has not served a notice of trial and is in default in appearing and pleading cannot be taken advantage of by a co-defendant upon whom he has served a cross complaint. *Belden v. Brown* (1912), 77 Misc. 282, 136 N. Y. Supp. 287.

Section cited.—*Dearstine v. Carpenter* (1919), 106 Misc. 102, 173 N. Y. Supp. 875.

§ 522. Allegation not denied; when to be deemed true.

This section only applies to allegations of fact. *Doyle v. Hamilton Fish Corporation* (1915), 216 N. Y. 627; *Wood v. Glens Falls Automobile Co.* (1916), 161 N. Y. Supp. 808; *Whitley v. Speed* (1916), 171 App. Div. 102, 156 N. Y. Supp. 973.

Allegations admitted by answer conclusive.—Such admissions are conclusive and evidence inconsistent therewith must be disregarded. *Horan v. Hastorf* (1918), 223 N. Y. 490.

A denial of knowledge or information sufficient to form a belief which is palpably untrue will be treated as no denial. *Bank of Long Island v. Schildkrant* (1916), 162 N. Y. Supp. 699.

Affirmative pleading.—Matter set up by a defendant by way of defense and avoidance is deemed controverted by the plaintiff without affirmative pleading. *Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co.* (1912), 151 App. Div. 465, 135 N. Y. Supp. 990.

Allegations of an affirmative defense controverted.—The allegations of an affirmative defense in an action to recover commissions, that a contract under seal, a copy of which was annexed to the answer and made a part thereof, was the agreement set forth and referred to in the complaint, will be deemed to be controverted so that after defendant had put in the contract under seal to establish his defense plaintiff had the right to offer testimony showing want of consideration or fraud. *Wiederman v. Verschleiser* (1916), 95 Misc. 276, 159 N. Y. Supp. 226.

New matter of answer deemed controverted.—The consent executed by an owner of real property to the construction of an elevated railroad having been pleaded as a part of the affirmative defense, the allegations thereof, no reply having been required, are deemed controverted, and any evidence to show that the consent was not binding on plaintiff was available to her. *Maybeck v. New York Municipal R. Corp.* (1918), 104 Misc. 330, 171 N. Y. Supp. 848.

Avoidance.—When new matter in an answer by way of avoidance is such that, if true, it will constitute a complete defense unless in some manner avoided, the court will as a general rule order that a reply be made to the answer. *Schweitzer v. H. A. P. A. Gesellschaft* (1912), 149 App. Div. 900, 134 N. Y. Supp. 812.

Where a plaintiff has been ordered by the court to reply to a defense by way of avoidance his failure to do so merely admits the facts set forth in the defense; there is no waiver of his right to attack the defense as insufficient in law. *Humboldt Exploration Co. v. Fritch* (1912), 150 App. Div. 90, 134 N. Y. Supp. 747.

Demurrer to separate defenses.—Material allegations contained in a complaint must

be taken as true upon demurrer to separate defenses, where such defenses do not deny such allegations. *Colwell Lead Co. v. Home Title Ins. Co. No. 1* (1912), 154 App. Div. 83, 138 N. Y. Supp. 738.

Effect of failure to contest counterclaim.—When a counterclaim is not specifically pleaded as such, plaintiff is not precluded from contesting it, although he has served no reply thereto. *Young v. Stillwater Crushed Stone Co.* (1912), 153 App. Div. 453, 138 N. Y. Supp. 539.

Failure to reply.—Matter pleaded as a counterclaim, but which in legal effect is not such, is not admitted by a failure to reply thereto. *McGee v. Felter* (1912), 75 Misc. 349, 135 N. Y. Supp. 267.

Where plaintiff makes no reply upon defendants setting up a general release made by a decedent after the accident and before his death, and the defendants make no application to the court to compel the service of a reply, when the trial is reached the plaintiff may meet the defense of a general release by traverse or avoidance. In other words he may offer evidence to avoid the release on equitable grounds. *Linker v. Jamison* (1916), 173 App. Div. 349, 159 N. Y. Supp. 469.

Guardian ad litem, admissions not binding.—An admission in a pleading made by a guardian *ad litem* is not binding upon the infant. *Ahearn v. Bowery Savings Bank* (1914), 164 App. Div. 809, 150 N. Y. Supp. 244.

Proof of counterclaim is unnecessary when there is no reply. A failure to reply admits the allegations. *Charlton v. Ward* (1918), 102 Misc. 238, 168 N. Y. Supp. 876.

Inconsistent allegations in answer.—Material allegations of the complaint are not put in issue by inconsistent allegations in the answer, even though the intent to deny is plainly inferable or to be implied from the inconsistent allegations. *Pullen v. Seaboard Trading Co.* (1914), 165 App. Div. 117, 150 N. Y. Supp. 719.

Defendant is entitled for an examination of plaintiff to prove affirmative defenses and a counterclaim, since no reply is necessary to create an issue with respect thereto. *Blair v. Wagner* (1918), 170 N. Y. Supp. 547.

Libel.—Under this section each material allegation of the complaint not controverted by the answer is to be taken as true. It is elementary that each separate defense is to be tested alone, and, therefore, an answer in an action for libel which does not deny, admits publication. *Tully v. New York Times Co.* (1912), 78 Misc. 165, 137 N. Y. Supp. 962.

Mechanic's lien; new matter in answer.—In an action to foreclose a mechanic's lien, where a defendant makes a claim upon a co-defendant, the answer is in effect a

complaint to which the co-defendant may interpose an answer, and is not an allegation of new matter which is deemed to be controverted. *Mellen v. Athens Hotel Co.* (1912), 149 App. Div. 534, 133 N. Y. Supp. 1079.

Mechanic's lien action.—In a suit against the owner and a subsequent lienor for the foreclosure of a mechanic's lien no pleading by the owner is necessary to put in issue the claims against it asserted in the subsequent lienor's answer because by this section these allegations are "deemed controverted by the adverse party, by traverse or avoidance as the case requires." *Albright v. Trinity Presbyterian Church*

(1915), 170 App. Div. 70, 157 N. Y. Supp. 79.

An answer that plaintiffs agreed to take back certain goods, in an action on a contract for the sale of goods, is deemed denied, and it is incumbent on defendants to prove the agreement. *Reichenthal v. Glockner* (1916), 158 N. Y. Supp. 699.

In an action on an assigned claim to recover a balance due from a guarantor, the defendant by failing to deny the allegations of the complaint admitted that it guaranteed payment. *Dougherty v. Houlder, Weir & Boyd, Inc.* (1918), 182 App. Div. 609, 169 N. Y. Supp. 1003.

§ 523. When pleading must be verified; and when verification may be omitted.

Application.—*Meyer v. Mayo* (1916), 173 App. Div. 199, 157 N. Y. Supp. 1135.

The remedy of a plaintiff against an unverified answer is governed by § 5p8. *Gilbert v. Johnson* (1915), 169 App. Div. 840, 155 N. Y. Supp. 687.

Answer by one defendant.—Where a complaint contains allegations that the defendants unlawfully conspired for the purpose of defrauding the plaintiff, the answer by one of the defendants need not be verified. *Kellogg v. Match Supply Co.* (1914), 87 Misc. 418, 149 N. Y. Supp. 391.

It is not reversible error to admit in a criminal action for grand larceny the summons and complaint in a prior civil action brought against the defendant to recover the securities held by him, especially where no objection was raised at the trial and there was nothing in the defendant's answer which connected him with the crime other than showing his relations with the decedent and his management of her property. *People v. Smith* (1916), 172 App. Div. 826, 159 N. Y. Supp. 1073.

§ 525. Verification; how by whom made.

Where the complaint of a foreign corporation contains no allegations upon information and belief, a verification made by its president in the form usually employed by a party, is proper and calls for a verified answer. Within a reasonable time after the return of the answer to such a complaint, on the ground that it was not properly verified by defendant's attorney, another answer was served in time, the verification of which was good but for the fact that statements therein disclosed that

the attorney making it did not have personal knowledge of the matters alleged, and all the denials in the answer were upon information and belief. *Held*, that the return of said answer on the ground of defective verification was justified. *Treen Motors Corporation, Inc. v. Van Pelt* (1919), 106 Misc. 357, 174 N. Y. Supp. 500.

Section cited.—*Planten v. National Nassau Bank* (1916), 174 App. Div. 254, 160 N. Y. Supp. 297.

§ 526. Form of affidavit of verification.

The officer of a corporation who verifies a complaint does not have to state the grounds of his belief. *Johnson v. Case* (1916), 97 Misc. 247, 162 N. Y. Supp. 841.

A verification made by an attorney, without explanation as to why it is not made by plaintiff or some officer of the plaintiff, is not proper. *Embalmers Supply Co. v. Rowe* (1917), 101 Misc. 717, 166 N. Y. Supp. 1045.

The agent or attorney for a foreign corporation, applying to amend a complaint on his own affidavit, should be required to give the sources of his information.

Goodwin Preserving Co. v. Holton (1917), 167 N. Y. Supp. 46.

Petition to extend limits of village.—Verification of a petition to extend the corporate limits of a village, made as provided herein, does not comply with § 348 of the village law, especially where the body of the petition does not allege the jurisdictional fact that its signers represented a majority in value of the property therein assessed upon the last preceding town assessment roll. *People ex rel. Underwood v. Trustee of Patchogue* (1916), 171 App. Div. 347, 156 N. Y. Supp. 1096.

§ 528. Remedy for defective verification, or want of verification.

Application.—Embalmers Supply Co. v. Rowe (1917), 101 Misc. 717, 166 N. Y. Supp. 1045.

A notice returning an answer because improperly verified, should specify the particulars wherein the verification was defective, and the mere statement that the verification "is defective and the same is not verified in compliance with the provisions of the Code of Civil Procedure" is insufficient, leaving the situation the same as though the answer had not been returned. Treen Motors Corporation, Inc. v. Van Pelt (1919), 106 Misc. 357, 174 N. Y. Supp. 500.

Default.—Where an unverified answer was returned within twenty-four hours after service thereof, and no verified answer or demurrer was served the next day, plaintiff is within his rights in entering judgment by default and issuing an execution but the court in its discretion may open a default and permit the defendant to serve an answer on just and proper terms. Imposition of costs on plaintiff is erroneous. Felix v. Josephthal (1912), 76 Misc. 267, 134 N. Y. Supp. 923.

§ 529. When defendant not excused from verifying answer to charge of fraud.

Violation of constitutional rights.—The provision that a defendant is not excused from verifying an answer to a complaint charging him with fraud affecting the right or property of another, violates con-

stitutional rights where the facts charged in the complaint constitute a criminal offense. Kellogg v. Match Supply Co. (1915), 165 App. Div. 885, 151 N. Y. Supp. 361.

§ 530. Private statute; how pleaded.

Banking law.—It is not necessary to plead the provisions of the banking law, it being a general statute. Van Tuyl v. New York Real Estate Security Co. (1912), 153 App. Div. 409, 138 N. Y. Supp. 541.

Private and general statutes.—A private statute should be pleaded as provided by this section; a general statute need only be named. Hooper v. City of New York (1916), 96 Misc. 47, 160 N. Y. Supp. 14.

Foreign statute must be alleged and approved as a fact, but interpretation thereof is not admitted by demurrer. Whether an act of the legislature of a for-

eign state has been passed or has been amended or repealed is a question of fact which is beyond the ken of judicial notice, and hence must be specifically alleged and proved. The construction placed on a foreign statute or the interpretation of a rule of common law presents a question of law. Therefore, where the decisions of a foreign state are presented to the court on the argument of a demurrer, it is competent for said court to determine the question of law. Hanna v. Lichtenhein (1918), 182 App. Div. 94, 169 N. Y. Supp. 589.

§ 531. Account, how pleaded; bill of particulars.

The office of a bill of particulars is not only to define and limit the issues, but also to apprise the opposing parties of what the latter has to meet at the trial. Thompson v. De Visser (1919), 106 Misc. 165, 175 N. Y. Supp. 276.

Application for bill of particulars; affidavit of attorney.—As a general rule a motion for a bill of particulars must be founded upon the affidavit of the party applying therefor; the affidavit of his attorney alone is insufficient unless some good reason exists for a departure from the rule. Strohoefer v. Sec. Mu. Life Ins. Co. (1912), 148 App. Div. 763, 133 N. Y. Supp. 289. The stringency of the rule requiring an affidavit of a party as a basis for a bill of particulars or other relief has been

relaxed to some extent, and particularly when it appears that the attorney was familiar with the material facts and was in a position to make the affidavit quite as well if not better than the client; but the rule has not been abandoned and is peculiarly applicable to a case where the bill of particulars is not necessary to limit the issues, and should not be granted if the plaintiff possesses the information required by the bill of particulars. General Film Co., Inc. v. L. & L. & Globe Ins. Co. (1918), 181 App. Div. 862, 169 N. Y. Supp. 257.

Idem; when to be made.—No time limit is prescribed within which to make application for a bill of particulars; a bill of particulars will not be granted merely to enable a party to determine the form

which his pleading shall take, but may be granted in exceptional cases before issue joined to enable a party to plead. *Bracken v. Toland* (1912), 153 App. Div. 57, 137 N. Y. Supp. 1043.

A bill of particulars which merely repeats the allegations of the complaint without any affidavit that plaintiff cannot give further particulars, is insufficient upon its face. Where upon a motion to compel the defendant's attorney to accept a bill of particulars, the plaintiff furnishes an affidavit that he is unable to give further particulars, although at the time the bill was rejected he had not made such an affidavit, it is useless to order a further bill of particulars, and the motion should be granted, but without costs. *Huyler v. Huyler* (1918), 183 App. Div. 537, 169 N. Y. Supp. 689.

Aiding plaintiff.—Defendant is not bound to furnish a bill of particulars of facts which the plaintiff must establish in order to maintain his action. *Knickerbocker Trust Co. v. Miller* (1912), 149 App. Div. 685, 133 N. Y. Supp. 989.

Aid in defense.—A defendant before answering is not entitled to a bill of particulars on the ground that it is necessary for purposes of defense. *Udike v. Mace* (1913), 156 App. Div. 381, 141 N. Y. Supp. 587.

Dates and names; failure of memory.—Where a bill of particulars sufficiently advises the defendant of the facts upon which plaintiff's claim is based, he will not be ordered to give dates and names more definitely, it appearing that his memory has been impaired by age and sickness. *Herrman v. Empire Realty Corporation* (1912), 152 App. Div. 822, 137 N. Y. Supp. 809.

Disclosure of evidence not required.—A demand for a bill of particulars of the defendant's "claim" includes both defenses and counterclaims, but the defendant should not be required to disclose substantially all his evidence; and a provision in an order for a bill of particulars precluding the defendant from giving evidence if he fails to furnish the particulars required is premature. *Posner v. Rosenberg* (1912), 149 App. Div. 270, 133 N. Y. Supp. 702.

A bill of particulars of a defense of payment ordinarily will not be directed because it would not call for the particulars of the claim of the party but of the evidence to sustain such claim. *Seedy v. Breakwater Co.* (1913), 144 N. Y. Supp. 771.

Idem; inspection of instrument.—An inspection of a negotiable instrument cannot be obtained under the guise of an application for a bill of particulars. *Herrington v. Davitt* (1912), 78 Misc. 199, 139 N. Y. Supp. 198.

One party cannot compel another party to present a bill of particulars for the pur-

pose of furnishing evidence. *Moore v. American Molasses Co.* (1917), 163 N. Y. Supp. 633.

Answer examined, and held, that allegations as to accord and satisfaction are sufficiently precise, so that an order for particulars thereof would require the defendant to disclose its evidence. *Ebin v. Equitable Life Assurance Society* (1917), 177 App. Div. 458, 164 N. Y. Supp. 284.

Bill of particulars to make damages of special nature.—Where a complaint merely claims general damages for a breach of contract to purchase a certain amount of lumber, the defendant cannot have a bill of particulars by setting up in its motion therefor matters alleged to make the damages claimed of a special nature. *Young v. Curtiss Aeroplane Co.* (1918), 184 App. Div. 709, 172 N. Y. Supp. 458.

Disclosure of names of witnesses.—While it is true that the object of a bill of particulars is not to disclose the names of witnesses, it is designed to make the pleadings more reasonably certain and to prevent surprise at trial, and in a proper case may require the disclosure of names of persons, and it is not a valid objection that they may subsequently be called as witnesses. *Evening Herald Co. v. Kilmer* (1915), 167 App. Div. 399, 153 N. Y. Supp. 121.

In a contested probate proceeding an application for a bill of particulars which must state the names of the persons who, as alleged by contestant, exercised undue influence on testator in the matter of the execution of the will, will be denied. *Matter of Velter* (1916), 95 Misc. 62, 158 N. Y. Supp. 449.

Although a bill of particulars required the plaintiff to state the names of persons who made certain communications to a decedent and he stated the name of one person only, he was entitled to produce other witnesses at trial, if there was no order precluding such evidence. *Reis Co. v. Post* (1918), 183 App. Div. 696, 170 N. Y. Supp. 610.

Only under unusual circumstances will the court compel giving of names of witnesses prior to trial. Unless it is clearly shown that such a disclosure is necessary to the securing of justice, the granting of such an order is an abuse of discretion. *Goakes v. City of Oneida* (1917), 180 App. Div. 118, 167 N. Y. Supp. 389.

Failure to furnish further bill; order precluding giving of testimony.—Where, in an action for negligence, the defendant has furnished a bill of particulars as to its defense of contributory negligence in such general terms that it conveys no real information to the plaintiff, and has taken no steps to comply with an order for a further bill of particulars, although its employee is the only living witness of the accident, an order precluding it from offering evidence is proper. *McCullum v. Beau-*

Site Co. (1918), 182 App. Div. 243, 169 N. Y. Supp. 603.

On motion to preclude giving of testimony, it is no defense that plaintiff is not in possession of facts enabling him to comply with an order for a bill of particulars, where the same defense was urged when the order was granted. *Everard's Breweries v. Wohlschlatter* (1917), 164 N. Y. Supp. 897.

A defendant is not required to return a second bill of particulars, which is insufficient, or to move for further particulars, but may move to preclude the giving of testimony. *Bloom v. Bush Terminal Co.* (1917), 164 N. Y. Supp. 895.

Knowledge of facts immaterial.—Where the particulars authorized to be required are of a plaintiff's claim, knowledge on the part of the defendant of alleged facts is quite immaterial. *Larrere v. Morse* (1916), 159 N. Y. Supp. 74.

Discretion of court.—It is always a question resting in the sound discretion of the court as to how far the defendant is required to give particulars. *Fernet v. Stewart & Co.* (1914), 163 App. Div. 112, 148 N. Y. Supp. 646.

A motion for a bill of particulars is addressed to the sound discretion of the court, and that discretion should be exercised with due regard of the circumstances of the particular case. *De Cordova v. Sanville* (1916), 171 App. Div. 422, 157 N. Y. Supp. 432.

It seems that where the motion for particulars is addressed to the discretion of the court an affidavit of merits is required by rule 23 of the general rules of practice. *Ebin v. Equitable Life Assurance Society* (1917), 177 App. Div. 458, 164 N. Y. Supp. 284.

Doubt as to facts relied on.—A plaintiff may plead facts according to their legal effect; if the defendant is in doubt as to the facts relied upon, he may move that the pleading be made more definite and certain or for a bill of particulars. *Kronau v. Weisburg* (1912), 151 App. Div. 355, 135 N. Y. Supp. 404.

Familiarity with nature of claims.—Where in an action on a building contract, the pleadings show both parties are familiar with the claims of the other to the extent that defendant cannot be seriously surprised on the trial before referee, a motion for bill of particulars will not be granted with respect to over forty phases of the controversy, but where a contract provides notice of delays in work must be given forty-eight hours after delay occurs in order to obtain an extension of time fixed for completion and the complaint alleges such delays as excuse for non-performance and are also included in plaintiff's claim for damages, motion for bill of particulars will be granted. *Boland Co. v. Emma Willard School* (1912), 76 Misc. 18, 136 N. Y. Supp. 314.

Idem; where facts are necessarily within knowledge of party applying for bill.—

Where the complaint in a suit for an accounting alleges that the plaintiff, after entering into numerous contracts with property owners to represent them in condemnation proceedings, made an agreement with the defendant to do certain legal work and collect for and pay over to the plaintiff the consideration provided by the contracts and the expenses advanced by it thereunder; that the defendant in violation of said agreement, collected large sums of money due to the plaintiff from the owners out of the awards made to them, and has failed and refused to turn over such moneys, and the answer denies the allegations as to refusal to pay over amounts collected but admits the agreement, and alleges that the contracts made by the plaintiff with the owners were *ultra vires*, the defendant is not entitled to a bill of particulars specifying the names of the property owners from whom he has collected money belonging to the plaintiff, and at what times he failed to make reports, as the accounting is sought for the purpose of acquiring information which is known to the defendant, and necessarily unknown to the plaintiff. *U. S. Title Guaranty Co. v. Brown* (1913), 160 App. Div. 591, 145 N. Y. Supp. 1014.

Inconsistent defenses.—Where, in an action against the guarantors of a loan, the defendant pleads several inconsistent defenses, the plaintiff is not entitled to a bill of particulars to ascertain the defense upon which the defendant will rely at the trial. *Kraus & Co. v. Mayer* (1912), 150 App. Div. 122, 134 N. Y. Supp. 694.

Non-compliance with order.—A further bill of particulars may be required where the particulars furnished do not comply with the original order. *New York County National Bank v. Herrman* (1912), 148 App. Div. 631, 133 N. Y. Supp. 200.

Where an order requiring a bill of particulars is not complied with, the default should not be lightly excused. *Driscoll v. New York Veal and Mutton Co.* (1915), 89 Misc. 147, 151 N. Y. Supp. 647.

Idem; no evidence admissible.—The provision that the party shall be precluded from giving evidence of the allegations of his pleading, of which particulars have been ordered and not delivered is mandatory, and, if particulars ordered are not furnished, the precluding order follows as a matter of course. *McKenna v. Horwitz & Schanback* (1914), 163 App. Div. 541, 148 N. Y. Supp. 970.

Idem; exclusion of evidence.—If, after a plaintiff has furnished a bill of particulars, the defendant is of opinion that he has not exercised good faith, he may then apply to the court for an order excluding evidence as to those parts of the claim of which particulars have not been given. But a provision in the order granting the

bill of particulars precluding the plaintiff from giving any evidence on the trial in support of the claims of which he has not given particulars, is unauthorized. *Richards v. Miller* (1915), 167 App. Div. 443, 153 N. Y. Supp. 388.

It is no excuse for plaintiff to refuse to furnish a bill of particulars and to merely state the purport of certain alleged writings, on the ground that the papers are in the possession of defendant and that the latter has refused to furnish copies, since he can force their production. *Rosenblum v. Westin* (1915), 155 N. Y. Supp. 102.

A bill of particulars of the date, nature, and amount of special services performed, set up in an answer, will be ordered, although the defendant claims not to have information, where the court is satisfied that the defendant has the means of obtaining the information, and it is unjust to compel the plaintiff to try out the issue without the information. *Board of Trustees v. Hurlburt* (1916), 161 N. Y. Supp. 436.

An order precluding a party from introducing evidence of the particulars of an account will be granted where a demand for particulars has been made and the party has neglected to comply with the demand. *Remer v. Bishop* (1916), 161 N. Y. Supp. 410.

Better cause of action.—A bill of particulars should not be ordered to compel a plaintiff to state a better cause of action than she has alleged. *Donohue v. Carroll* (1917), 179 App. Div. 602, 166 N. Y. Supp. 884.

Not a part of pleading.—On a demurrer to a complaint upon the grounds of insufficiency a bill of particulars served by the plaintiff should not be considered as part of the pleading. *Kaufman v. Hopper* (1912), 151 App. Div. 28, 135 N. Y. Supp. 363.

A bill of particulars is no part of the pleadings and cannot enlarge the cause of action or perfect an imperfect pleading. *United States Printing & Lithograph Co. v. Powers* (1916), 171 App. Div. 406, 157 N. Y. Supp. 440.

Separate defense.—Where an answer, containing no demand for affirmative relief, prays simply for a dismissal of the complaint, plaintiff's motion for a bill of particulars relating only to matter set up as a separate defense will be granted. *Bowsky v. Schlichten* (1912), 76 Misc. 206, 134 N. Y. Supp. 600.

An affidavit on a motion for a bill of particulars need not allege that the defendant has no knowledge of the particulars of the plaintiff's claim. *Rubinfeld v. Stolts* (1916), 159 N. Y. Supp. 597.

General damages.—It is not proper to require the plaintiff to give the items of a claim for general damages. *Chimbaluk v. Garcia* (1915), 155 N. Y. Supp. 106.

Defense not relevant to complaint.—A defendant will not be required to give a bill of particulars of a defense that is in no wise relevant to the cause of action alleged in the complaint. *Pollock v. Samuel W. Peck & Co.* (1916), 175 App. Div. 394, 161 N. Y. Supp. 892.

Different from motion to make pleading more definite.—There is a distinction between the office of a bill of particulars and a motion to make the pleading more definite and certain. *United States Printing & Lithograph Co. v. Powers* (1916), 171 App. Div. 406, 157 N. Y. Supp. 440.

Before pleading.—A bill of particulars may be granted before answer or other pleading only in exceptional cases as, for instance, where it is necessary in order to prepare a proper answer or other pleading. *Gordon v. Williams* (1917), 100 Misc. 172, 165 N. Y. Supp. 384.

It is peculiarly the province of a bill of particulars to amplify the pleadings and to make plain the issues to be tried and determined and the suggestion that defendants know the facts better than plaintiff begs the question which is not what the facts are but what plaintiff claims them to be. *Buffalo General Electric Co. v. Lunz* (1916), 96 Misc. 219, 159 N. Y. Supp. 905.

Stay of proceedings unauthorized.—An order in a suit for specific performance requiring plaintiff to furnish a bill of particulars, and staying plaintiff's proceedings until the particulars are furnished, is unauthorized. *Borgrosser v. Risch* (1912), 149 App. Div. 248, 133 N. Y. Supp. 683.

Payments to individual.—Decisions to the effect that where payment has been made to a corporation a bill of particulars may be ordered showing to what officer of the corporation the payment was made, have no application where payments are made to an individual. *Ebin v. Equitable Life Assurance Society* (1917), 177 App. Div. 458, 164 N. Y. Supp. 284.

Defense of payment.—Under the practice in the first department a defendant will not be required to give particulars of a defense of payment unless very special reasons therefor appear. *Ebin v. Equitable Life Assurance Society* (1917), 177 App. Div. 458, 164 N. Y. Supp. 284.

Attorneys' services.—Bill of particulars in action by attorneys for professional services. *Pace v. Amend* (1914), 164 App. Div. 209, 149 N. Y. Supp. 738.

Sufficiency of bill of particulars by attorneys in an action on *quantum meruit* for professional services. *Gormley v. Smith* (1914), 165 App. Div. 169, 150 N. Y. Supp. 614.

Where in an action by an attorney to recover for professional services the defendant does not deny the retainer of the plaintiff, there is no reason for directing plaintiff to furnish the particulars of his retainer and employment, but he should give the reasonable value of services ren-

dered by counsel. *Wolfe v. Miller* (1917), 164 N. Y. Supp. 302.

In an action by an attorney for various professional services and disbursements, a bill of particulars, giving the dates of various items with reasonable charge for each separate matter, is sufficient. *Bien v. Ali* (1917), 165 N. Y. Supp. 270.

Building contract; statement of damages.

—In an action to recover reasonable value of work done and material furnished under a building contract where the answer pleads as a counterclaim, that plaintiff did work so negligently that damage was done to ceilings and walls of certain rooms to the extent of \$2,000, the plaintiff is only entitled to a bill of particulars and an itemized statement of damage done to said certain rooms. *Duff & Sons, Inc. v. Levin* (1912), 76 Misc. 249, 134 N. Y. Supp. 903.

Commissions and balances due under contract.

—In an action by the plaintiff, as assignee of a company operating in the Republic of Brazil, to recover commissions and balance due under a contract made by his assignor with the defendants to dispose of shipments of petroleum products, the defendant is entitled to a bill of particulars stating the names of the persons to whom each cargo or part thereof was sold. *Reincke v. Texas Co.* (1912), 150 App. Div. 210, 134 N. Y. Supp. 752.

Where the plaintiff, an insurance agent, sets forth numerous causes of action against his principal for commissions alleged to have been earned in placing policies, and the defendant, among other things, pleads payment in full and an account stated, the defendant should not be required to furnish a bill of particulars giving all the details of each payment made to the plaintiff. *Ebin v. Equitable Life Assurance Society* (1917), 177 App. Div. 458, 164 N. Y. Supp. 284.

A plaintiff claiming a commission for furnishing a tenant to defendant is not excused from furnishing a bill of particulars upon the ground that he has not the information, where he can procure it by order for examination of defendant's officers. *Bloom v. Bush Terminal Co.* (1917), 164 N. Y. Supp. 895.

Completion of building; counterclaim of damages.

—Where in an action for services rendered in supervising the completion of a building, the defendant sets up a counterclaim for damages caused by plaintiff's negligence and want of skill, whereby the building cost more than it should, defendant will be compelled to give a bill of particulars of the specific items, but as the plaintiff must prove performance of his contract, he is not entitled to particulars of his negligence. *Herrman v. Leland* (1912), 148 App. Div. 641, 133 N. Y. Supp. 271.

Contract; partly oral and partly written.

—Where a plaintiff suing upon a contract,

who has been ordered to give a bill of particulars of those parts of the contract which are in writing, and also of those parts which are oral, after admitting that the contract is partly oral and partly written, with deliberation and intention gives particulars only as to the written portion, a motion to preclude him from giving testimony as to the oral portion should be granted. *Witschleben v. Glynn* (1913), 156 App. Div. 193, 140 N. Y. Supp. 1037.

Idem; lack of information as to names and dates.—Where a party is without information as to a contract alleged to have been made or of negotiations alleged to have been had by him through an agent, he is entitled to a bill of particulars giving the name of the agent and specifying the time and place and to a copy of any contract or other writing. *Astor Mortgage Co. v. Tenney* (1913), 157 App. Div. 361, 142 N. Y. Supp. 265.

Contributory negligence.—Bill of particulars as to defense of contributory negligence of coservant and assumption of risk denied because of nature of complaint. *Fernet v. Stewart & Co.* (1914), 163 App. Div. 112, 148 N. Y. Supp. 646.

Bill of particulars as to contributory negligence pleaded as an affirmative defense. *Szymanski v. Contract Process Co.* (1913), 82 Misc. 46, 143 N. Y. Supp. 604; *Kanya v. Pennsylvania R. Co.* (1917), 167 N. Y. Supp. 765.

Idem; discretion of court.—The court in its discretion may require the defendant to give a bill of particulars as to an allegation of contributory negligence contained in the answer. *Ithaca Trust Co. v. Driscoll Brothers & Co.* (1914), 163 App. Div. 54, 148 N. Y. Supp. 775.

Idem; disclosure of defense.—Where a defendant sued for personal injuries alleges that the injuries were caused by the contributory negligence of the plaintiff and by the negligence of a competent fellow-servant, the plaintiff is not entitled to a bill of particulars of the facts constituting said defenses, for prior to the trial the defendant should not be compelled to state the particulars required and thus limit and define his possible defense. *Griffin v. Cunard Steamship Co.* (1913), 159 App. Div. 453, 144 N. Y. Supp. 517.

In an action to rescind a contract for the sale of land, there being several defendants, it was held that the plaintiff should be required to state which of them extended her time to make payment on the contract, which of them repudiated the provisions as to the payment of assessments, which of them told the plaintiff that she would have to pay assessments, and which of the defendants promised to return earnest money paid by the plaintiff. *Mattoon v. Ives* (1915), 169 App. Div. 830, 155 N. Y. Supp. 679.

Breach of contract for personal services.

—In an action for breach of a contract for

services as a private secretary wherein the defendant alleged that the plaintiff did not perform his services in a satisfactory manner, it was held that the defendant should not be compelled to set forth in a bill of particulars what acts of the plaintiff made him unsatisfactory to the defendant, but that the defendant should be allowed to prove, in a general way, the entire course of conduct of the plaintiff covering the whole period that he was in the defendant's employ. *Varnum v. Huntington* (1916), 174 App. Div. 392, 161 N. Y. Supp. 165.

Where in an action for the breach of a contract of employment the defendant by way of separate defence pleads that the plaintiff did not serve the regular hours and was insubordinate, a bill of particulars may be granted as to when and where the plaintiff agreed to commence work at 8 a. m. (as alleged in the answer) and what were the particular days at which he started to work at a later hour, and what was such later hour. *Krause v. Jarkow* (1916), 160 N. Y. Supp. 1005.

In an action for breach of contract to deliver merchandise, where the averments of a defense that war conditions prevented performance were not provable under defendant's denials, it should have been directed to furnish particulars as to shortage of coal, government orders, operatives taken over for military service or war work and dates of commandeering of looms by the government. *Alsberg v. Crompton Richmond Co., Inc.* (1918), 172 N. Y. Supp. 167.

Contributory negligence and assumption of risk.—Where in an action under the labor law brought by a servant against his master to recover for personal injuries alleged to have been caused by negligence, the defendant, after denying the material allegations of the complaint, charges that the plaintiff was guilty of contributory negligence and assumed the risks incident to his employment, the court, in its discretion may require the defendant to give a bill of particulars of the affirmative defenses aforesaid. *Havholm v. Havholm* (1913), 159 App. Div. 578, 144 N. Y. Supp. 833.

Divorce; as to offenses relied upon.—Where the complaint in an action for divorce is framed in such general terms as to permit plaintiff to offer proof of adulteries committed anywhere, with any man, and at any time within a period of two years, he will be compelled to furnish a bill of particulars. *Furthmann v. Furthmann* (1913), 155 App. Div. 202, 139 N. Y. Supp. 1055.

In an action for divorce, defendant is not entitled to a bill of particulars as to the allegation in the complaint that between certain dates he committed adultery with one whose name is unknown to the plaintiff, where the affidavit is made not by

himself, but by his attorney. *Knox v. Knox* (1913), 79 Misc. 648, 140 N. Y. Supp. 356.

A bill of particulars will be ordered in an action for divorce, where the adultery is alleged to have been committed "in other towns of Monroe county" "in various towns and cities in the state of New York, and in other towns and cities in other states of the United States," "with various women," although there are in the complaint specific allegations of adultery at specified places with a specified correspondent. *Yauck v. Yauck* (1916), 161 N. Y. Supp. 413; *Geimer v. Geimer* (1916), 161 N. Y. Supp. 415.

Separation action.—Although § 1764 requires the acts constituting cruel and inhuman treatment to be specified in a complaint for separation, particulars will not be ordered where the defendant, in a defense to an action for divorce, has alleged acts upon which she bases her charge of cruel and inhuman treatment with reasonable certainty within the information which she possesses. *Geimer v. Geimer* (1916), 161 N. Y. Supp. 415.

Contract for sale of goods.—Where a defendant sued for an alleged breach of contract to sell and deliver certain goods to the plaintiff defends upon the ground that the contract of sale only required defendant to furnish the quantity of goods used by the plaintiff in his own business during the current year and that as the price of the commodity had risen the plaintiff had embarked upon a scheme to solicit customers of the defendant and require the latter to furnish said goods to the plaintiff in unlimited quantities to be sold by him for purposes of speculation, etc., the defendant is entitled to a bill of particulars showing the names and addresses of all the persons from whom the plaintiff claims to have received orders for the goods and the dates, quantities ordered and prices of goods alleged to have been sold by the plaintiff, the contemplated profits upon which constitute the damage he seeks to recover. *Moore v. American Molasses Co.* (1917), 179 App. Div. 505, 166 N. Y. Supp. 4.

Manufacture of goods sold; cost of production.—Plaintiff, in an action to recover damages for defendant's refusal to complete a contract for the purchase of goods to be manufactured by the plaintiff, should not be required to give a bill of particulars stating the number of men employed by him, and where the bill of particulars served is sufficient, plaintiff should not be charged costs as a condition of requiring defendant to accept such bill. *Pomeroy Co. v. Wells Brothers Co.* (1912), 149 App. Div. 673, 134 N. Y. Supp. 353.

Where it is claimed that certain merchandise was inferior and not up to sample and standard quality the defendant will be required to give a bill of particulars of

said defects as they are peculiarly matters for a bill of particulars and not for the pleading. *Harney Shoe Co. v. Ginzberg-Gordon Co.* (1918), 182 App. Div. 496, 169 N. Y. Supp. 848.

Counterclaim for failure to deliver shrapnel parts.—A motion for a bill of particulars as to a counterclaim for breach by the plaintiff of a written contract to deliver shrapnel fuse parts should be modified so as to call only for a general description of the parts which plaintiff did not continue to deliver as rapidly as possible, as it would be burdensome and unnecessary to require the defendant to specify each of the parts separately. As the defendant has sufficiently indicated its claim by specifying that not more than 108,000 were delivered, and the plaintiff knows how many complete sets were furnished, a bill of particulars relating thereto should not be granted. As the defendant claims gross negligence and bad faith as the cause for delay in deliveries, the plaintiff is entitled to have these generalities made specific. The plaintiff is entitled to a bill of particulars so that it may appear whether the alleged delays were substantial. As there was no allegation or claim of special damage, the plaintiff is not entitled to specifications of items of damage. *Manning, Maxwell & Moore, Inc. v. American Can Co.* (1918), 182 App. Div. 709, 169 N. Y. Supp. 713.

In an action for failure to deliver merchandise pursuant to orders filed with it by the plaintiff, a defendant is not entitled to a bill of particulars of such orders. *Moore v. American Molasses Co.* (1917), 163 N. Y. Supp. 633.

Where, in an action for the purchase price of a turpentine substitute delivered by plaintiff to defendant under a written contract, plaintiff claimed that the contract covered only such an amount as defendant actually needed and required in its business, and the defendant counterclaimed for damages because of the plaintiff's refusal to deliver the maximum amount provided for by the contract, and in answer to plaintiff's demand for a bill of particulars stated that the maximum was used by the defendant in the manufacture of paint products, and no part of it was resold to other persons in the form in which it was purchased from plaintiff, the latter being still unconvinced that defendant actually needed the amount of turpentine substitute which was undelivered, is entitled to a further bill of particulars showing from whom the defendant claims to have received orders for paint products, the manufacture of which required the use of the turpentine substitute which was not delivered. *Warner-Quinlan Asphalt Co. v. American A. P. Co.* (1918), 182 App. Div. 235, 169 N. Y. Supp. 384.

Negligence; items of damages.—Where allegations of negligence are so general in

character, as to make it impossible to determine what issues are to be raised, plaintiff will be required to furnish a bill of particulars of the items of damage. *Wojtczak v. American Manufacturing Co.* (1912), 152 App. Div. 433, 137 N. Y. Supp. 287.

Idem; bill of particulars insufficient.—In an action to recover damages for breaking an electric light pole plaintiff's bill of particulars stating that defendant, a railway company, was negligent and careless in that by reason of the manner in which one of its cars was operated an automobile driven by the other defendant was thrown against the pole by reason of which plaintiff sustained the damages referred to in the complaint, is insufficient and plaintiff will be directed to give in good faith its version of the facts out of which its claim of negligence arises. *Buffalo General Electric Co. v. Dunz* (1916), 96 Misc. 219, 159 N. Y. Supp. 905.

Promissory note; new promise.—Where a complaint anticipating the defense of the statute of limitations in an action upon a promissory note alleges a new promise of the defendant to pay which is denied by the answer and that is the only issue, the defendants are entitled to a bill of particulars stating when and how the new promise was made and are also entitled to a copy of the promise if in writing. *Herrington v. Davitt* (1913), 155 App. Div. 831, 140 N. Y. Supp. 944.

Idem; prima facie case established.—Proof of the allegations of a complaint upon a promissory note that it was made to the order of defendant, was indorsed by it and delivered to plaintiff before maturity, establishes a *prima facie* case entitling plaintiff to recover and she need not furnish a bill of particulars of other matters. *Hague v. Northern Hotel Co.* (1912), 77 Misc. 142, 135 N. Y. Supp. 1047.

Reformation of insurance policy.—Where, in a suit for the reformation of a policy of burglar insurance, so as to show a prior loss and damages by plaintiff's assignors, and a prior rejection of insurance by another company, it is claimed that the policy was returned to the defendant, and that it agreed to so amend the same, a bill of particulars should be granted to the defendant, showing the names of the person in its employ with whom the plaintiff's assignors claim they made the agreement to amend the policy. *Harris v. Great Eastern Casualty Co.* (1913), 159 App. Div. 875, 144 N. Y. Supp. 950.

Action on policy of burglary insurance.—*Jacobson v. Massachusetts Bonding & Ins. Co.* (1917), 165 N. Y. Supp. 776.

Slander.—Where, in an action for slander, the plaintiff alleges that the slanderous words were uttered in conversations with merchants with whom plaintiff had already contemplated business relations, and that "a number of merchants and persons," and in particular certain firms named, ceased to deal with him and refused to extend

credit, the defendant is entitled to a bill of particulars, stating the persons in whose presence or to whom the slanderous words were spoken, and the names of all the persons who refused to deal with the plaintiff. *Kayata v. Ontra* (1913), 159 App. Div. 511, 144 N. Y. Supp. 475.

Stockholder's action.—Where in a representative action by a stockholder against the officers and directors of a corporation to require them to account for alleged mismanagement, it appears that the plaintiff has had the benefit of a complete examination of the books and officers, he should be required to serve a bill of particulars. The rule that where the plaintiff is entitled to an accounting a bill of particulars will not be required with respect to particular allegations of misconduct does not apply, as the officers and directors of a corporation may not be called upon to account by a stockholder as a matter of right but only for some specific act of negligence or misconduct. Laches, unaccompanied by injury or prejudice to the adverse party, is not a sufficient ground for denying a motion for a bill of particulars. *Tilton v. Gans* (1913), 155 App. Div. 612, 140 N. Y. Supp. 782.

Wrongful discharge.—Bill of particulars as to affirmative defense in an action for wrongful discharge. See *Stern v. Bellas, Hess & Co.* (1915), 166 App. Div. 806, 152 N. Y. Supp. 258.

Injury to property by explosion.—In an action for injury to property by blasts during the construction of a subway the plaintiff will be required to give a bill of particulars as to the location of the acts charged and the specific character of the acts of negligence charged, but not as to the methods the plaintiff claims the defendant used in prosecuting its work or the method the plaintiff claims the defendant should have used. *Howland v. Bradley Contracting Co.* (1915), 155 N. Y. Supp. 510.

Conspiracy to ruin business.—Where a complaint alleges that the defendants, publishers of a newspaper, and other persons, entered into a conspiracy to deprive the plaintiff's newspaper of its patronage and

business and sets forth various transactions between the defendants, their co-conspirators, agents, servants, subscribers, advertisers, employees, etc., whereby the plaintiff's business was destroyed, the court, in granting an order for a bill of particulars on motion of the defendants, may require the plaintiff to set out the names of the persons by whom and upon whom the wrongful or improper influence was exerted, and this is true although some of the said persons may subsequently testify as witnesses. *Evening Herald Company v. Kilmer* (1915), 167 App. Div. 399, 152 N. Y. Supp. 121.

Injury to plaintiff's business.—Where no special damages are alleged concerning the injury to plaintiff's business, a motion for a bill of particulars, stating the damages in detail, should be denied. *Duncan Co. v. Hemsley & Co.* (1917), 164 N. Y. Supp. 670.

Where, in an action by an executrix to recover a sum of money alleged to have been loaned to defendant by the testator in his lifetime, the plaintiff intends to prove the fact of a loan and a promise to repay by establishing a delivery of the money to the defendant at a time when the decedent was not indebted to him, an order granting unconditionally defendant's motion for a detailed bill of particulars concerning matters as to which the plaintiff swears she has no knowledge, and of which the defendant necessarily has knowledge, should be modified by providing that if plaintiff has no present knowledge as to any of the matters as to which she is required to give particulars, she shall so state under oath, and that such statement shall serve in place of an answer as to those matters concerning which she so makes oath. *De Cordova v. Sanville* (1916), 171 App. Div. 422, 157 N. Y. Supp. 432.

Partnership accounting.—In a suit for an accounting with the defendant, with whom the plaintiff was a partner for many years, the defendant should be furnished particulars of the matters alleged to constitute the account. *Richards v. Miller* (1915), 167 App. Div. 443, 153 N. Y. Supp. 388.

§ 532. Judgment; how pleaded.

Application.—This section is applicable to the city court of the city of New York and in an action therein on a judgment in a foreign state, an allegation that such judgment was duly given, is sufficient. *Spitzer v. Greens* (1915), 89 Misc. 123, 152 N. Y. Supp. 882.

Issuance of letters of administration.—In an action by an administratrix to recover for the death of her husband, the denial of the allegation that the letters were "duly issued" raised an issue and enabled

the defendants to make an attack, but only for fraud or collusion. The establishment of "actual fraud" was not essential. *Webster v. Kellogg Co.* (1915), 168 App. Div. 443, 153 N. Y. Supp. 800.

Recovery of judgment.—While in an action upon a judgment this section permits a plaintiff to plead that the judgment was "duly" recovered, such conclusion may be "controverted." *Simmons Co. v. Van Rees* (1914), 87 Misc. 284, 149 N. Y. Supp. 857.

Pleading determination of workmen's compensation commission, if plaintiff controverts allegation of award, the defendant is required on the trial to make proof of the facts, but they need not be pleaded.

Corrico v. Smith (1917), 178 App. Div. 33, 164 N. Y. Supp. 190.

Section cited.—*Gustavus v. Dahlmer* (1917), 98 Misc. 462, 163 N. Y. Supp. 132.

§ 533. Conditions precedent; how pleaded.

Requirements must be strictly followed.—One who seeks to avail himself of the above section and avoid setting forth the facts constituting performance must strictly follow its requirements. *Sisskin v. Workmen's Circle* (1917), 163 N. Y. Supp. 535.

Fulfillment of covenants.—Where a party relies upon an executory contract to support a cause of action or sustain a defense he is required to allege and prove fulfillment upon his part of the covenants which he was obligated to perform. *Bklyn. Heights R. R. Co. v. Bklyn. City R. R. Co.* (1912), 151 App. Div. 465, 135 N. Y. Supp. 990.

The performance of a condition precedent is sufficiently alleged in an action for wages and unlawful discharge under a contract of employment as a salesman where the complaint alleges that he "entered upon the performance of said contract and went out on the road and took and sent in orders to the defendant." *Hart v. Sherman* (1916), 96 Misc. 564, 160 N. Y. Supp. 844.

Provisions not conditions precedent.—An allegation of the complaint in an action to recover damages for breach of contract to sell to plaintiff talking machines, for which they agreed to pay cash upon delivery and were given the exclusive license to sell the machines in a certain territory except to certain specified dealers, and that plaintiffs were ready, willing and able to receive and pay for said machines and had demanded the delivery thereof, was a sufficient allegation of performance on their part; the provision not to accept orders from certain specified dealers was not a condition precedent within said section and the provision that plaintiffs would pay for the machines on delivery was a dependent condition. *Marx v. Talking Doll and Novelty Co.* (1916), 96 Misc. 591, 160 N. Y. Supp. 861.

Only by pleading the performance of conditions precedent specified in a contract, can one invoke the aid of this section. Neither tender nor the attitude of the other party rendering a tender unnecessary is such a condition. There are facts outside of the contract which must be alleged and proved before the recovery of damages can be had for the breach of a contract. *Ketcham v. Alexander* (1915), 168 App. Div. 38, 153 N. Y. Supp. 864.

Acceptance of building by architect.—A complaint in an action for the foreclosure of a mechanic's lien which sets out a builder's contract under which the defendant

was to make final payment when the work was completed and accepted by the architect, and alleges that the plaintiff "has duly performed all the conditions of the said contract on his part," is sufficient. The general allegation in the language of the code is broad enough to cover the provision of the contract as to the architect's certificate or acceptance. *Smith v. Cary* (1914), 160 App. Div. 119, 145 N. Y. Supp. 99.

"Actually performed" as equivalent to "duly performed."—An application that the plaintiff did "actually" perform and carry out all the terms and conditions in said agreement contained on his part, is not equivalent to an allegation that he "duly" performed, and, hence, the complaint fails to state a cause of action. *Marcus Contracting Co. v. Weinbros Real Estate Co.* (1914), 162 N. Y. App. Div. 495, 147 N. Y. Supp. 576.

A general allegation that the plaintiff duly performed and tendered performance of all conditions of said contract, is not effective to save a complaint where the plaintiff sets forth what he actually did do, if that falls short of due performance. *Towers v. Errington* (1912), 78 Misc. 29, 138 N. Y. Supp. 177.

A general allegation of due performance by plaintiff of conditions precedent to his right to recover on a contract without stating the facts constituting performance is expressly authorized; but not so as to a breach of contract by the defendant. *Baby Show Exhibition Co., Inc. v. Crowell Pub. Co.* (1916), 174 App. Div. 368, 161 N. Y. Supp. 205.

A general allegation that plaintiff duly performed all the conditions of an agreement on its part to be performed, is sufficient, and it is not incumbent on him to allege and prove that certain provisions of the agreement, in the form of exceptions, did not become operative. *David v. City National Securities Co.* (1916), 174 App. Div. 593, 161 N. Y. Supp. 174.

Plea of performance.—The complaint in an action to recover for the breach of an agreement whereby the defendant promised to pay the book value of certain stock delivered to it, through its director, by the plaintiff, is not subject to demurrer for a failure to plead performance by the plaintiff as a condition precedent, where he alleges that he "duly performed all the conditions on his part." And especially is this so where the facts alleged by the plaintiff show due performance upon his part, and

state a complete cause of action independent of the general allegation. *Moghhabghab v. Sherman, etc. Co.* (1914), 161 App. Div. 135, 146 N. Y. Supp. 392.

Allegation of performance when not sufficient.—In an action to recover damages for a breach of contract, it is sufficient to allege generally that plaintiff has duly performed all the conditions on his part. An allegation that plaintiffs had performed and complied with each and every of the terms of the agreement on their part to be performed is not equivalent to an allegation that they have "duly" performed the agreement on their part, and is not sufficient. *Marx v. Talking Doll and Novelty Co.* (1916), 96 Misc. 591, 160 N. Y. Supp. 861.

In an action for an alleged wrongful discharge an allegation, "That in accordance with the agreement as aforesaid, the plaintiff had duly entered upon the employment of the defendant, and fully performed his duties in accordance with the aforesaid agreement," is insufficient. *Siaskin v. Workmen's Circle* (1917), 163 N. Y. Supp. 535.

Where in an action to foreclose a mechanic's lien a cross-answer, based on an entire contract and seeking to enforce a mechanic's lien thereunder, does not allege due performance, it is insufficient to constitute a cause of action for goods sold and delivered or for labor performed under the contract, and a personal judgment cannot be granted in case a valid mechanic's lien is not established. *Weaver*

Hardware Co. v. Solomovitz (1917), 98 Misc. 413, 163 N. Y. Supp. 121.

An allegation that plaintiff performed his part of the contract set forth in the pleading is insufficient. *Weaver Hardware Co. v. Solomovitz* (1917), 98 Misc. 413, 163 N. Y. Supp. 121.

A complaint founded on an alleged breach of a contract by the defendant under which the plaintiffs were to have the exclusive right to manufacture certain goods, which is defective in that "due" performance on their part is not alleged, cannot be sustained as one where nonperformance by the plaintiff is excused because the defendant breached the contract before the time set for performance, if there is nothing to show that the defendant repudiated the contract before said time. *Siegel v. Montgomery Ward & Co.* (1917), 177 App. Div. 487, 164 N. Y. Supp. 252.

While this section authorizes a general allegation of due performance by plaintiff of the conditions precedent to a right to recover on certain contracts without stating all of the facts constituting performance, still a complaint in an action for the breach of a unilateral contract not under seal which sets forth no facts which show that plaintiff had done anything under the contract which called for action upon the part of the defendants or imposed any duty or obligation upon them under the contract, fails to state a cause of action. *Cohn v. Levine* (1918), 185 App. Div. 529, 173 N. Y. Supp. 289.

§ 534. Instrument for payment of money; how pleaded.

Where the complaint sets forth the guaranty in full, the plaintiff is entitled to the benefit of its every feature and its full legal effect, and if susceptible of conflicting interpretations the one most favorable to the plaintiff must be adopted. *Westchester Mortgage Co. v. Thomas B. McIntire Inc.* (1915), 168 App. Div. 139, 153 N. Y. Supp. 437.

Legal effect of document annexed to complaint, when pleaded.—Unless the issue tendered can be gathered from reading a contract annexed to the complaint the pleader should determine in his own mind

the legal effect of the contract upon which his cause of action is founded and plead its legal effect as he understands it and as he purposes to maintain it, even though a copy be annexed. Especially should a plaintiff plead the legal effect of a document annexed to the complaint where it is ambiguous without evidence of surrounding circumstances or parole evidence tending to show the intent of the parties. *U. S. Printing & Lithograph Co. v. Powers* (1918), 183 App. Div. 513, 170 N. Y. Supp. 314.

§ 535. Pleadings in libel and slander.

Correct report of judicial proceedings.—Where the complaint in an action for libel admits that the article complained of and published in defendant's newspaper, charging the plaintiff with having been arrested and held for trial, was substantially a correct report of a judicial proceeding and, therefore, privileged, a demurrer to the complaint for insufficiency will be sustained. *Smith v. New Yorker Staats-*

Zeitung (1912), 77 Misc. 601, 138 N. Y. Supp. 557.

Defamatory matter must refer to plaintiff.—This section requires the plaintiff to state that the defamatory matter refers to him, but he need not allege extrinsic matter to show that his conclusion is correct. If, however, he pleads matter which shows that the article does not relate to him, he contradicts his direct assertion.

Carpenter v. Glens Falls Post Co. (1914), 164 App. Div. 396, 149 N. Y. Supp. 801.

Joinder of action with action under § 51 of civil rights law.—An action for libel and the action under § 51 of the civil rights law may be joined in one complaint, as both causes of action arise out of the same transaction. *d'Altomonte v. New York Herald Co.* (1913), 154 App. Div. 453, 139 N. Y. Supp. 200.

Justification.—In an action for libel, an answer pleading justification, need not meet the immaterial and irrelevant facts alleged in the libel. *Tully v. New York Times Co.* (1912), 78 Misc. 165, 137 N. Y. Supp. 962.

Name of person; effect of wrong name.—Where a complaint sets forth an alleged libelous article and asserts that the defendant maliciously published the same concerning plaintiff, the mere fact that the plaintiff says that his name is "Bert L. Carpenter," whereas the name used in the article is "Sam Carpenter," is not a contradiction of the assertion that the article was published concerning the plaintiff. *Carpenter v. Glens Falls Post Co.* (1914), 164 App. Div. 396, 149 N. Y. Supp. 801.

Plaintiff not mentioned by name.—Where a complaint in an action for libel alleges that the plaintiff is a man of good reputation, lawfully engaged in the business of selling motion pictures and rights to exhibit the same; that during the time in question he was the owner of "certain rights to exhibit a certain motion picture film called 'The Feudists,' and was authorized to sell and vend same;" that the defendant published "of and concerning the plaintiff" in certain moving picture journals articles which stated in substance that persons engaged in the unlawful practice of stealing and selling films without authority of the real owners were at large, and that the defendant's president purposes to apprehend the criminals and fling them into jail, and that "The Feudists" is one of the pilfered films, but such article nowhere mentions the plaintiff by name, and the innuendo consists of the mere statement that the plaintiff was the person referred to, without averment of extrinsic facts, there is a failure to state a cause of action. *Feely v. Vitagraph Co.* (1918), 184 App. Div. 527, 172 N. Y. Supp. 264.

Privileged.—Plaintiff suing for libel need not allege that the article was not privileged, the defense of privilege resting upon the defendant. *Hinrichs v. Butts* (1912), 149 App. Div. 236, 133 N. Y. Supp. 769.

A complaint for slander by a corporation need not allege that a duly authorized agent of the defendant uttered the defamatory words, nor need it allege that the corporation authorized, ratified or instigated the slander. It is sufficient to allege that the words were spoken by the defendant corporation. *Kharas v. Collier* (1916), 171 App. Div. 388, 157 N. Y. Supp. 410.

Repetition of offensive words.—The rule in this state permits the defendant to interpose a plea authorized by this section and § 536 that may require the repetition of the offensive words or some of them without penalty of having such repetition considered upon the question of damages, unless the plea is made in bad faith or wantonly or recklessly. *Walling v. Commercial Advertiser Association* (1916), 173 App. Div. 491, 159 N. Y. Supp. 329.

Surplus allegations.—In an action for libel, brought by the husband to recover for loss of his wife's services, surplus allegations as to libel upon the husband may be stricken out on motion, but furnish no ground for demurrer. *Garrison v. Star Co.* (1912), 153 App. Div. 744, 138 N. Y. Supp. 761.

Truth of article.—A complaint in an action for a libel which shows that the alleged libelous article is true does not state a cause of action. *Maldonado & Co. v. Yglesias* (1913), 154 App. Div. 520, 139 N. Y. Supp. 102.

Idem; scope and language.—In determining whether a newspaper article is libelous, its scope and object must be considered together and its language given a natural construction. If such alleged publication imputed to plaintiff a vicious act tending to diminish his respectability and impair his comfort by the attendant disgrace and contempt, damage will be presumed and complaint is good on demurrer. *O'Connell v. Press Publishing Co.* (1912), 77 Misc. 3, 137 N. Y. Supp. 332.

Words not imputing criminality.—A complaint in an action for slander which relies solely upon words which do not in themselves impute any criminal charge, is demurrable. *Gillespie v. Byrne* (1912), 151 App. Div. 703, 136 N. Y. Supp. 207.

§ 536. Pleading mitigating circumstance in action for a wrong.

Usury.—Where an answer alleges with sufficient certainty facts which amount to usury, the answer may not be stricken out as insufficient and frivolous for want of an allegation that the agreement was intentionally usurious. *Shape v. Shape* (1912), 77 Misc. 649, 137 N. Y. Supp. 605.

In action for false imprisonment it is not necessary to show want of probable cause or malice in the sense of ill-will or even recklessness. The jury may consider the quality of the act and the intent with which it was done and, if it is found that there was ill-will or recklessness involved, to award primitive damages, and it is only

to meet the claim for such damages that mitigating circumstances may be shown. *Jones v. Pickard* (1917), 101 Misc. 117, 166 N. Y. Supp. 721.

Action of libel.—Where in a partial defense set up in mitigation of damages there is an affirmative allegation that the

publication was without malice, a denial theretofore set up in the answer need not be repeated, and a demurrer to said partial defense as insufficient will be overruled. *McCue v. Survey Associates, Inc.* (1919), 106 Misc. 160, 175 N. Y. Supp. 346.

§ 537. Frivolous pleadings; how disposed of.

The remedy for a frivolous pleading is a motion for judgment thereon. The relief afforded by this section can only be granted where the whole answer is frivolous, and where there is no affirmative defense. There is no authority for the striking out of an answer or any part thereof on the ground that it is frivolous. *Hagedorn-Merz Co. v. Burns* (1917), 178 App. Div. 483, 165 N. Y. Supp. 99.

Admission of material allegations and general denial.—Where, in an action for an accounting, the defense is a decree in surrogate's court, judicially discharging defendant, a reply which admits the entry of the decree and that it has not been reversed, modified or discharged, but merely denies on information and belief certain allegations respecting the accounts settled, is frivolous. *Childs v. Childs* (1912), 150 App. Div. 656, 135 N. Y. Supp. 972.

Denial of motion.—When motion for order overruling answer as frivolous denied, see *Hyland v. Montgomery* (1914), 88 Misc. 295, 150 N. Y. Supp. 613.

Denial of knowledge of assignment of tax lien.—An answer in a suit to foreclose a tax lien, brought under the provisions of the Greater New York charter, is not frivolous in that it denies that the defendant has any knowledge or information sufficient to form a belief as to the plaintiff's allegation that the tax lien and moneys due thereunder were assigned to him. This, because such assignment is not necessarily a matter of record. *Altman v. Bungay Co.* (1914), 161 App. Div. 583, 146 N. Y. Supp. 949.

Judgment on pleadings.—While a motion for judgment is authorized on the ground that the demurrer interposed is frivolous, the preferable practice is to move under § 547 for judgment on the pleadings. *Posner v. Rosenberg* (1912), 149 App. Div. 272, 133 N. Y. Supp. 704.

A judgment, strictly speaking, can be had on motion on the ground that the answer is frivolous, where its frivolous character appears plainly on the face thereof. *Gibbs v. Title Guaranty & Surety Co.* (1913), 79 Misc. 247, 139 N. Y. Supp. 945.

An application for a judgment upon an answer as frivolous, must be determined by the inspection of the pleading; argument to demonstrate the insufficiency of the pleading must be unnecessary, and the practice of interposing affidavits for or against the pleading cannot be sanctioned. *Partenfelder v. People* (1913), 157 App. Div. 462, 466, 142 N. Y. Supp. 915, *aff'd* 211 N. Y. 355.

Presumptively frivolous.—Where denials in an answer are only presumptively frivolous, the plaintiff, in order that the defendant may justify his answer by affidavit or otherwise, should move for judgment under § 537 and not under § 547. *Cerlian v. Bacon* (1913), 155 App. Div. 118, 140 N. Y. Supp. 47.

What amounts to frivolous answer.—Where, in an action for the breach of a written contract of employment, the defendant denied that it ever executed the contract with the plaintiffs, and alleges that, if its name was signed to any paper purporting to be such a contract it was without authority and was not the act of the defendant, a direct issue is presented and the answer should not be stricken out as frivolous. *Levine v. Mohawk Clothing Co.* (1914), 161 App. Div. 539, 146 N. Y. Supp. 567.

Where defendant pleads tender of payment, but no facts that constitute a tender, he merely pleads a legal conclusion. And the answer is frivolous on its face and raises no issue. *Cook v. Broughton* (1918), 102 Misc. 260, 168 N. Y. Supp. 818.

§ 538. Sham defenses to be stricken out.

Limited to sham defenses.—There is no authority in law for striking out a defense unless it is sham. *Bradley v. McCutcheon* (1916), 161 N. Y. Supp. 394.

Denials of material allegations.—A denial upon information and belief, even as to matters unquestionably within the defendant's knowledge, cannot be stricken out as sham. *Rockowitz v. Siegal* (1912),

151 App. Div. 636, 136 N. Y. Supp. 192.

Portions of an answer containing denials of material allegations of the complaint cannot be stricken out as sham. *Gibbs v. Title Guaranty & Supply Co.* (1913), 79 Misc. 247, 139 N. Y. Supp. 945.

An answer in an action to foreclose a mortgage which denies, in the words of the complaint, that defendant had failed

to comply with the conditions of the mortgage by omitting to pay the principal sum, or that the sum claimed, or any sum whatever, remains due and unpaid, may not be stricken out as sham. *Carleton v. Lawrence* (1912), 77 Misc. 573, 137 N. Y. Supp. 200.

A defendant's denial of knowledge or information as to an account stated, is not sham, where it is not necessarily as to a matter within his personal knowledge. *Curtis-Blaisdell Co. v. Lederer* (1913), 82 Misc. 444, 143 N. Y. Supp. 1074.

In an action on a promissory note the defendant's denials of knowledge or infor-

mation sufficient to form a belief as to whether the note became due on a certain date, whether he paid it at maturity, whether he gave a new note in renewal thereof, whether he has repaid to the indorsers a certain sum which they paid on the note are all sham and must be stricken out. But a denial of knowledge and information sufficient to form a belief as to whether the note was indorsed by the plaintiff and whether the plaintiff paid a certain amount on the note and the discount on a renewal of note is not a sham. *McNeil Lumber Co. v. Chase* (1915), 154 N. Y. Supp. 872.

§ 539. Material variances; how provided for.

The whole scope of the provisions permitting immaterial variances to be disregarded implies that all the material allegations of the plaintiff or defendant shall be spread upon the record, shall be actually inserted in the pleadings, and when variances are disregarded, it is upon the principle that they may be amended *nunc pro tunc* at the trial, and the court will so order to perfect the record so that it shall show the question really litigated and decided. The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*; and this rule cannot be departed from without inextricable confusion and uncertainty and mischief in the administration of justice. Parties go to court to try the issues made by the pleadings, and courts have no right impromptu to make new issues for them, on the trial, to their surprise or prejudice, or found judgments on grounds not put in issue, and distinctly and fairly litigated. So when a case is tried as one for conversion, which action does not lie, it is error for the court to direct a verdict on the theory that the action was brought to set aside a fraudulent transfer. *Stewart v. Sulger* (1916), 174 App. Div. 838, 161 N. Y. Supp. 489.

Inconsistency between plaintiff's evidence and defendant's admission held not to be a variance which can be corrected. *Horan v. Hastorf* (1918), 223 N. Y. 490.

So a complaint stating a legal action for conversion cannot be amended at trial, against the objection of defendant, so as to materially change the character of the action into one in equity. *McNeil v. Cobb* (1919), 186 App. Div. 177, 173 N. Y. Supp. 865.

Executed contract alleged, but executory contract proved.—When a complaint clearly and definitely states a cause of action for breach of an executed contract, judgment for violation of an oral agreement, constituting an executory contract, will not be sustained. *Walrath v. Hanover Fire Ins. Co.* (1915), 216 N. Y. 220.

Amendment to be made at special term.—An application for an amendment to a complaint to correct a material variance so as to justify a recovery on the facts must be made to the special term, where terms can be imposed. *Cody v. Dickinson* (1913), 159 App. Div. 234, 144 N. Y. Supp. 158.

Application.—*Lynch v. Cronk* (1915), 91 Misc. 422, 155 N. Y. Supp. 271.

§ 540. Immaterial variances; how provided for.

Action for personal injuries.—*Lemik v. American Sugar Refining Co.* (1917), 176 App. Div. 378, 162 N. Y. Supp. 1016.

Application.—*Lynch v. Cronk* (1915), 91 Misc. 422, 155 N. Y. Supp. 271.

§ 541. What to be deemed a failure of proof.

What is failure of proof.—The variance between the pleading and proof must be of a substantial nature; it must go to the very nature of the action, or to the result accomplished, rather than to the mere detail of the method of accomplishing that act. *Lynch v. Cronk* (1915), 91 Misc. 422, 155 N. Y. Supp. 271.

Evidence discredited though not received.—It is reversible error for the appellate division in order to cure an error and sustain a decree of a surrogate, to find

that if competent evidence offered by appellant had been received the witnesses were discredited by the history of the case and their conduct in it, and the evidence offered could not have changed the result. The appellate division cannot base a finding upon no evidence, but upon its conclusion that if proper evidence on a plain question of fact had been received it would have been incredible. *Matter of Reed* (1917), 221 N. Y. (mem.).

§ 542. Amendments of course.

Right to amend of course where amended complaint has been served pursuant to order.—Plaintiffs, although they have served an amended summons and complaint, pursuant to an order granted upon their motion, may still serve another amended complaint, as of course, as permitted by this section. *O'Connell v. Wilson* (1914), 162 App. Div. 392, 147 N. Y. Supp. 570.

An amendment by leave of the court is not a substitute for the absolute right to amend a pleading once, of course, and does not preclude a subsequent amendment. *Guenther v. Ridgway Co.* (1916), 173 App. Div. 790, 156 N. Y. Supp. 534.

Amendment at close of evidence.—It is error to permit the plaintiff at the close of the evidence to amend his complaint so as to change the cause of action. *Walrath v. Hanover Fire Ins. Co.* (1915), 216 N. Y. 220.

Right to amend answer after default.—An amended answer should not be allowed after the time required by law, except upon substantial terms. *Vaden v. Schleicher Co.* (1915), 166 App. Div. 743, 152 N. Y. Supp. 354.

Effect of amendment; on admission in answer.—An admission in an answer of a fact alleged in a complaint is evidence against the defendant of the existence of such fact on the trial although the answer was superseded by an amended answer which denied the fact formerly admitted. *Kelly v. St. Michael's Roman Catholic Church* (1912), 148 App. Div. 767, 133 N. Y. Supp. 328.

Idem; on demurrer to original complaint.—A service of an amended complaint alleging but one of the original causes of action against but one of two defendants kills a demurrer to the original complaint, which alleges causes of action against each of said defendants. *O'Connor v. Christopher* (1915), 90 Misc. 77, 152 N. Y. Supp. 955.

Idem; withdrawal of demurrer.—A defendant, having demurred to a complaint on the ground that it fails to state facts sufficient to constitute a cause of action, cannot withdraw the demurrer and answer as a matter of right. *Crotty v. Erie Railroad Co.* (1912), 149 App. Div. 262, 133 N. Y. Supp. 696.

Idem; after demurrer noticed for trial.—A motion made after a demurrer has been noticed for trial for leave to change the title of the action by omitting the words "individually and as executors, etc.," is really one to amend the complaint or to discontinue as against the executor and will be granted on payment of taxable costs. *Obnet v. Ridder* (1917), 100 Misc. 142, 160 N. Y. Supp. 171.

Application for amendment; affidavit by attorney.—An affidavit made by the attorney on a motion for leave to serve a

further amended answer, which shows no reason why it was not made by one of the defendants, fails to show any personal knowledge of the attorney as to the facts sought to be pleaded, discloses no reason why all of the facts could not have been asserted before, and does not contain an affidavit of merits, is insufficient. *Vaden v. Schleicher Co.* (1915), 166 App. Div. 743, 152 N. Y. Supp. 354.

Amendment changing place of trial.—A plaintiff cannot deprive the court of jurisdiction to hear a pending motion for change of venue by serving an amended complaint changing the place of trial from the county named in the original complaint to the county where one of the parties resided when the action was commenced. *Barbera v. Quittner* (1912), 154 App. Div. 322, 138 N. Y. Supp. 1000.

An amended answer setting up new issues, which if power will constitute a bar to plaintiff's claim, held not to have been served "for the purpose of delay." *Hallheimer v. United States Fidelity & Guaranty Co.* (1916), 157 N. Y. Supp. 303.

Prior amendment.—A second application to serve an amended complaint should be denied where the proposed complaint does not state a cause of action. *Hamilton Trust Co. v. Schevlin* (1913), 156 App. Div. 307, 141 N. Y. Supp. 232; *Strong & Trowbridge Co. v. Defiance M. Works* (1917), 166 N. Y. Supp. 446.

Right to amend answer once as of course is not affected by a prior amendment by leave of the court. *Hall v. Galban & Co.* (1914), 164 App. Div. 873, 148 N. Y. Supp. 517.

Verification.—A proposed amended answer should be verified. *Vaden v. Schleicher Co.* (1915), 166 App. Div. 743, 152 N. Y. Supp. 354.

Demurrer not equivalent to amended complaint.—The significant and controlling word in the section is the word "on." It defines the extent to which the privilege of amendment under it may be carried. A party may amend his pleading as of course once and once only. If amendment be found necessary more than once leave must be obtained. This amendment of course may be at any one of several times either within twenty days after he has served his pleading, or within twenty days after the answer, demurrer or reply is served, or at any time before the time for answering expires, but if once made at any one of the times specified the right is exhausted and no further amendment can be made by virtue of it. It is true that if the plaintiff amends his complaint after the defendant has once amended his answer as of course, the right to once amend the answer to the amended complaint will revive, for the amended complaint takes the place of the original complaint and the ac-

tion will proceed as if the original complaint had never been served. But a demurrer to an amended answer cannot be deemed to be equivalent to an amended complaint so as to allow a second amendment of the answer as of course. *Orlik v. National Carbon Co.* (1917), 176 App. Div. 600, 163 N. Y. Supp. 768.

§ 543. Amended pleading to be served; answer thereto.

Service within time allowed.—Failure to serve an amended answer within the time allowed by law should be explained and excused. *Vaden v. Schleicher Co.* (1915), 166 App. Div. 743, 152 N. Y. Supp. 354.

Effect of service.—Upon the service of an amended complaint, the action is to be treated as though the original complaint had never been served. *Maytham v. Parker* (1913), 81 Misc. 400, 142 N. Y. Supp. 582.

§ 544. Supplemental pleadings.

Discretion of the court is judicial. *Wetzel v. Wetzel* (1918), 169 N. Y. Supp. 259.

Change of form of action.—The supplemental pleading must be read with the original complaint. It does not take the place of the original pleading, and therefore it is never proper to permit a supplemental complaint in such a form as would change the action from one in law to one in equity, or to change the form of an action for moneys due upon a promissory note to one in tort. *Wetzel v. Wetzel* (1918), 169 N. Y. Supp. 259.

Determination of merits on motion.—Although the court will not ordinarily on motion determine the merits of a supplemental answer, but will leave the parties to litigate at the trial the questions raised thereby, it is its duty to consider all the circumstances and grant or refuse the application as may be just and proper in the particular case. *People v. Beguelin* (1918), 184 App. Div. 759, 172 N. Y. Supp. 530.

On a motion to serve a supplemental summons and complaint neither the sufficiency of the pleadings nor the relevancy of its allegations nor defects of parties will be considered. *Baum v. Stockell* (1915), 168 App. Div. 286, 153 N. Y. Supp. 1004.

The distinction between an amended and supplemental complaint is that in an amended complaint allegations of fact existing when the action was commenced may be incorporated while a supplemental complaint is necessary when it is sought to allege material facts which occurred after the original complaint was made. *Brinberg v. Oliver Typewriter Co.* (1916), 174 App. Div. 511, 161 N. Y. Supp. 226.

Order permitting supplemental complaint.—Where an order permits the making of a supplemental summons and complaint and does not expressly provide that the supplemental complaint shall take the place of the former pleading, the issues made by the former complaint and answer thereto still stand and the defendant is not in default for failure to answer the supplemental pleading in so far as it repeats the allegations of the former plead-

ing. *Casassa v. Savarese* (1912), 149 App. Div. 243, 133 N. Y. Supp. 657.

Supplemental complaint allowed.—Where a complaint in foreclosure sets forth a default in the payment of taxes on the mortgaged property and alleges that pursuant to the terms of the mortgage the plaintiff elects to consider the principal immediately due and payable, he will be granted leave to serve a supplemental complaint pleading a subsequent default in the payment of interest which also gives him the right to declare the principal due. *Dunn v. O'Connor* (1918), 104 Misc. 426, 172 N. Y. Supp. 336.

Allowance of costs to plaintiff upon granting leave to defendant to serve supplemental answer may be made by the court by virtue of its general equitable and discretionary powers, but not as an extra allowance under section 3253. *Halfmoon Bridge Co. v. Canal Board* (1914), 213 N. Y. 160.

Leave granted as matter of course.—Applications for leave to serve an amended or supplemental pleading, where the other party cannot be injured thereby, are granted almost as a matter of course. *Milliken v. McGarrah* (1914), 164 App. Div. 110, 149 N. Y. Supp. 484.

Subsequent acts may be set forth.—In a suit in equity the plaintiff may be allowed to file a supplemental complaint setting forth acts which occurred subsequent to the commencement of the action and for which an independent action might have been brought. *Merrihew v. Kingsbury* (1912), 150 App. Div. 40, 134 N. Y. Supp. 452.

Although a plaintiff has served an amended complaint, he may subsequently move for leave to serve a supplemental complaint, setting out facts which have arisen since the commencement of the action, as such facts could not have been properly included in the amended complaint. *Milliken v. McGarrah* (1914), 164 App. Div. 110, 149 N. Y. Supp. 484.

A supplemental answer, pleading a fact which happened after the service of an amended answer, may be served with the

permission of the court. *Bertrand v. Oesting Building Co.* (1917), 163 N. Y. Supp. 70.

The sufficiency of a supplemental answer should not be determined on a motion for leave to file the same. *Bertrand v. Oesting Building Co.* (1917), 163 N. Y. Supp. 70.

Where a supplemental complaint alleges no new matter the supplemental answer may not set up matter materially changing the issues. *Kugelman v. Ritter* (1915), 155 N. Y. Supp. 97.

Acts unknown to plaintiff when complaint drawn.—A stockholder suing on behalf of himself and other stockholders to compel the officers and directors of his corporation to account for mismanagement and waste who sets forth that one of the defendants, having qualified as executor of the chief stockholder, brought action in his representative capacity against the corporation pursuant to a conspiracy to dissipate its assets, which action was abandoned, is en-

titled to an order authorizing the serving of a supplemental complaint setting out acts of the defendant as executor in collusion with the assignee to whom the corporation assigned its assets for the benefit of creditors, which acts took place before and after the commencement of the action, but were unknown to the plaintiff at that time. *Baum v. Stockwell* (1915), 168 App. Div. 286, 153 N. Y. Supp. 1004.

Effect of previous attempt to serve amended summons and complaint.—An application for leave to serve a supplemental summons and complaint should not be denied because the plaintiff had previously attempted to serve an amended summons and complaint upon the defendant as executor without leave of court, which complaint was stricken out on motion, with leave to the plaintiff to move for an amendment of process *nunc pro tunc*. *Baum v. Stockwell* (1915), 168 App. Div. 286, 153 N. Y. Supp. 1004.

§ 545. Motion to strike out irrelevant, etc., matter.

Application.—*Clarkin v. City of New York* (1915), 91 Misc. 98, 154 N. Y. Supp. 1019; *Shea v. Kiely* (1917), 167 N. Y. Supp. 570; *T. H. Symington Co. v. John Thomson Press Co.* (1918), 172 N. Y. Supp. 677.

Motion to strike out not favored.—Motions to strike out allegations of a pleading as irrelevant and redundant, especially where the pleading is an answer to which the plaintiff is not required to reply, are not favored by the courts, and are granted only where the allegations can have no possible bearing on the subject-matter of the litigation. *Stern v. Philipsborn* (1915), 169 App. Div. 781, 155 N. Y. Supp. 689.

Where there is a semblance of a cause of action or defense pleaded, its sufficiency cannot be determined on motion to strike out as redundant or irrelevant. The proper way to test its validity is by demurrer or by motion on the trial. *Plymouth Garage, Inc. v. Shanly* (1915), 170 App. Div. 61, 156 N. Y. Supp. 23.

Amended answer; motion to strike out.—Where defendant is in default for failure to comply with an order directing the service of an amended answer, but plaintiff agrees to receive the amended answer upon payment of costs and disbursements, and does accordingly receive and retain the same for two days, he cannot return it on the ground that it fails to comply with the order; he should move to strike out the portions which do not comply with it. *Whitman v. Morris* (1912), 152 App. Div. 97, 136 N. Y. Supp. 596.

Idem; when interposed for delay.—An amended answer may be stricken out where it appears that it was interposed for delay.

Joyce v. Eastman Kodak Co. (1917), 99 Misc. 361, 163 N. Y. Supp. 623.

Application denied if adverse party injured.—Motions to strike out irrelevant allegations are not favored and are granted only when it is evident that, if denied, the moving party will be prejudiced, and denied unless it is plain that the adverse party will not be harmed. *Brauch v. Young* (1912), 149 App. Div. 466, 134 N. Y. Supp. 53.

Dower; allegations as to adulterous conduct.—Where in an action brought to admeasure dower a motion by plaintiff's attorney to strike out certain specified allegations in the answer relating to plaintiff's adulterous conduct with her present husband has been granted, leaving other matter in the answer of the same general character without questioning it, she will not be permitted to object in the new or amended pleading and her subsequent motion to strike it out will be denied. *Garra-brant v. Disbrow* (1913), 155 App. Div. 456, 140 N. Y. Supp. 242.

Entire cause of action or an entire defense may not be stricken out but only the matter thereof which is irrelevant, redundant or scandalous. *Crotty v. Erie Railroad Co.* (1912), 153 App. Div. 902, 137 N. Y. Supp. 1102.

Evidentiary facts alleged in a complaint will be stricken out on motion under this section. *Barclay v. Barclay* (1914), 162 App. Div. 557, 147 N. Y. Supp. 597; *Conner v. Bryce* (1918), 170 N. Y. Supp. 94.

Extension of time to plead over.—Where a motion by plaintiffs to have certain paragraphs of the answer stricken out and others adjudged frivolous, and for judgment on the pleadings is granted, with

leave to defendant to plead over, it is improper for the special term upon motion by the defendant, to extend his time to plead over in case the order from which he has appealed should be affirmed. *Schwabe v. Herzog* (1913), 157 App. Div. 672, 142 N. Y. Supp. 652.

Facts essential to defense.—If denials or facts elsewhere pleaded are essential to render other facts pleaded available as a separate defense, they should not be stricken out; but if they are not material or relevant to the defense, they should not be left in to shield any matter alleged as a defense against a demurrer. *Pullen v. Seaboard Trading Co.* (1914), 165 App. Div. 117, 150 N. Y. Supp. 719.

In a suit in equity.—While greater latitude in pleading is permissible in a suit in equity than in an action at law, nevertheless obviously irrelevant matters should be stricken out so that the issues shall be sharply and clearly defined before the cause comes to trial. *Isaacs v. Salomon* (1913), 159 App. Div. 675, 144 N. Y. Supp. 876.

Insurance policy; misstatements in application.—Allegations of an answer in an action upon a policy of life insurance, of misstatements made by the insured to the defendant's medical examiner and that they were made fraudulently with intent to deceive and that they did deceive the defendant will be stricken out on motion on ground that the medical examination of the insured and the questions and answers are in no way referred to in the policy. *Becker v. Colonial Life Ins. Co.* (1912), 75 Misc. 213, 133 N. Y. Supp. 41.

Irrelevant and redundant allegations, stricken out, see *Barry v. Silberstein* (1914), 164 App. Div. 220, 149 N. Y. Supp. 627.

A motion to strike out allegations as irrelevant and redundant may be denied, where they are coupled with other material allegations. *Young v. White* (1913), 158 App. Div. 760, 143 N. Y. Supp. 931.

The power to strike out on motion averments in a pleading because of irrelevancy, applies only to such matter as is irrelevant to the cause of action or defense attempted to be stated. *Plymouth Garage, Inc. v. Shanly* (1915), 170 App. Div. 61, 156 N. Y. Supp. 23.

Redundant allegations.—Allegations in a complaint will not be stricken out as redundant, unless it clearly appears that in every reasonable aspect of the case such allegations can have no place in the pleadings. *Kidder v. Port Henry Iron Ore Co.* (1912), 151 App. Div. 348, 135 N. Y. Supp. 353.

Where the third cause of action set out in a complaint joins in a single cause of action the two causes set out in the first and second counts of the complaint, a motion to strike it out as redundant will be

granted, for if the plaintiff were required separately to state and number the two causes set out in the third count they would be but repetitions of the first and second counts. *Barrows v. Fidelity & Casualty Co. of New York*, 174 App. Div. 539, 161 N. Y. Supp. 203.

Leave to answer pending appeal from order denying motion.—Conditions may be imposed upon granting leave to answer pending appeal from order denying motion to strike out and make more definite and certain allegations of the complaint *Young v. White* (1913), 158 App. Div. 763, 143 N. Y. Supp. 934.

Separation of good and bad allegations.—Where, on a motion to strike out irrelevant and redundant allegations from the complaint, good and bad allegations are inextricably intermingled, the court is not bound to separate them. *Gutta-Percha & Rubber Mfg. Co. v. Holman* (1912), 150 App. Div. 678, 135 N. Y. Supp. 766.

The court may grant a motion to strike out parts of a complaint containing evidence or irrelevant matters, even though they include relevant facts, and leave it to the party to reform the pleading. *Cleveland v. Boynton* (1914), 165 App. Div. 39, 43, 150 N. Y. Supp. 477.

Surplus allegations.—In an action for libel, brought by the husband to recover for loss of his wife's services, surplus allegations as to libel upon the husband may be stricken out on motion, but furnish no ground for demurrer. *Garrison v. Star Co.* (1912), 153 App. Div. 744, 138 N. Y. Supp. 761.

Unnecessary allegations.—Where numerous allegations unnecessary to a statement of the alleged cause of action are inserted in the complaint, the only purpose of which is to make the real issue obscure, they should be stricken out as irrelevant and redundant. *Young v. White* (1913), 158 App. Div. 760, 143 N. Y. Supp. 931.

Vice of irrelevancy is more serious in a complaint than in an answer. *Isaacs v. Salomon* (1913), 159 App. Div. 675, 144 N. Y. Supp. 876.

Where effect of striking out is to change nature of action.—An order which, by striking out as irrelevant certain allegations of the complaint, converted the action into one on contract will be reversed. *Franklin v. Dinits* (1913), 83 Misc. 124, 144 N. Y. Supp. 770.

The sufficiency of the facts pleaded as a cause of action or defense will not be determined on a motion to strike out allegations of a pleading as irrelevant and redundant. *Stern v. Philipsborn* (1915), 169 App. Div. 781, 155 N. Y. Supp. 684.

A party is aggrieved when such irrelevant or redundant matter appears in a pleading which requires an answer or reply. *Conner v. Bryce* (1918), 170 N. Y. Supp. 94.

§ 546. Indefinite or uncertain allegations.

Application.—*Michie v. Slayback* (1914), 163 App. Div. 407, 148 N. Y. Supp. 890.

Applies to answers.—*Hooper v. City of New York* (1916), 96 Misc. 47, 160 N. Y. Supp. 14.

A motion to make more definite and certain is intended, primarily to aid the opposing party to plead. If the purpose of a party is to obtain a more particular statement of his opponent's claim, for the purpose of narrowing the issues at the trial, or to prevent surprise, his remedy is by application for a bill of particulars. And where the claim is definitely stated, although the statement thereof is wanting in detail, the remedy lies in an application for a bill of particulars. *Meredith v. Art Metal Construction Co.* (1916), 97 Misc. 69, 161 N. Y. Supp. 1.

Only legal conclusions stated.—A complaint which alleges that it was agreed on or about a certain date "by various agreements in writing," that the defendant should guarantee to the plaintiff the indebtedness of a corporation without alleging any one of the agreements either in substance or form, is defective, because it states only a legal conclusion as to the effect of "various agreements," and a motion to make it more definite and certain by setting forth in full or by annexing to the complaint as exhibits the alleged agreements, should be granted, although the plaintiffs have voluntarily served a verified bill of particulars, setting forth in full three agreements stated to be the ones referred to in the complaint. *United States Printing & Lithograph Co. v. Powers* (1916), 171 App. Div. 406, 157 N. Y. Supp. 440.

Application stating details to be included.—Where an application is made to make a complaint more definite and certain by stating a mass of details, the court is not called upon to sort out these matters which may properly be the subject of the motion, unless it appears to be necessary to protect or preserve a substantial right. *Baruch v. Young* (1912), 149 App. Div. 466, 134 N. Y. Supp. 53.

Such a motion is only granted where the facts are peculiar and complicated or where the facts required to be pleaded are substantive parts of the pleading. It is only when the allegations of a pleading "are so indefinite and uncertain that the precise meaning or application thereof is not apparent" that such a motion will lie. Where a complaint is very simple and merely alleges the plaintiff's agreement to sell and the defendant's agreement to purchase, plaintiff's willingness to perform and defendant's refusal to accept and pay for the goods, defendant's motion to require the plaintiff to make his complaint more definite and certain by stating whether the contract was in writing, and

if in writing by attaching a copy thereof to the complaint, for the reason that it desires to take advantage of the statute of frauds by demurrer in case the contract is oral, should be denied. *Swartmore Textile Co., Inc. v. Bernhard Co.* (1918), 184 App. Div. 572, 172 N. Y. Supp. 15.

A complaint which mingles in a single count a cause of action on contract and one in conversion will be required, under this section, to be made definite and certain, either by reducing the complaint to a single cause of action, or by separately stating and numbering each cause of action. *Curtis v. Wilson* (1917), 165 N. Y. Supp. 427.

Bill of particulars.—If a pleading is indefinite or uncertain the remedy is not by bill of particulars, but by motion to make definite and certain by amendment. *Kraus & Co. v. Mayer* (1912), 150 App. Div. 122, 134 N. Y. Supp. 694.

Facts which may properly be ascertained by an application for a bill of particulars, cannot be secured by a motion to make the complaint more definite and certain. *Young v. White* (1913), 158 App. Div. 760, 143 N. Y. Supp. 931.

Where the allegations of an answer are so indefinite and uncertain that the precise meaning thereof is not apparent, the defendant, on motion by the plaintiff, should be required to make the answer more definite and certain by amendment instead of furnishing a bill of particulars. *Harney Shoe Co. v. Ginzberg-Gordon Co.* (1918), 182 App. Div. 496, 169 N. Y. Supp. 848.

Clearness required.—A pleading is not objectionable as ambiguous or obscure if it is certain to a common intent; that is, if it is clear enough according to reasonable intendment or construction, though not worded with absolute precision. *Lasher v. McDermott* (1914), 162 App. Div. 232, 147 N. Y. Supp. 446.

Demurrer not available.—A complaint is not demurrable merely for indefiniteness; such a defect should be cured by motion. *Jacocks v. Morrison* (1912), 149 App. Div. 558, 133 N. Y. Supp. 1002.

Demurrer, when proper remedy.—Where a complaint is so indefinite and uncertain that the defendant cannot safely answer it and the uncertainty is such as cannot properly be obviated by a bill of particulars, or by an order to make the complaint definite and certain, demurrer is the proper remedy. *U. S. Printing & Lithograph Co. v. Powers* (1918), 183 App. Div. 513, 170 N. Y. Supp. 314.

Denial of any knowledge or information sufficient to form belief.—Where a defendant admits certain allegations of a complaint, but as to others denies that he has any knowledge or information sufficient to form a belief, the plaintiff is not entitled to an order to compel the defendant to make

the defense more definite and certain, for it fulfills the requirements of the code of civil procedure. *Lasher v. McDermott* (1914), 162 App. Div. 232, 147 N. Y. Supp. 446.

Doubt as to facts alleged.—A plaintiff may plead facts according to their legal effect. If the defendant is in doubt as to the facts relied upon, he may move that the pleading be made more definite and certain or for a bill of particulars. *Kronau v. Weisburg* (1912), 151 App. Div. 355, 135 N. Y. Supp. 404.

Promissory note; allegations as to circumstances.—A complaint, in an action upon a promissory note, which, besides setting forth the consideration upon which the note was given, also contains allegations as to the circumstances under which it came into the plaintiff's possession, states only one cause of action and is not ambiguous or uncertain. *Peters v. Miller* (1912), 150 App. Div. 249, 134 N. Y. Supp. 881.

Services and materials; dates to be furnished.—Where a complaint in an action for work, labor, services and materials furnished fails to allege when the services were rendered or the materials furnished, or when payments or demands therefor were made, a motion to make the complaint more definite and certain should be granted, because under such allegations the defendant is deprived of information as to whether he has a defense under the statute of limitations. *Peters v. Huppert* (1913),

159 App. Div. 829, 144 N. Y. Supp. 308.

Time and place; particulars to be stated.—It seems that if a complaint is indefinite as to particulars of time and place, which are material, a motion to make it more definite and certain will be granted. *Updike v. Mace* (1913), 156 App. Div. 381, 141 N. Y. Supp. 587.

Suit by people to set aside land grants.—In an action brought by the people of the state to set aside certain letters patent granting lands to several corporations it appeared that some of the grants stated that they were made for the purpose of promoting the commerce of the state, or for the beneficial enjoyment by the adjacent owner and for no other purpose, and reserved to the people the free use of certain lands under water which were included in the grants which were also made upon the condition that the corporations or their assigns should erect docks and fill in the same. Grants to other corporations purported to be made for similar purposes except that the words "or for the beneficial enjoyment of the same by the adjacent owner" were omitted. On demurrer by the defendant complaint examined, and *held*, to be so indefinite in the allegation of facts as to make it impossible for the court to determine the rights of the plaintiff and that the defendant's motion for judgment on the pleadings was properly granted. *People v. American Sugar Refining Co.* (1918), 182 App. Div. 212, 169 N. Y. Supp. 386.

§ 547. Motion for judgment on the pleadings.

Application.—*Stewart v. Franchetti* (1915), 167 App. Div. 541, 153 N. Y. Supp. 453.

Plaintiff is entitled to judgment on the pleadings where the denial does not put in issue any material allegation of the complaint and does not constitute an offset or counterclaim. *Katz Underwear Co. v. Burns* (1917), 178 App. Div. 487, 165 N. Y. Supp. 431.

The purpose of this section is to permit of a judgment disposing of the action on the same grounds and governed by the same rules as though the motion had been made at the trial. *Cunningham v. Platt* (1913), 82 Misc. 486, 144 N. Y. Supp. 51.

Effect of moving for judgment.—A defendant by moving for judgment on the pleadings admits the truth of the facts alleged in the complaint. *Felt v. Germania Life Ins. Co.* (1912), 149 App. Div. 14, 133 N. Y. Supp. 519.

Admission of allegations.—A defendant, by moving for judgment on the pleadings, admits every material allegation of the complaint. *McCarthy v. Fitzgerald* (1912), 139 N. Y. Supp. 950.

A defendant by moving for judgment admits all the allegations of fact contained

in the complaint, and the court must assume that they are true, and defendant is only entitled to an order granting his motion where the pleadings are legally insufficient or no issue of fact is raised. *Guggenheim v. Guggenheim* (1916), 95 Misc. 332, 159 N. Y. Supp. 333.

Denial of material allegation.—If the answer contains no denial of any material allegation in the complaint, a motion should be made for judgment on the pleadings. *Bradley v. McCutcheon* (1916), 161 N. Y. Supp. 394.

Where a complaint entitles plaintiff to any relief, legal or equitable, even though the judgment demanded be not the precise relief to which he is entitled, defendant's motion for judgment on the pleadings will be denied. *Guggenheim v. Guggenheim* (1916), 95 Misc. 332, 159 N. Y. Supp. 333.

A defendant is not entitled to judgment on the pleadings where there is at least one good cause of action contained in the complaint, although the other causes are insufficient. *Menzies v. Tasker-Halsted Realty Co.* (1917), 164 N. Y. Supp. 403.

Appeal from order.—An order directing or denying judgment upon the pleadings is appealable directly. Yet there is no

precedent which holds that, when the motion is made at the trial itself, the ruling of the court can be reviewed directly and before the termination of the trial and entry of judgment. The matter is regulated by § 996 *post*, which limits the review of exceptions taken at a trial to an appeal from the judgment. *Jackman v. Hasbrouck* (1915), 168 App. Div. 256, 153 N. Y. Supp. 876.

Demurrer to complaint.—On motion for judgment upon pleadings after demurrer, the court cannot make another order sustaining demurrers to complaint and dismissing same as the only matter before the court is the motion for judgment on the pleadings. *Wayte v. Bowker Chemical Co.* (1917), 180 App. Div. 568, 168 N. Y. Supp. 122.

The sufficiency of a demurrer may in a proper case be tested by a motion and an issue of law raised thereby tried upon the merits. *Lindebauer v. Weiner* (1916), 94 Misc. 612, 159 N. Y. Supp. 987.

Demurrer to supplemental complaint.—Where a demurrer to a supplemental complaint is overruled, upon a motion for judgment on the pleadings, the question as to whether the defendant should be allowed to answer the supplemental complaint cannot be raised as the defendant is virtually in default. *Bilder v. Ellis* (1912), 148 App. Div. 647, 133 N. Y. Supp. 425.

A demurrer may be brought on for hearing in three ways; (1) under the original provisions of the code, which require that the issue be noticed for trial at special term, put on the calendar, and reached in regular order; (2) under this section which authorizes a motion of judgment upon the pleadings, (3) under § 976 of the code, which provides that the demurrer may be brought on and tried as a contested motion. *Keyes v. Lestershire Heights Realty Co.* (1916), 173 App. Div. 336, 158 N. Y. Supp. 617.

A demurrer may be brought to trial (1) as an issue of law under §§ 963, 965, 969 of the Code; or (2) as a contested motion under § 976 of said Code, or (3) by a motion under § 547 of said Code for judgment on the pleadings. *Kramer v. Barth* (1913), 79 Misc. 80, 139 N. Y. Supp. 341.

A demurrer may be disposed of by a trial of an issue of law before a judge at a term without a jury followed by findings and judgment, a trial at any term under § 976, or on a motion for judgment on the pleadings. *Palito v. New York State Railways* (1915), 91 Misc. 674, 155 N. Y. Supp. 926.

Defendant may demur to complaint and then move for judgment on the pleadings. *Stirrup v. Trafton* (1912), 77 Misc. 473, 136 N. Y. Supp. 1052.

An issue of law raised by a demurrer to a complaint which goes to the whole cause of action, may be brought on for decision by a motion for judgment on the pleadings.

There is no apparent reason why the right to make such a motion should be limited to the plaintiff. His having demurred should not be deemed an election of a remedy because the motion for judgment could not be made by him until he had demurred. Issue having been joined, the defendant may elect to move for judgment on the pleadings or by noticing it for argument as a contested motion as permitted by § 976. *Hudson Iron Co. v. Clark* (1914), 145 N. Y. Supp. 789.

When motion does not present all questions raised on demurrer.—While a motion by defendants for judgment on the pleadings admits every material allegation of the complaint, it does not present all the questions which may be raised on a demurrer under § 488. *Mulkins v. Snow* (1919), 106 Misc. 556, 175 N. Y. Supp. 41.

Overruling of demurrer, how effectuated.—In a proceeding under either this section or § 976, all that is necessary to effectuate the decision of the court overruling a demurrer to the complaint is an order which should provide leave to plead over upon payment of, presumably, costs of motion; to be followed by judgment if the privileges extended by the order are not accepted. *Palito v. New York State Railways* (1915), 91 Misc. 674, 155 N. Y. Supp. 926.

An order overruling or sustaining a demurrer is appealable since the enactment of this section and the amendment of § 976, and prior cases to the contrary are obsolete. *Kahn v. Johnston* (1917), 177 App. Div. 383, 163 N. Y. Supp. 984.

Demurrer; order to be entered.—Where a demurrer is brought before the court on notice of motion, under this section and § 976, no written decision or interlocutory judgment need be filed or entered, but an order should be entered. *Taishoff v. Elkema* (1916), 171 App. Div. 288, 157 N. Y. Supp. 98.

Material issues cannot be summarily disposed of on a motion for judgment upon the pleadings. *Simon v. Bierbauer* (1913), 154 App. Div. 506, 139 N. Y. Supp. 327; *Gibbs v. Title Guaranty and Surety Co.* (1913), 79 Misc. 247, 139 N. Y. Supp. 945.

If the complaint entitles the plaintiff to any relief, legal or equitable, defendant is not entitled to demand judgment upon the pleadings. *Reppert v. Hunter* (1917), 180 App. Div. 680, 167 N. Y. Supp. 857.

Pleadings to be liberally construed.—If, by a liberal construction, an answer presents a good defense, a motion for judgment on the pleadings will be denied. *The Met. Printing Co. v. O'Neill* (1911), 148 App. Div. 885, 131 N. Y. Supp. 1009.

Pleadings and bill of particulars may be considered.—On a motion by defendant for judgment on the pleadings before trial, the court may consider the plaintiff's bill of particulars and whatever might properly be considered on a motion for judgment at

the opening of the trial. *Dineen v. May* (1912), 149 App. Div. 469, 134 N. Y. Supp. 7.

Nothing but pleadings may be considered.—A motion for judgment on the pleadings cannot be granted at plaintiff's instance, where the answer raises any material issue of fact as to which evidence must be taken to warrant a judgment, and on such a motion nothing but the pleadings can be considered. *Partenfelder v. People* (1913), 157 App. Div. 462, 466, 142 N. Y. Supp. 915, aff'd 211 N. Y. 355.

The summons and the affidavit of service are not pleadings and should not be considered. Hence, a defendant is not entitled to judgment on the pleadings because the complaint in an action does not allege that it was commenced within the statutory limitations, even though that fact be shown by the date of the summons and by the defendant's affidavit. *Agresta v. Federal Steam Navigation Co.* (1915), 169 App. Div. 467, 155 N. Y. Supp. 343.

The bill of particulars may be considered on a motion for judgment on the pleadings. *Butler v. Lincoln Hospital and Home* (1915), 155 N. Y. Supp. 1001.

A motion made under this section is analogous to a motion at the opening of the trial or upon demurrer. The complaint should be liberally construed and its material allegations deemed true. The pleadings only may be considered, and no greater weight should be given to a verified answer than to an unverified complaint. *Spielberg v. Canada Steamship Lines, Limited* (1917), 98 Misc. 304, 162 N. Y. Supp. 610.

Motion served after notice of answer.—Motion for judgment on the pleadings made after the joining of issue, the notice of motion having been served after service of the answer, is not prematurely made. *McIntyre v. Sprague* (1916), 159 N. Y. Supp. 1034.

Where motion is made at eve of trial, plaintiff should be allowed to serve an amended complaint without prejudice to proceedings already had, or to the position of the case upon the calendar, if in fact security has already been furnished. *People ex rel. Delehanty v. McIntyre* (1917), 179 App. Div. 528, 166 N. Y. Supp. 634.

Where issues of fact are raised by the pleadings they cannot be determined on a motion for judgment thereon, and such motion requires the consideration of the allegations thereof and not the facts to be proven thereunder. *Theobald v. U. S. Rubber Co.* (1914), 83 Misc. 627, 146 N. Y. Supp. 597.

Motion made before taking of testimony.—Judgment on the pleadings before the taking of any testimony should not be granted where issues are raised requiring trial by jury. *Elevator Automatic Signal Co. v. Bok* (1916), 159 N. Y. Supp. 13.

Issues of fact must be determined at the

trial and cannot be summarily disposed of on a motion for judgment on the pleadings. *Guggenheim v. Guggenheim* (1916), 95 Misc. 332, 159 N. Y. Supp. 333.

Questions of fact raised by pleadings.—Judgment on the pleadings under this section will not be directed, where issues of fact are presented by the pleadings which should be tried. *Gaston v. Wolf* (1916), 162 N. Y. Supp. 274.

Evidence outside the pleadings.—In a motion for judgment on the pleadings it is not proper for the court to receive evidence of matters *dehors* the pleadings themselves. *Faas v. Armstrong* (1915), 170 App. Div. 596, 156 N. Y. Supp. 806.

Upon a motion for judgment on the pleadings they must be liberally construed in favor of the pleader so far as matters of form are concerned, but the answer may not be considered in determining whether the complaint states facts sufficient to constitute a cause of action. *Guggenheim v. Guggenheim* (1916), 95 Misc. 332, 159 N. Y. Supp. 333.

Prayer for relief which may not be granted.—Where there is much in the complaint which affords no ground for a cause of action and asks for results that cannot be granted, the plaintiff will be given such relief as the proof in its entirety will show it to be entitled to. *The Gutta Percha and Rubber Mfg. Co. v. Holman* (1913), 208 N. Y. 583.

Presumptively frivolous.—Where denials in an answer are only presumptively frivolous, the plaintiff, in order that the defendant may justify his answer by affidavit or otherwise, should move for judgment under § 537 and not under § 547. *Cerlian v. Bacon* (1913), 155 App. Div. 118, 140 N. Y. Supp. 47.

Separately stated.—The fact that two alleged causes of action are not separately stated does not preclude the court from considering them upon a motion for judgment on the pleadings. *Hevia v. Wheelock* (1913), 155 App. Div. 387, 140 N. Y. Supp. 351.

Inconsistent causes of action; election.—A complaint may not be dismissed upon a motion for judgment on the pleadings if it discloses any cause of action. If there be two inconsistent causes there may be a motion for election at trial. *Kornblum v. Commercial Advertiser Association* (1918), 183 App. Div. 615, 170 N. Y. Supp. 249.

Sufficiency of complaint.—Where plaintiff, by his bill of particulars, limits his proof, the sufficiency of the complaint may be tested on a motion for judgment, made at the opening of the trial, upon the pleadings and bill of particulars. *Wood v. Miller* (1912), 78 Misc. 377, 138 N. Y. Supp. 562.

Complaint to state cause of action.—A plaintiff who moves for judgment on the pleadings submits his complaint to the

scrutiny of the court. Although an answer does not state facts sufficient to constitute a defense the plaintiff cannot obtain a judgment upon the pleadings unless his complaint states a cause of action. *Equitable Life Assurance Society v. Wilds* (1918), 184 App. Div. 435, 171 N. Y. Supp. 505.

A defendant, although he has answered by denying the averments of the complaint, may move for judgment on the pleadings on the ground that the allegations of the complaint are insufficient. *Spielberg v. Canada Steamship Lines, Limited* (1917), 98 Misc. 304, 162 N. Y. Supp. 610.

Practice; knowledge of pleader.—It is proper to grant judgment upon the pleadings when the only denials in an answer are denials of knowledge or information sufficient to form a belief with respect to matters which are unmistakably within the knowledge of the defendant; but a different rule applies where this form of denial is used to meet allegations of fact which are only presumptively within the knowledge of the person making the denial, or where the defect in the pleading is such that the court may, upon proper terms and conditions, permit it to be changed or amended. *Kirschbaum v. Eschmann* (1912), 205 N. Y. 127.

Idem; preferable to motion to strike out as frivolous.—While a motion for judgment is authorized on the ground that the demurrer interposed is frivolous, the preferable practice is to move under § 547 for judgment on the pleadings. *Posner v. Rosenberg* (1912), 149 App. Div. 272, 133 N. Y. Supp. 704.

Idem; where demurrers and interposed.—Where a plaintiff, after defendants interpose demurrers to one of two separate and distinct causes of action pleaded by him gives notice for the trial of the issues raised by the demurrers and moves for judgment on the pleadings on the second cause of action the court may on the hearing of such motion pass upon the issues of law raised by the demurrers. *Schwartz v. Williams* (1912), 153 App. Div. 302, 137 N. Y. Supp. 1048.

Where on a motion for judgment on a complaint and a demurrer thereto, the court sustains the demurrer, it is without power to award judgment for defendant, no cross-notice of motion having been served. *Rieser v. Prager* (1916), 157 N. Y. Supp. 118.

Without some cross-motion or notice of a trial of the issues of law judgment should not be entered on the pleadings. So where, after a demurrer to a complaint, plaintiff moves for judgment, the court on sustaining the demurrer should deny plaintiff's motion by order. *Dahm v. O'Connell* (1917), 179 App. Div. 363, 166 N. Y. Supp. 450.

When the defendant has demurred to

the complaint, and the plaintiff moves for judgment on the pleadings, the proper practice is for the defendant to serve a counter notice, returnable at the same time, stating that the issue of law raised by the demurrer will be brought on for trial as a contested motion. In such case, if the complaint is insufficient, it may be dismissed, and, in the discretion of the court, leave granted to amend upon terms. The failure of the defendant to serve such a counter notice does not necessarily preclude the court from dismissing the complaint. *Lobsitz v. Lissberger Co.* (1915), 157 N. Y. Supp. 117.

Idem; question of capacity to sue.—A motion by a defendant for judgment on the pleadings, upon the sole ground that the complaint does not state facts sufficient to constitute a cause of action, does not present the question of want of capacity to sue. *Van Tuyl v. New York Real Estate Security Co.* (1912), 153 App. Div. 409, 138 N. Y. Supp. 541.

Idem; where made.—A motion for judgment on the pleadings under § 547 is properly made in Kings county at the special term for motion and not at the special term for trials. *Higgins v. New York Dock Company* (1912), 75 Misc. 227, 132 N. Y. Supp. 590.

Idem; evidence not admissible.—This section does not empower the court to determine issues of fact and affidavits or evidence cannot be considered. The practice is the same as upon motion for judgment at opening of a trial, and the same rule of disposition must be applied. The moving party admits every material fact alleged in the pleading of his adversary and is only entitled to judgment if such pleading be insufficient in law or no issue of fact be raised. *Continental Securities Co. v. Belmont* (1912), 75 Misc. 234, 133 N. Y. Supp. 580.

Idem; where question of jurisdiction is raised.—Where, in an action by the receiver in bankruptcy of a corporation against its president for money had and received to its use on the sale of shares of stock, the facts necessary to show jurisdiction in the bankruptcy court are alleged in the complaint and admitted by the answer, a demurrer to a supplemental complaint alleging as additional facts that the matters in controversy in the action were determined in plaintiff's favor and against the defendant in a proceeding before the referee in bankruptcy to compel defendant to turn over assets of the bankrupt to the trustee, raises no issue and plaintiff is entitled to judgment upon the pleadings. *Bilder v. Ellis* (1912), 75 Misc. 255, 133 N. Y. Supp. 425.

Idem; analogous to motion on trial.—The procedure under this section is analogous to a motion at the opening of the trial. Said section was not intended as a means of severance. *Howard v. Brown*

(1915), 89 Misc. 535, 153 N. Y. Supp. 702.

A motion under this section where an answer has been interposed is to be treated ordinarily as though made at the opening of the trial. *O'Rourke v. Patterson* (1913), 157 App. Div. 284, 142 N. Y. Supp. 195.

Idem; complaint defective.—The plaintiff, on a motion for judgment upon the pleadings, made after a demurrer to the complaint, may avoid an additional hearing upon the issues raised by the demurrer by giving notice for the trial of such issues. But such a motion made without asking for the trial of the issues raised by the demurrer, will be denied, where it appears that the complaint is defective. *Manhattan & Jamaica Railway Co. v. Brady* (1915), 170 App. Div. 322, 155 N. Y. Supp. 918.

Idem; motion made before defendant's right to amend.—A motion for judgment on the pleadings, made after defendant had interposed an answer but before his time to amend as of right had expired, must be denied, where the defendant before the hearing of the motion avails himself of his right to amend. *Dorf v. Corsa* (1917), 163 N. Y. Supp. 602.

Idem; how brought on; terms; costs.—A motion for judgment on the pleadings must be brought on by notice of motion. The court on determining the motion, if leave to amend or to withdraw the demurrer and plead over be given, has power to impose such terms as may be just. Costs, however, cannot exceed those before notice of trial and ten dollars motion costs. *Taishoff v. Elkema* (1916), 171 App. Div. 288, 157 N. Y. Supp. 98.

Idem; specifying grounds of objection to counterclaim.—Upon a motion under this section which in effect permits the trial of an action on the pleadings, the requirement of § 496 as to specifying the grounds of objection to a counterclaim upon demurrer thereto under § 495 does not apply. *Dessar v. Gunther* (1917), 98 Misc. 312, 162 N. Y. Supp. 794.

Right to plead over.—Where plaintiff asks for judgment under this section, after the defendants have demurred to the complaint, the court, on holding the complaint sufficient, has the same power to grant the defendant the right to plead over as though the case was brought before it on a regular argument of the demurrer. *People v. Hyman* (1912), 136 N. Y. Supp. 145.

Right to judgment dismissing counterclaim.—A plaintiff is not entitled to a judgment dismissing a counterclaim on a motion under this section where other issues remain undetermined; for it is a general rule that there can be only one final judgment in an action where the issues therein have not been severed. *Sayre v. Progressive, etc. Leasing Co.* (1913), 159 App. Div. 799, 144 N. Y. Supp. 897.

When plaintiff put to proof.—Where the defense admitted the incorporation of plaintiff and denied "each and every other allegation in the complaint contained," the plaintiff was put to its proof to make out its cause of action, and it was error for the court to grant judgment for plaintiff on the pleadings. *Marine & Contractors' Supply Co. v. Paltrowitz* (1913), 139 N. Y. Supp. 43.

Alternative relief.—A defendant moving for judgment on the pleadings may as alternative relief ask for an order vacating an order for an examination before trial, such relief being authorized by § 768, in order to save time to the court and expense to litigants. *Chapman v. Read* (1912), 149 App. Div. 52, 133 N. Y. Supp. 625.

Conclusions; allegations insufficient.—The allegation of conclusions is not sufficient to constitute a cause of action, and a motion for judgment on the pleadings will be granted. *Pfizer v. Wassermann* (1912), 77 Misc. 641, 138 N. Y. Supp. 566.

Insufficient denial in amended answer.—Where an amended answer does not adequately deny the allegations of the complaint and contains only defenses which are insufficient in law a motion by plaintiff for a judgment on the pleadings should be granted. *Hodgens v. Jennings* (1912), 148 App. Div. 879, 133 N. Y. Supp. 584.

Decided on complaint and last answer.—A motion for judgment on the pleadings, made after the defendant had served a second amended answer, must be decided on the complaint and the last answer, and the plaintiff has no right to support the motion by the original and first amended answer. *Kenneth v. Newgold* (1918), 183 App. Div. 652, 170 N. Y. Supp. 803.

Knowledge or information, denial of; sufficiency.—Where a verified complaint alleges goods sold and delivered to the defendant corporation, an answer verified by the defendant's treasurer denying any knowledge or information sufficient to form a belief as to the allegations of the complaint is good. *Scranton Lehigh Coal Co. v. Hetkin & Co.* (1912), 78 Misc. 512, 138 N. Y. Supp. 617.

Decision binding.—The decision of the judge on a motion for judgment on a complaint and demurrer thereto, not overruled or appealed from, is binding on the justices of the same court on a subsequent argument on the same pleadings as a trial of an issue of law. *Rieser v. Prager* (1916), 157 N. Y. Supp. 118.

Denials of knowledge or information palpably untrue.—It is proper to grant a judgment upon the pleadings where the only denials in an answer are denials of knowledge or information sufficient to form a belief with respect to matters which are unmistakably within the knowledge of the defendant who interposes such an answer,

or where the denial is palpably untrue. *Bank of Long Island v. Schildkrant* (1916), 162 N. Y. Supp. 699.

Idem; answer of corporation.—An answer of a corporation, which denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs, naming them, of the complaint, is good, and a motion by plaintiff for judgment on the pleadings must be denied. *Jacobs v. Wanamaker* (1912), 77 Misc. 563, 138 N. Y. Supp. 387.

Bankruptcy; right of receiver to sue.—Where the complaint, in an action by a receiver in bankruptcy to recover on an account due the alleged bankrupt for goods sold and delivered to defendant, alleges that on the filing of the involuntary petition in bankruptcy plaintiff was appointed receiver of the bankrupt's estate and that an order was duly made by the bankruptcy court authorizing him to sue upon all indebtedness due the alleged bankrupt, and the answer, in substance, is a general denial, a motion by defendant for judgment on the pleadings, on the grounds that the complaint fails to state a cause of action and that plaintiff is not entitled to sue, will be denied. *Greenhall v. Hurwitz* (1913), 80 Misc. 186, 141 N. Y. Supp. 914.

Fraudulent sale.—Where the complaint, in an action to recover the purchase price of goods sold and delivered to defendant on credit, alleges that defendant's assignor was induced to make such sales in reliance on defendant's representation that he was a member of a certain firm, and that such representation was false and untrue, and the allegation of the answer that defendant was an infant is admitted by demurrer, the alleged false representation, be-

ing antecedent and inducing the contract, was material to the issue, and the burden of proof that the sale of the goods was induced by the alleged false representation was on plaintiff and defendant's motion for judgment on the pleadings must be denied. *Shenkein v. Fuhrman* (1913), 80 Misc. 179, 141 N. Y. Supp. 909.

Negligence.—The fact that plaintiff was on the elevator to ascertain what was out of order cannot be regarded, in and of itself and without further elaboration, as a defense to a charge of negligence in permitting a state of disrepair to exist. *Seltzer v. Stein* (1913), 140 N. Y. Supp. 92.

Taxpayer's action.—Where a complaint in a taxpayer's action fails to state a cause of action, and a demurrer has been interposed by some of the defendants and an answer by others, motion for judgment on the pleadings made by all the defendants will be granted. *Cross v. Gaynor* (1912), 78 Misc. 216, 139 N. Y. Supp. 177.

Where the complaint of a tenant against her landlord seeking to recover for personal injuries, caused by a defect in the stairway which led from the upper rooms to the kitchen of her apartment, contains no allegation whatever that the landlord was in control of the stairway in question, and the natural inference from the allegations is that the stairway was part of the demised premises, the defendant is entitled to judgment on the pleadings, though the plaintiff may amend on the payment of all costs. *Voigt v. Johnson* (1917), 176 App. Div. 722, 163 N. Y. Supp. 785.

Section cited.—*Archer v. Equitable Life Assurance Society* (1915), 169 App. Div. 43, 154 N. Y. Supp. 519; *Piser v. Hecht* (1915), 170 App. Div. 668, 156 N. Y. Supp. 601.

§ 548. No person to be arrested in civil proceedings, without a statutory provision ne exeat abolished.

Order of arrest.—Under § 768, on a motion to vacate an order of arrest for technical defects in the affidavit upon which it was founded, the court will allow the omis-

sions to be supplied, and the motion will be denied. *Manhattan Commercial Co. v. Leuchtenberg Co.* (1912), 77 Misc. 565, 138 N. Y. Supp. 168.

§ 549. When right to arrest depends upon the nature of the action.

Injury to property.—Where defendant bought a pair of diamond earrings on the installment plan, the title to remain in the vendor until the entire purchase price be paid, upon her refusing to surrender the same after default, an execution may be issued against her person. The refusal of the defendant to surrender the earrings is a wrongful detention and consequently "an injury to property." *People ex rel. Hammond v. Becker* (1913), 143 N. Y. Supp. 277.

Fiduciary capacity; sufficiency of complaint against person in.—A complaint, al-

leging that the plaintiff made four promissory notes payable to the order of the defendant and delivered them to him without consideration, but for accommodation, under an agreement whereby the defendant was to procure the discount of the notes and pay the proceeds to the plaintiff, and that almost immediately thereafter and without the knowledge of the plaintiff the defendant procured the notes to be discounted and received the proceeds thereof, "which said sum the said defendant has embezzled and has wrongfully converted

to his own use; and has not paid over to the plaintiff any part thereof," is sufficient, and an order of arrest, granted upon the ground that the defendant converted or misapplied money received by him in a fiduciary capacity, should not be set aside upon the ground that the complaint does not state facts showing the commission of a wrongful act by the defendant. *Spiegel v. Levine* (1914), 161 App. Div. 764, 147 N. Y. Supp. 78.

Failure to prove fraud, plaintiff cannot recover. *Cominelli v. Aelter* (1918), 173 N. Y. Supp. 464.

Fraud; wrongful discharge from employment.—In an action to recover damages for wrongful discharge from employment, an order of arrest is not justified under subdivision 4 of this section, by an allegation in the complaint of fraud in the making of the contract of employment. *Novotny v. Kosloff* (1915), 214 N. Y. 12.

Idem; proof required.—Prior to 1879, it was not essential that the cause of arrest under subdivision 4 should appear in the complaint, or be proved on the trial. *Novotny v. Kosloff* (1915), 214 N. Y. 12, 15.

Idem; against creditors.—In an action upon promissory notes, where the complaint also charges that the defendants have transferred their property to defraud creditors, and particularly the plaintiff, the plaintiff must, in order to recover, prove

the fraud on the trial of the action. *Bolo v. D'Achille* (1913), 157 App. Div. 294, 142 N. Y. Supp. 506.

Idem; allegation in action on check.—Allegation in action on a check charging defendant with fraud in "contracting or incurring the liability" sued on, held sufficient to warrant the granting of an order of arrest. *Britton v. Lane* (1916), 163 N. Y. Supp. 307.

Meaning of word "liability."—The meaning of the word liability as used in subdivision four of this section means a liability flowing from a breach of the contract upon which the action is based and not a liability for deceit in inducing the contract. Hence, a plaintiff who alleges that a contract was induced by fraud may recover on proving a breach thereof; he need not rescind the contract and bring his action for damages for the deceit. *Novotny v. Kosloff*, 159 App. Div. 478, 144 N. Y. Supp. 652, aff'd 214 N. Y. 12.

Giving of undertaking condition precedent.—The giving of an undertaking as required by § 559, relating to actions for personal injury is a condition precedent to a valid order of arrest in a civil action for assault, and an order granted in the absence of such an undertaking will be vacated. *Miner v. Margolis* (1916), 97 Misc. 469, 163 N. Y. Supp. 195.

§ 557. Proof necessary to procure order.

Malicious prosecution; proof required.—Affidavits upon an application for an order of arrest in an action for malicious prosecution, should state facts showing

malice and absence of probable cause. *Reiss v. Levy* (1914), 165 App. Div. 1 150 N. Y. Supp. 440.

§ 558. When order may be vacated; effect of complaint subsequently made.

The order must be vacated, where the order of arrest accompanies the complaint, if the complaint fails to set forth a cause of action. It is only where the order of arrest is applied for after the service of the complaint that leave may be granted

to serve an amended complaint. *Reinboth v. Ederheimer* (1912), 134 N. Y. Supp. 16.

An order of arrest granted upon insufficient allegations in the complaint may be vacated on motion. *Novotny v. Kosloff* (1915), 214 N. Y. 12, 16.

§ 559. Security, upon order of arrest made by judge.

Action on undertaking; premature.—No action lies upon an undertaking given to obtain an order for arrest, where an appeal, taken by the plaintiff from a judgment for the defendant, is still pending and undecided. *Cook v. National Surety Co.* (1915), 169 App. Div. 656, 155 N. Y. Supp. 493.

Idem; extent of recovery.—Where the trial of an action is necessary to vacate an

order of arrest, the expenses of the trial are recoverable from the sureties on the undertaking. Such undertaking, being not one to indemnify but to pay, a defendant may recover not only what he has actually paid to his counsel, but also the sums which he is liable to pay. *Cook v. National Surety Co.* (1915), 169 App. Div. 656, 155 N. Y. Supp. 493.

§ 572. Supersedeas, unless defendant is charged in execution, etc.

This section is plainly applicable, both in terms and by reason of the context, only to discharge from an order of arrest, and has no reference to execution against the person. *Linder v. Feier* (1914), 146 N. Y. Supp. 1066.

A body execution is not required to be issued within three months after the recovery of the judgment, as the provisions of this section are applicable only to an order of arrest and were designed to limit the extension of the period of imprisonment which would occur if the defendant could be held indefinitely under the order of arrest and then taken on a body execution. *Weinus v. Light* (1918), 183 App. Div. 591, 170 N. Y. Supp. 173.

Order of arrest must have been issued.—This section relates only to cases where an order of arrest has been issued, and

provides a supersedeas where there is delay in entering judgment or charging defendant on a body execution. *Andrews v. Gardiner* (1918), 185 App. Div. 477, 173 N. Y. Supp. 1.

Unexplained delay in issuing a body execution for more than ten days entitles the defendant to a supersedeas. *Levison v. Harris* (1912), 134 N. Y. Supp. 12.

Discharge because family suffering.—The only grounds for the discharge of a defendant from arrest in a civil action are stated herein and the fact that defendant's family had suffered by his imprisonment and that it can serve no useful purpose does not justify an order vacating the order of arrest. *Pustet v. Twardowski* (1915), 92 Misc. 232, 155 N. Y. Supp. 536.

Section cited.—*Purcell v. Lynch* (1915), 92 Misc. 148, 155 N. Y. Supp. 101.

§ 575. Undertaking of the bail; what to contain.

Defendant leaving jurisdiction; evidence of plaintiff's consent.—Where, in an action on a bond, under which the defendant in an action for conversion had been discharged from custody under an order of arrest, it appeared from the testimony of one of the attorneys for the defendant in the action for conversion, that there had been an agreement between him and the attorney for the plaintiff in said action whereby the plaintiff consented to the defendant leaving the country in order to raise money, it was error to exclude letters from the plaintiff's attorney to the defendant corroborating the testimony both of the defendant and his attorney as to the agreement. *Ducas v. Federal Union Surety*

Co., 168 App. Div. 24, 153 N. Y. Supp. 803.

Consent by plaintiff that defendant leave jurisdiction as defense to action on bond. *Ducas v. Federal Union Surety Co.* (1915), 170 App. Div. 696, 156 N. Y. Supp. 470.

Divorce; action on bond.—Where in an action for divorce the defendant husband was arrested and gave a bond to obtain his release, he failed to obey the condition of the bond and was given reasonable notice thereof, an action may be maintained on the bond although the husband has never been served with an order to show cause why he should not obey the condition of the bond. *Bond v. National Surety Co.* (1913), 79 Misc. 563, 141 N. Y. Supp. 217.

§ 585. How deposit disposed of.

Return of deposit upon giving bond.—When cash is deposited with the sheriff in lieu of bail, and subsequently an undertaking is given, the affirmative duty is imposed upon the sheriff of serving notice of justification, without waiting for exception, and until such notice is given and said sureties justified and the judge before whom the justification is had so directs, the sheriff is not authorized to return such deposit, and if he does so, he is

guilty of an unlawful official act. *Tiffany v. Harvey* (1913), 158 App. Div. 159, 143 N. Y. Supp. 31.

Money deposited by defendant to secure his release from an order of arrest in an action for separation should be returned where final judgment has been returned for defendant. It is immaterial whether the plaintiff take an appeal or not. *Tiedeman v. Tiedeman* (1916), 173 App. Div. 537, 159 N. Y. Supp. 818.

§ 587. Sheriff, when liable as bail; his discharge from liability.

Complaint.—In order that a judgment creditor may maintain an action against the sheriff as bail, he must allege and prove the matters relating to the issuance of executions prescribed in § 597 as part of his affirmative case. *Buczynski v. An-*

derson (1916), 174 App. Div. 790, 156 N. Y. Supp. 697.

Escape of insolvent prisoner.—Where the sheriff has become liable as bail the insolvency of the prisoner who has escaped is no defense and cannot be shown in miti-

gation of damages. *Buczynski v. Anderson* (1916), 174 App. Div. 790, 156 N. Y. Supp. 697.

Conditions precedent to liability of sheriff.—Where a sheriff is liable as bail for an escape an action cannot be brought against him until an execution against the property of the debtor has been issued to the sheriff of the county in which he was arrested and also to the sheriff of the county where he resides, and returned wholly or partly unsatisfied, and, also, an execution has been issued against the person of the debtor to the sheriff of the county where

arrested and by him returned, not less than fifteen days after the receipt, to the effect that the debtor cannot be found within his county. *Buczynski v. Anderson* (1916), 174 App. Div. 790, 156 N. Y. Supp. 697.

Payment of cash bail into court.—A sheriff who fails to pay cash bail into court within five days after the receipt thereof, becomes liable, provided the plaintiff is injured thereby. *Tiffany v. Harvey* (1913), 158 App. Div. 159, 143 N. Y. Supp. 31.

Section cited.—*Matter of Rouss* (1917), 221 N. Y. 81, 91.

§ 591. When defendant may be surrendered.

Where plaintiff induced defendant to leave the jurisdiction of the court the bail may protect himself by surrendering defendant and he will be discharged from liability. *Ducas v. Federal National Surety*

Co. (1915), 168 App. Div. 24, 153 N. Y. Supp. 803.

Section cited.—*Ducas v. Federal Union Surety Co.* (1915), 168 App. Div. 24, 153 N. Y. Supp. 803.

§ 596. Bail; how proceeded against.

Divorce; action on bond.—Where in an action for divorce the defendant husband was arrested and gave a bond to obtain his release, he failed to obey the condition of the bond and was given reasonable notice thereof, an action may be maintained on

the bond although the husband has never been served with an order to show cause why he should not obey the condition of the bond. *Bond v. National Surety Co.* (1913), 79 Misc. 563, 141 N. Y. Supp. 217.

§ 597. Certain executions necessary before action against bail.

Construction.—This section and § 1489 should be read and construed together. *Tiffany v. Harvey* (1915), 216 N. Y. 300.

Issuance of execution against property to county of residence.—An action to recover cash bail deposited with a sheriff by a defendant arrested in an action for conver-

sion, cannot be maintained without proof that the defendant was not a resident of the state or that an execution against his property and person, issued to the county where he resides, has been returned unsatisfied. *Tiffany v. Harvey* (1915), 216 N. Y. 300.

§ 603. Injunction, when the right thereto depends upon the nature of the action.

The complaint must show that the plaintiff is entitled to an injunction or the court has no authority to make the order, and the defendant is not in contempt for failing to comply therewith, as no right or remedy has been defeated or prejudiced. *Koenig v. Eagle Waist Co.* (1910), 176 App. Div. 724, 726, 163 N. Y. Supp. 1019, 1021.

Complaint not stating cause of action entitling plaintiff to injunction. *Aetna Explosives Co. v. Bassick* (1917), 226 N. Y. (mem.).

An injunction which finally decides a litigation will not be granted where the right thereto is doubtful, and should only be granted on the clearest evidence and with the greatest caution. *Davies v. Epoch Producing Corporation* (1915), 91 Misc. 631, 155 N. Y. Supp. 597.

Right to injunction in special proceeding.

—An injunction cannot issue in a special proceeding save in the few cases authorized by statute. Authority, therefore, for granting an injunction must be found, if at all, in some statutory provision, otherwise it cannot be said to exist. *Matter of Holle* (1914), 160 App. Div. 369, 145 N. Y. Supp. 388.

A justice of the supreme court has no power, in a proceeding to review the action of inspectors of a primary election under § 56 of the election law, to enjoin a person to whom a certificate of election to the county committee of a political party has been issued, from participating in the meetings of the committee, for such a proceeding is not an action and therefore this section is not applicable. *Matter of Holle* (1914), 160 App. Div. 369, 145 N. Y. Supp. 388.

Corporate name.—When injunction will be granted to enjoin use of corporate name. *Merritt Burial & Cremation Co. v. Merritt Co.* (1913), 155 App. Div. 565, 140 N. Y. Supp. 895.

Laches.—Where it appears that a minority stockholder for several years had known of the violation of a contract and did not commence his suit until the president had refused to purchase his stock or give him employment with the corporation, the court will refuse a temporary injunction on the ground of laches. *Metzger v. Knox* (1912), 77 Misc. 271, 136 N. Y. Supp. 681.

Necessity that complaint show right to injunctive relief.—An appeal from an order denying a motion for an injunction *pendente lite* will be dismissed where it appears that a demurrer to the complaint has been sustained and the original complaint is the only complaint upon which the motion for the injunction is made, even though after the demurrer the plaintiff has pleaded over. The right to injunctive relief must appear by the complaint and cannot be established by affidavits. *Blakeslee v. International Motor Co.* (1914), 161 App. Div. 624, 147 N. Y. Supp. 49.

Pendente lite.—In an action for an injunction to restrain the defendant from using a label alleged to be in fraudulent imitation of a label used by plaintiff, where the imitation is apparent, use by the defendant will be enjoined *pendente lite*. *Luyties Brothers v. Zimmermann & Co.* (1912), 149 App. Div. 542, 133 N. Y. Supp. 997.

Where the facts, presented on a motion for an injunction *pendente lite*, in an action by a railroad company to restrain a village from further work upon the land, are insufficient to establish an intention on plaintiff's part to entirely surrender the land to the village, the motion will be granted. *The Lehigh & Hudson R. R. Co. v. The Village of Warwick* (1912), 78 Misc. 1, 137 N. Y. Supp. 658.

Where an action is brought to restrain the mayor and city council of a city from awarding a contract for the pavement of a certain street, and it appears that the adjoining owners have not petitioned for such improvement, an injunction *pendente lite* should be granted. *Scott v. McClung* (1912), 150 App. Div. 794, 135 N. Y. Supp. 311.

Idem; authority for granting.—The authority for granting an injunction *pendente lite* must be found in the code of civil procedure, and the right thereto depends upon the sufficiency of the complaint. *Koenig v. Eagle Waist Co.* (1917), 176 App. Div. 726, 163 N. Y. Supp. 1019.

Idem; contract for personal services.—An injunction *pendente lite* may be granted to enforce a covenant not to enter the employment of another, in a contract for personal services, where the services are unique, special or extraordinary, involve

trade secrets or confidential information and the contract is not in restraint of trade, unreasonable, unconscionable or inequitable, and there is no adequate remedy at law. *Clark Paper & Mfg. Co. v. Stenacker* (1917), 100 Misc. 173, 105 N. Y. Supp. 367.

Idem; mandatory injunction.—A mandatory injunction may only be issued in those rare cases in which affirmative action by the defendant *pendente lite* is necessary to preserve the *status quo* until a trial and judgment. *Moller v. Lincoln Safe Deposit Co.* (1916), 174 App. Div. 458, 161 N. Y. Supp. 171.

Idem; taxpayer's action.—Where on motion for an injunction *pendente lite* in a taxpayer's action to restrain a city from entering into a contract with a firm of architects to prepare plans for a proposed public building, it appears the real purpose is to compel the city to approve an oral contract made several years before but which has been disapproved by the corporation counsel, and it is conclusively shown the employment thereunder was simply for preliminary drawings at a stated compensation, the motion will be denied. *Hoyt v. Steers* (1912), 76 Misc. 21, 136 N. Y. Supp. 58.

Restraining one of two claimants to office.—Where two persons have assumed to enter into possession of an office and each is exercising or assuming to exercise the duties of the position, an exceptional case is presented where the court may with propriety exercise its discretion to grant an injunction restraining one of them from performing or attempting to perform the duties of the office, and it has power to do so under the section. *People v. Zeeh* (1914), 85 Misc. 151, 148 N. Y. Supp. 111.

Injury to property.—A plaintiff, merely seeking to recover damages for injury to property, is not entitled to an injunction because of the nature of the action. *Reynolds v. Webber* (1916), 160 N. Y. Supp. 177.

Temporary injunction.—The supreme court has no inherent power to grant a temporary injunction in cases not authorized by the Code. *Matter of Greene* (1912), 153 App. Div. 8, 138 N. Y. Supp. 95.

Temporary injunction in special proceeding.—Under the Code there does not seem to be any warrant for the granting of a temporary injunction save in an action. The only exceptions are to be found in the few isolated cases where an injunction is authorized in special proceedings specifically named. Hence a provision in an order granted under § 16 of the membership corporations law providing for a visitation by the supreme court of a cemetery corporation providing for an injunction restraining the sale of the property of the corporation is unauthorized. *Matter of Greene* (1912), 153 App. Div. 8, 138 N. Y. Supp. 95.

§ 604. Injunction; when the right thereto depends upon extrinsic facts.

Landlord and tenant; alterations of building.—Where there is an issue as to whether a sub-tenant of a portion of a building was authorized by his landlord to make certain structural changes in the building such as could be made without consent, the landlord should not be enjoined *pendente lite* from interfering with the proposed alterations of the sub-tenant. *Moses v. Salomon* (1912), 150 App. Div. 563, 135 N. Y. Supp. 408.

A lessee of a hotel in an action for injury to said property is not entitled to an injunction where the acts of the defendants sought to be enjoined would not render ineffectual any judgment plaintiff might obtain; and there is no claim that the defendants threaten to remove their property in fraud of the plaintiff. *Peynolds v. Webber* (1916), 160 N. Y. Supp. 177.

Pending an appeal from a judgment dismissing a complaint a temporary injunction may be granted under §§ 604, 608 when necessary to protect the rights of the appellant and save a judgment of reversal from being rendered ineffectual. *Ocorr v. Lynn* (1918), 105 Misc. 489, 173 N. Y. Supp. 518.

A plaintiff seeking to impress an equitable lien upon a fund resulting from a sale of property which he negotiated as a broker is not entitled to a temporary injunction restraining the defendant from disposing of the fund until the determination of the suit where the complaint contains no allegations which establish a right to an equitable lien. *Battery Place Commercial Corporation v. de Willis* (1918), 183 App. Div. 569, 170 N. Y. Supp. 772.

An injunction in an action to foreclose a mortgage restraining the defendant mortgagor from selling his personal property in order that the plaintiff may reach it on an execution which might issue upon any judgment for deficiency, is unauthorized and on motion will be vacated. *Broadfoot v. Miller* (1919), 106 Misc. 455, 174 N. Y. Supp. 497.

Orders.—An order granted in one action restraining a defendant from disposing of its real estate is not effective in another action. *Barnes v. Midland Railroad Terminal Co.* (1912), 153 App. Div. 365, 138 N. Y. Supp. 546.

§ 605. Restrictions upon injunction to restrain state officers.

The Commissioners of the Palisades Interstate Park may be enjoined in the third judicial department from an illegal condemnation of land, although the land be situated in another department. Such commissioners are required to advertise in the city of Albany, to make their reports to the legislature sitting there, and to file their records in the office of the secretary of state. The location of any state board is presumptively at the capital of the state. *Bunyan v. Com'rs of Palisades Interstate Park* (1915) (App. Div.), 153 N. Y. Supp. 622.

This section of the Code is directory merely, and not mandatory. It is a rule of convenience, and the supreme court doubtless has power to transfer the action to the judicial department in which the

state officer sought to be restrained is located, in a case where the convenience of the court or the parties would be promoted by such a transfer. It is the duty of the court to give this section such a construction as is consistent with its constitutionality. *Schieffelin v. Komfort* (1914), 86 Misc. 678, 149 N. Y. Supp. 254.

Evasion by issue of mandamus.—The provisions of this section are applicable to cases where the object of the proceeding is to restrain state officers, or boards, while engaged in the performance of a legal or statutory duty, and its effect cannot be evaded by issuing a writ of mandamus, by the terms of which the state officers are restrained. *Brooklyn Borough Gas Co. v. Public Service Com.* (1916), 175 App. Div. 684, 161 N. Y. Supp. 169.

§ 606. By whom injunction granted in other cases.

Except where it is otherwise specially prescribed by law an injunction order may be granted by the court in which the action is brought or by a judge thereof, or by any county judge; and where it is granted by a judge, it may be enforced as the order of the court. An injunction order which may be modified or vacated by the appellate division may also be granted or continued by the appellate division, or a justice thereof, pending appeal to that court or to the court of appeals from an order or judgment denying or vacating an injunction.

Amended by L. 1913, ch. 112, in effect Sept. 1, 1913. The amendment of 1913 added the last sentence.

Source.—Code of Proc., § 218, in part.

This section should be construed so as to read as follows: "Pending an appeal to the appellate division or to the court of appeals from an order or judgment denying or vacating an injunction, an injunction order which, if granted, may be modified or vacated by the appellate division may also be granted or continued by the appellate division or a justice thereof." *United States Title Guaranty Co. v. Brown* (1913), 158 App. Div. 542, 143 N. Y. Supp. 835.

The willful violation of an order may be punished as for a criminal contempt where the complaint for the injunction gave the

court jurisdiction of the subject matter and service of the summons on the defendants gave the court jurisdiction over them. *Northland Rubber Co. v. Internat. Auto. League* (1913), 143 N. Y. Supp. 9.

An injunction order, although a judge's order in form, is, in effect, an order of the court, under this section and § 3343, subdivision 2, and willful disobedience thereof may be punished as a criminal contempt under subdivision 3 of § 750 of the judiciary law. *People ex rel. Empire Leasing Co. v. Mecca R. Co.* (1916), 174 App. Div. 384, 161 N. Y. Supp. 241.

§ 607. Proof necessary to procure injunction.

Manufacture or sale of certain articles.—Injunction to restrain defendant from selling, licensing, manufacturing or dealing in any geared brakes in the United States, Canada, Mexico and Hawaii. *National Brake Co. v. Ackley* (1913), 80 Misc. 251, 140 N. Y. Supp. 1091.

Contracts for services of attorney.—A temporary injunction should not be granted

restraining a defendant, an attorney at law, from collecting percentages due him under certain contracts of retainer, where the nature and the legality of the contracts are at issue, and the plaintiff has failed to incorporate them in the moving papers. *United States Title Guaranty Co. v. Brown* (1913), 158 App. Div. 542, 143 N. Y. Supp. 835.

§ 608. At what time the order may be granted.

The word final should be construed to mean the final determination of the litigation since it does not appear in the section as originally enacted and it is to be as-

sumed that a change was intended when this word was inserted. *Ocorr v. Lynn* (1918), 105 Misc. 489, 173 N. Y. Supp. 518.

§ 611. Security, on staying proceedings in an action, before trial.

Injunction staying suit.—A creditor, upon the granting of an injunction staying his suit, is not entitled to an undertaking because this section refers to actions in

which a judgment for a sum of money only is demanded. *Seaboard National Bank v. Reid* (1916), 172 App. Div. 135, 158 N. Y. Supp. 250.

§ 620. Security in other cases.

A motion to cancel a bond filed upon obtaining an injunction *pendente lite* is premature, where an appeal has been taken, although a final judgment has been entered granting a permanent injunction. And the court will not require defendant to perfect his appeal within a specific time as a condition of denying the motion, where no lack of diligence has been shown. *Vitagraph Co. of America v. Stewart* (1918), 170 N. Y. Supp. 527.

Plaintiff who has not joined with the surety in an undertaking given to obtain an injunction, cannot be held liable there-

on. *Snyder v. Snyder* (1919), 106 Misc. 440, 174 N. Y. Supp. 729.

Injunction *pendente lite*.—In a suit by a tenant against a landlord to obtain a mandatory injunction requiring the landlord to render possession to the tenant, the court has no power to grant a mandatory injunction *pendente lite* without requiring the plaintiff to give an undertaking. This because the defendant would be without indemnity should the court finally determine that the plaintiff was not entitled to injunctive relief. *Koenig v. Eagle Waist Co.* (1917), 176 App. Div. 726, 163 N. Y. Supp. 1019.

§ 623. Damages, how ascertained.

Costs and damages.—The expenses of the reference, exclusive of counsel fees, are costs and not a part of the damages. The counsel fees incurred upon a reference to assess damages resulting from an injunc-

tion are part of the damages and recoverable as such, and must be so considered in enforcing the surety's liability. *Sarafian v. United States Fidelity & G. Co.* (1915) (App. Div.), 152 N. Y. Supp. 737.

Costs on reference to ascertain damages.—The awarding of costs of the reference to ascertain the damages is with the court, not with the referee, and where the damages found are substantial, the expense of the reference should be imposed upon the

defendant. *Barnes v. Midland Railroad Terminal Co.* (1914), 161 App. Div. 621, 146 N. Y. Supp. 1033.

Section cited.—*Hathorn v. National Carbonic Gas Co.* (1917), 179 App. Div. 425, 165 N. Y. Supp. 1044.

§ 627. Application to vacate or modify injunction order, upon notice.

Papers taken as true.—Where an application is made upon notice to vacate an injunction on the papers on which it was

granted they must be taken as truly stating the facts. *Averbach v. Northland Rubber Co.* (1916), 161 N. Y. Supp. 396.

§ 628. When prior motion not to prejudice subsequent application.

A subsequent motion cannot be made without leave where a motion to dissolve an injunction has been made upon affi-

davits and denied. *Lawrence v. Lawrence* (1918), 172 N. Y. Supp. 146.

§ 635. Warrant of attachment; in what actions.

A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only as a tax, or as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.

2. Wrongful conversion of personal property.

3. An injury to person or property, in consequence of negligence, fraud or other wrongful act.

4. A wrongful act, neglect or default by which the decedent's death was caused, when the cause of action arose in this state before or after the passage of this act and the action is brought by an executor or administrator against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued as prescribed by section nineteen hundred and two of this act.

Amended by L. 1877, ch. 416; L. 1894, ch. 736; L. 1895, ch. 578; L. 1916, ch. 441; L. 1919, ch. 482, in effect May 8, 1919. The amendment of 1916 added subdivision 4. The amendment of 1919 added the words "as a tax, or" in line 4.

Source.—Parts of Code of Proc., §§ 227 and 229.

Insufficient affidavit.—Where in an action for services by an attorney the moving papers contain no statement of facts from which can be determined the nature or extent of the services alleged to have been rendered or their approximate value they are clearly inadequate as a basis for an attachment, even though sufficient for the purpose of setting forth a cause of action. *Fine v. Lyons* (1913), 141 N. Y. Supp. 294.

Affidavit considered as showing cause of

action for conversion. *Ingalls v. Nutter* (1918), 172 N. Y. Supp. 210.

Action to foreclose mortgage.—Where on the face of the complaint in an action to foreclose a mortgage the plaintiff is entitled to have recourse to the defendants for only so much of the mortgage debt as the proceeds of the sale will be unable to pay, the granting of a warrant of attachment is unauthorized and upon motion will be vacated. *Smyth v. Mayer* (1918), 105 Misc. 391, 174 N. Y. Supp. 197.

§ 636. What must be shown to procure the warrant.

2. That the defendant is either a foreign corporation or not a resident of the state; or, if he is a natural person and a resident of the state, that he

has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with the like intent or if the defendant is a domestic corporation that no person can be found within the state after diligent effort, upon whom a summons can be served; or where, for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence as to his financial responsibility or standing; or, where the defendant, being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section four hundred and thirty of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

Amended by L. 1919, ch. 275, in effect Sept. 1, 1919. The amendment of 1919 inserted the words "or if the defendant is a domestic corporation that no person can be found within the state after diligent effort, upon whom a summons can be served" in lines 9-11.

Sufficiency of affidavit.—Where no complaint has been filed the affidavit for an attachment should set forth facts showing the existence of a cause of action in favor of the plaintiff against the defendant. *Swift v. Martini* (1916), 162 N. Y. Supp. 136.

An affidavit on a motion for a warrant of attachment which states "that the deponent is the attorney in fact for the plaintiffs herein and knows them and has received instructions respecting all the facts herein stated," but which does not state from whom the attorney received the instructions and information nor show any facts upon which his personal knowledge can be predicated, is insufficient. *Stewart v. Sandall* (1918), 184 App. Div. 446, 171 N. Y. Supp. 464.

Affidavit in support of an attachment must contain evidence from which the court can determine that the ultimate facts stated in the pleading can be substantiated. *Makepeace v. Dilltown Smokeless Coal Co.* (1917), 179 App. Div. 662, 167 N. Y. Supp. 83.

A statement in the moving affidavit that the defendants were justly indebted to the plaintiffs in a certain sum over and above all payments, set-offs or counterclaims which defendants have against the plaintiff, "as near as they are known to deponent," does not comply with this section. *Nerenberg v. Keith* (1917), 101 Misc. 551, 167 N. Y. Supp. 612.

Affidavit considered sufficient.—Ingalls

v. Nutter (1918), 172 N. Y. Supp. 210.

Affidavits not showing cause of action.—

Where a complaint in an action by an indorsee of a one-half interest in a promissory note has been held not to state a cause of action, affidavits upon an application for a warrant of attachment stating that "defendants * * * endorsed and transferred the one-half interest therein to and delivered the same to this plaintiff," are insufficient to warrant an attachment, although the word "transferred" was not used in the complaint. *Barkley v. Muller* (1915), 168 App. Div. 110, 153 N. Y. Supp. 923.

Moving papers insufficient.—A complaint which alleges that the defendant entered into a written contract with the plaintiff's assignor for the sale of a certain amount of coal at a fixed price and that the defendant has neglected and refused to make delivery, although the same was duly demanded, but which does not allege a tender on the part of plaintiff's assignor, or its readiness, willingness and ability to pay—payment being an obligation concurrent with delivery—is insufficient, and where such defect is not cured by affidavits and correspondence annexed thereto, an attachment based on said papers should be vacated. But the moving papers should be liberally construed. *Makepeace v. Dilltown Smokeless Coal Co.* (1917), 179 App. Div. 60, 166 N. Y. Supp. 92.

Contradictory affidavit.—Where the affidavit stated that the defendant had dis-

posed of all her property to an auctioneer contrary to the bulk sales act without giving notice to creditors, and that she was about to dispose of her remaining property with intent to defraud her creditors, it was held that the affidavit was self-contradictory and insufficient to warrant a finding of fraud. *Schavrien v. Reich* (1915), 155 N. Y. Supp. 365.

Statement in the alternative.—A statement in a warrant of attachment that defendant has disposed, or is about to dispose, of his property with intent to defraud his creditors, etc., being in the alternative is bad, and a motion to vacate the warrant on the ground that the moving papers were insufficient should have been granted. *Breakstone Bros. Bronx Branch, Inc. v. Hyman* (1916), 94 Misc. 171, 157 N. Y. Supp. 898.

Foreign corporation; information and belief.—Where the sole affidavit, in support of an attachment made by the plaintiff, states of plaintiff's own knowledge an alleged contract between his assignor and defendant, a foreign corporation, but sets forth no facts that show deponent knows anything of their transactions or that he knows defendant is a foreign corporation, his statements must be treated as having been made on information and belief, and not having disclosed the sources of his information, the affidavit was insufficient. *Pettit v. United States Motor Co.* (1912), 77 Misc. 277, 136 N. Y. Supp. 260.

Sufficiency of affidavit in action against foreign corporation.—Where in an action by an assignee of certified checks against a foreign corporation the allegations of the complaint are stated as of the personal knowledge of the plaintiff and it is duly verified, and the affidavit of the plaintiff for a warrant of attachment which states that the defendant is a foreign corporation, etc., that there is a certain amount now due and owing to the plaintiff from the defendant over and above all counterclaims known to the plaintiff, and then relates the certification and assignment of the checks and there is attached thereto a telegram from the foreign state department of banking that the defendant is a foreign corporation is sufficient and an order vacating the warrant should be reversed. *McMahon v. Roseville Trust Co.* (1913), 159 App. Div. 640, 144 N. Y. Supp. 841.

Sufficiency of statement of facts.—In a proceeding to foreclose a chattel mortgage after default, the plaintiff is entitled to a warrant of seizure of the mortgaged chattels in the possession of the defendant, without setting forth in his moving papers, matters required by this section. *Coiro v. Baron* (1913), 158 App. Div. 591, 143 N. Y. Supp. 853, overruling *Faraci v. Maller* (1913), 154 App. Div. 303, 138 N. Y. Supp. 961.

Where a defendant presents no affidavit in support of its motion to vacate an attachment the plaintiff is entitled to the

benefit of all legitimate inferences to be drawn from the facts alleged in the complaint. *Commonwealth M. Co. v. Sargent & Co., Inc.* (1918), 104 Misc. 558, 172 N. Y. Supp. 594.

Where in an action for services neither the complaint nor plaintiff's affidavits state sufficient facts from which the court can properly estimate the extent or value of the plaintiff's services a motion to vacate a warrant of attachment should be granted. *Barbrick v. Carrero* (1918), 184 App. Div. 160, 171 N. Y. Supp. 447.

Foreclosure of mortgage.—The holder of a chattel mortgage who brings an action in the supreme court for foreclosure, after default, is not entitled to a warrant of seizure or attachment, where he fails to show matters required by § 636. *Faraci v. Maller* (1912), 154 App. Div. 303, 138 N. Y. Supp. 961.

Nonresidence.—Where the defendants, who are husband and wife, left the country for France nine months previously, the husband having failed in business, they stating at the time they did not know whether they would return or not, there is sufficient proof of nonresidence to sustain an attachment on that ground. *Gotham Nat. Bank of New York v. Martin* (1915), 167 App. Div. 271, 152 N. Y. Supp. 654.

Attachment against nonresident; validity.—The mere procurement by the father of the plaintiff's president, without deceit or trickery, of the consummation of a contract in this state and the payment here of money to the defendant, a nonresident, does not prevent the plaintiff from attaching such money upon a claim against the defendant, where no representation was made to him, express or implied, that he would be free to remove the money received from the state, or that it would not be subject to any legal claims. *Condon Wrapping Machine Co., Inc. v. Dearborn* (1918), 181 App. Div. 311, 168 N. Y. Supp. 718.

Idem; presumption as to abandonment of residence.—The provision that an attachment may be granted against a resident who has been continuously without the state for more than six months without designating a person upon whom to serve a summons in his behalf relates to cases where there is no doubt of the defendant's continued residence within the state but has no application where the evidence justifies the presumption that the former residence in the state has been abandoned, and a non-residence established. *Gotham National Bank v. Martin* (1915), 167 App. Div. 271, 152 N. Y. Supp. 654.

Idem; evidence as to leaving.—Affidavits upon an application for an attachment, from which it appears that the defendants, under circumstances indicating the absence of any further business interests in this country, left for France their native land over nine months before, and that at the

time of leaving they had expressed their doubt as to whether they would ever return, furnish sufficient proof of non-residence. *Gotham National Bank v. Martin* (1915), 167 App. Div. 271, 152 N. Y. Supp. 654.

Idem; proof.—An affidavit which stated on information and belief that the defendant was a resident of another state, and gave as grounds for the belief the fact that the plaintiff had received letters from the defendant from such other state was held to be insufficient to show nonresidence. *Severn v. Otto* (1916), 161 App. Div. 340.

Fraud; evidence.—Before property may be attached upon an allegation of fraud there must be evidence submitted to the court sufficient to establish the fraud. *Ribak v. Norhaftig* (1915), 155 N. Y. Supp. 408.

In an action by a wife against her husband, a resident of this state, to recover for money claimed to have been necessarily expended for the support and maintenance of herself and children, a warrant of attachment should not be granted where there is no substantial evidence that the defendant has or is about to dispose of his property for the purpose of defrauding his creditors or that he has other debts. *Krotosky v. Krotosky* (1915), 169 App. Div. 850, 155 N. Y. Supp. 625.

Idem; statements by defendant.—Statements by one of the defendants that as soon as he could get the money "he would clear out of New York," and that he would never go into business there again, are as consistent with the absence of fraudulent intent as with a design to defraud creditors, and the meaning to be ascribed to such statements is one which comports with innocence and such statements are not ground for an attachment. *Millang v. Lambros* (1915), 90 Misc. 638, 153 N. Y. Supp. 944.

Idem; sale of goods in bulk.—Fraud for which a debtor's property may be attached must be actual and intentional, not statutory or constructive, and a sale of goods in bulk without notice to creditors in violation of § 44 of the personal property law will not support an attachment. *Millang*

v. Lambros (1915), 90 Misc. 638, 153 N. Y. Supp. 944.

Id.; action by foreign corporation against foreign corporation.—Where the complaint in an action brought by a foreign corporation against another foreign corporation doing business within this state and other defendants to recover damages alleged to have been sustained by plaintiff through the wrongful acts, fraud and conspiracy of the defendants in that they converted and injured plaintiff's property, certain corporate stock, alleged that many of said acts were committed within the state of New York, a motion to vacate a warrant of attachment on the ground that the complaint did not state facts sufficient to constitute a cause of action will be denied. *Commonwealth M. Co. v. Sargent & Co., Inc.* (1918), 104 Misc. 558, 172 N. Y. Supp. 594.

Intent of domestic corporation to remove property from state; failure to show intent to defraud creditors.—An attachment against the property of a domestic corporation should not be granted upon the ground that it is about to remove it from the state with an intent to defraud creditors on an affidavit which merely shows that the defendant is boxing its stock and records and has rented its local office with a view to moving its business to a city in a foreign state, there being no proof whatever that these acts are done with a view of defrauding creditors, and especially so where it does not appear that there are any creditors except the plaintiff himself. *Dickey v. Findeisen & Kropf Manufacturing Co.* (1917), 177 App. Div. 861.

Damages based on prospective profits.—In an action for breach of a contract of an exclusive agency by a foreign corporation the plaintiff is entitled to a writ of attachment, although the damages are based upon prospective profits somewhat speculative in their nature, provided he can show by affidavits facts from which it may be fairly presumed that he will suffer damages in a fixed sum. *Schreiber v. Gem Stopper Co.* (1915), 158 App. Div. 60, 153 N. Y. Supp. 878.

§ 638. When and by whom the warrant may be granted.

Application.—*Schumacher v. American Union Fire Ins. Co.* (1915), 92 Misc. 434, 156 N. Y. Supp. 102; *Fred S. James & Co. v. Commercial Nat. F. Ins. Co.* (1918), 170 N. Y. Supp. 402; *Fair v. Kenny* (1918), 103 Misc. 412, 171 N. Y. Supp. 694.

How granted.—A warrant of attachment

granted at the time of the issuance of a summons in a municipal court action is granted by the court though signed by the justice holding court in the district in which the action was brought, and though it does not recite on its face that it was granted by the court. *Ress v. Gurinsky* (1913), 80 Misc. 231, 140 N. Y. Supp. 975.

§ 642. Validity of undertaking.

How evidenced.—The fact that the warrant of attachment was granted by the court may be evidenced by the subscription of the clerk of the court in the proper

district and by the fact that it was indorsed upon, or annexed to, the summons. *Ress v. Gurinsky* (1913), 80 Misc. 231, 140 N. Y. Supp. 975.

§ 644. Sheriff must attach property of defendant.

Only books and papers of defendant which relate to the property attached can be taken by the sheriff. *Springfield National Bank v. Breitung* (1917), 180 App. Div. 406, 167 N. Y. Supp. 476. *Alimony*.—Alimony cannot be attached in an action against the wife to whom it was awarded, except in an action for such necessities as the husband would be obliged to furnish had the marital relation continued. *West v. Washburn* (1912), 153 App. Div. 460, 138 N. Y. Supp. 230.

§ 646. Attachment of unpaid subscription to foreign corporation.

Application. — *McNelus v. Stillman* (1916), 172 App. Div. 307, 158 N. Y. Supp. 428.

§ 647. Attachment; interest in corporation.

Certificates of stock in a foreign corporation owned by a nonresident are personal property and are subject to attachment and sale under an execution against the owner where they are within the state in possession of a bank for purposes of sale, together with assignments thereof in blank. *People ex rel. Wynn v. Grifenhogen* (1915) (App. Div.), 152 N. Y. Supp. 679.

§ 655. Sheriff may maintain actions.

Action for alleged loss or injury from wrongful act of pledgee.—*Houk v. Van Horn* (1918), 102 Misc. 263, 168 N. Y. Supp. 701.

§ 658-a. Application for order to discharge personal property from attachments; undertaking.

If goods or effects, other than a vessel, attached as the property of the defendant, or any portion thereof, are claimed by or in behalf of another person, such claimant may, at any time before such goods or effects shall have been sold under execution issued upon any judgment recovered by the plaintiff in the action wherein such goods or effects were attached, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to the whole or a part of the property attached. Upon such an application the claimant must give to the sheriff an undertaking with at least two sufficient sureties who must justify in double the value of the property claimed, as appraised in the inventory of the property attached. The undertaking must be conditioned to the effect that in an action to be brought on the undertaking, the claimant will establish that he was the owner of such goods or effects at the time of the levy thereon; and that in case of his failure to do so, he will pay to the sheriff the full value of the property so claimed with interest from the date thereof together with the costs of the action. Sections six hundred and ninety and six hundred and ninety-one shall apply to an undertaking given as prescribed in this section. Upon such an undertaking being given and after justification of the sureties if required, the court or judge must make an order discharging the property so claimed from the attachment, upon payment by the claimant of the sheriff's fees and necessary disbursements. Thereupon and upon such payment, the sheriff must discharge the same accordingly, notwithstanding that the plaintiff may have given an undertaking as provided in section six hundred and fifty-eight. The court or judge may, upon the application of the plaintiff or of the claimant at any time before the warrant is vacated or annulled, upon notice to all parties

in interest, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions and under such regulations as it or he deems just. In such an action, the claimant may show, in bar of a recovery, that he was the owner of the said property attached. If judgment passes against the claimant the plaintiff is entitled to recover the value of the said property with interest from the date of the undertaking with the costs of the action. Neither the giving of the undertaking as prescribed in this section, nor the recovery of any judgment thereon, shall affect in any manner, the right, if any, of the defendant in the attachment action in or to the property discharged from the attachment, nor shall this section be construed as affecting or impairing any other right or remedy which any person might otherwise have in respect to the property attached.

Amended by L. 1919, ch. 223, in effect Sept. 1, 1919. The amendment of 1919 inserted the section heading and substituted the words "at any time before such goods or effects shall have been sold under execution issued upon any judgment recovered by the plaintiff in the action wherein such goods or effects were attached" in lines 3-5 for the words "within five days after the levy of the attachment."

Purpose.—This section was enacted to provide a method by which the claimant could retain possession of the attached chattels. *Maldonado & Co. v. United States F. & G. Co.* (1917), 179 App. Div. 817, 167 N. Y. Supp. 197.

An allegation in a complaint, in an action upon an undertaking given pursuant to this section, of the making of an order by the court granting leave to bring such action, is sufficient. It is unnecessary to prove or allege that said order was prop-

erly issued or to show that the jurisdictional facts were before the judge or to allege "the disposition of the action in which the attachment was issued." If there was any infirmity in the proceeding, it must be taken advantage of by appeal from or motion to vacate the order, or by way of defense, if the facts show lack of jurisdiction. *Maldonado & Co. v. United States F. & G. Co.* (1917), 179 App. Div. 817, 167 N. Y. Supp. 197.

§ 677. Plaintiff may bring action in name of himself and the sheriff.

Creditor not estopped.—Where, upon the application of a creditor of a foreign corporation, the receiver who had been discharged was reinstated and directed to enforce the liability of stockholders on their subscriptions to stock, the assignee of said creditor was not estopped from attaching the liability of defendants' testator on his stock subscription and from maintaining

an action under this section and § 678 in aid of the attachment. *McNelus v. Stillman* (1916), 172 App. Div. 307, 158 N. Y. Supp. 428.

Action for alleged loss or injury from wrongful act of pledgee.—*Houk v. Van Horn* (1918), 102 Misc. 263, 168 N. Y. Supp. 701.

§ 682. Motion to vacate or modify warrant, or increase security.

Application.—*Nerenberg v. Keith* (1917), 101 Misc. 551, 167 N. Y. Supp. 612.

Not applicable where trustee in bankruptcy appointed.—This provision of the code of civil procedure applies only in cases where the defendant has an interest in the property attached, and does not apply to a case where a trustee in bankruptcy of his property has been appointed. In the latter case he has no interest to protect, and the motion to vacate the attachment must be made by the trustee. *Conrad Baking Co. v. Kunkel* (1916), 160 N. Y. Supp. 841.

The fact that defendant has divested himself of all his property is immaterial. *Thomas v. Blizzard* (1918), 170 N. Y. Supp. 11.

Delay in making motion.—If plaintiff, has not been prejudiced thereby, the court will consider defendant's motion to vacate or modify an attachment, although the motion has been long delayed. *Elwell & Co. v. Acme Portland Cement Co.* (1912), 154 App. Div. 122, 138 N. Y. Supp. 1004.

An assignee of an insolvent may move to vacate an attachment. *Wulff v. Roseville Trust Co.* (1914), 164 App. Div. 399, 149 N. Y. Supp. 683.

Reduction of amount.—Warrant of attachment modified by reducing the amount thereof to a sum within the jurisdiction of the court. *Fagan v. Raymond Manufacturing Co.* (1913), 80 Misc. 638, 141 N. Y. Supp. 948.

§ 683. How motion must be made; opposing it by new proofs.

Application.—*Marrone v. Tesoriere* (1915), 92 Misc. 602, 156 N. Y. Supp. 280; *Ingalls v. Nutter* (1918), 172 N. Y. Supp. 210.

Motion denied where defendant a non-resident and merely a sojourner in this country. *Equitable Trust Co. v. Sala* (1918), 102 Misc. 429, 169 N. Y. Supp. 930.

Evidence establishing agency.—A plain-

tiff who seeks to sustain a warrant of attachment upon the ground that the person with whom the contract involved in the suit was made was an agent of the defendant, must not omit from his moving papers readily available evidence of the existence of the agency. *Pfaltz & Bauer, Inc. v. Wiener* (1918), 181 App. Div. 793, 169 N. Y. Supp. 223.

§ 688. Undertaking to be given.

Effect of reversal of judgment.—Although the entry of a judgment for a defendant, there being no stay of proceedings, annuls a judgment so that it cannot be revived by the reversal of said judg-

ment on appeal, it does not discharge the bond of the surety on the undertaking given to discharge the attachment. *Youngman v. Fidelity & Deposit Co.* (1914), 87 Misc. 456, 150 N. Y. Supp. 788.

§ 707. When judgment enforceable only against attached property.

Death of defendant; service of summons on administrator.—In an action against a nonresident who was personally served and appeared in the state but who died before the issue raised by a demurrer was decided, it was held that a supplemental summons could not be served by publication or personally without the state on the administrators of the deceased defendant

because neither the defendant at the time of his death nor the administrators at the time of the service owned property in this state, and the court would not be authorized to render a personal judgment against them. *German-American Coffee Co. v. Johnston* (1915), 168 App. Div. 31, 153 N. Y. Supp. 866.

§ 708. Judgment in the principal action; how satisfied.

Sheriff.—Duty of sheriff and responsibility for the acts of his deputies. *Shea*

v. Conant (1912), 149 App. Div. 583, 134 N. Y. Supp. 315.

§ 709. When attachment discharged, etc., property to be restored to defendant.

Final judgment.—Where a final judgment is rendered in favor of a defendant, a warrant of attachment issued against it in the action is wholly annulled, unless there be a stay of proceedings suspending

the annulment, or the warrant is revived by the reversal or vacating of the judgment. *Flick v. Wyoming Valley Trust Co.* (1912), 149 App. Div. 546, 133 N. Y. Supp. 1066.

§ 710. Additional provision for his relief.

When defendant's books seized by sheriff on attachment do not relate to the property attached, and where defendant has rebonded the attached property so that the sheriff must return the books and papers, the plaintiff is not entitled to an order directing the sheriff to permit him to

examine said books and papers, especially where the examination is sought only to discover property upon which attachment may be levied. *Springfield National Bank v. Breitung* (1917), 180 App. Div. 406, 167 N. Y. Supp. 476.

§ 713. Receiver; when appointed.

Pendente lite.—Where in a suit to set aside assignments of property it appears that a final judgment for the plaintiff will be ineffectual because the defendant is financially irresponsible save for the property assigned, and that there is grave

danger of the transfer of the property pending the action, a receiver *pendente lite* will be appointed and an order granted restraining the assignee from transferring the property. *Morse v. Van Ness* (1913), 155 App. Div. 633, 140 N. Y. Supp. 1043.

A receiver of rents and profits may be appointed pending a suit to foreclose a mortgage without notice to the mortgagor if he be in default. *Conroy v. Polstein* (1912), 150 App. Div. 832, 135 N. Y. Supp. 419.

When receiver should not be appointed on motion of mortgagor in foreclosure proceeding. *Manhattan Life Ins. Co. v. Hammerstein Opera Co.* (1917), 180 App. Div. 69, 167 N. Y. Supp. 245.

A provision in a mortgage entitling the mortgagee to an appointment of a receiver of the rents and profits without notice and without regard to the adequacy of the security in case of default by the mortgagor, is binding upon a subsequent lessee, but does not entitle the mortgagee to the appointment of a receiver as a matter of right. *Schwarz v. Alexander* (1917), 178 App. Div. 641, 165 N. Y. Supp. 491.

§ 714. Appointment of receiver; notice of application.

Without notice.—An order appointing a receiver of rents and profits pending a suit to foreclose a mortgage may be made without notice to the mortgagor if he be in default. *Conroy v. Polstein* (1912), 150 App. Div. 832, 135 N. Y. Supp. 419.

Necessity for notice of application for appointment of receiver in foreclosure.—A clause in a mortgage authorizing the appointment of a receiver upon default does not dispense with notice of the application. Nor does a clause that upon default the mortgagee may enter the premises, take possession thereof and receive the rents and profits, dispense with the necessity of notice. *Straus v. Minkowski* (1918), 181 App. Div. 877, 169 N. Y. Supp. 442.

A letter written by the attorney for the

plaintiff in a suit for the foreclosure of a mortgage to another attorney is not equivalent to notice of an application for the appointment of a receiver, where the authority of the attorney to receive the notice is not established and the letter lacks the requisite precision. *Straus v. Minkowski* (1918), 181 App. Div. 877, 169 N. Y. Supp. 442.

Failure of service on nonresident.—*Finck v. Finck* (1918), 171 N. Y. Supp. 408.

Appointment in action for foreclosure is not in conflict with prior appointment of a temporary administratrix by the surrogate's court. *Cohn v. Bartlett* (1918), 182 App. Div. 245, 169 N. Y. Supp. 604.

§ 715. Security.

Filed with clerk of county.—The provision requiring a receiver to file a bond with the proper clerk must be construed to signify the clerk of the county in which

the action was triable, and in which the judgment roll was filed. *Mulstein Co. v. City of New York* (1915), 213 N. Y. 308.

§ 716. Certain receivers may hold real property.

Receiver in action for partition.—A receiver, appointed to take charge of real property and to collect and hold the rents and profits during the pendency of an action for partition does not take title or have power to sue for permanent injury

to the freehold by adjoining owners. *Rinehart v. Hasco Building Co.* (1912), 153 App. Div. 153, 138 N. Y. Supp. 258.

Mortgage foreclosure.—*Schwarz v. Alexander* (1917), 178 App. Div. 641, 165 N. Y. Supp. 491.

§ 721. Defects cured by verdict, etc., and by judgment.

Purpose.—This section and §§ 722, 723 were only intended to cure and supply defects for irregularities, and were not intended to remedy a jurisdictional defect, and a summons which is totally void cannot be amended. *Tucci v. Romeo* (1916), 94 Misc. 317, 158 N. Y. Supp. 262.

An order adjudging a relator guilty of a civil contempt is fatally defective where it contains no determination that the offense charged was calculated to or actually did defeat, impair or prejudice the rights or remedies of a party to a special proceeding. And as the defect goes to the jurisdiction the order cannot be amended under the provisions of this section. People ex

rel. *Cowan v. Hamlin* (1913), 145 N. Y. Supp. 400.

An omission to file the undertaking of commissioners appointed to lay out a highway under section 193 of the highway law may be corrected under this section. *Matter of Laidlaw* (1914), 162 App. Div. 755, 148 N. Y. Supp. 56.

Mistake in name of defendant.—Where a judgment-debtor whose true name was "Maryian Korpinski" was named in the summons and complaint as "Mike Korpinski," which he gave as his name to the judgment creditor and by which he was generally known in the community, the court acquired jurisdiction over him

by the service of the summons and a judgment rendered against "Mike Korpinski." *Matter of Korpinski* (1914), 84 Misc. 96, 146 N. Y. Supp. 859.

Verdict in favor of infant is not affected

because he appeared by attorney instead of guardian. *Smith v. New York Central Railroad Co.* (1918), 183 App. Div. 478, 171 N. Y. Supp. 64.

§ 723. Amendments by the court; disregarding immaterial errors.

Application.—This section applies to all courts including the city court of Niagara Falls. *Matter of Korpinski* (1913), 84 Misc. 96, 146 N. Y. Supp. 859; *Todd v. Silk Association of America* (1917), 100 Misc. 403, 167 N. Y. Supp. 1079.

Power of court.—There is no question of the power of the court to correct its decision and judgment. The authority of the court is regulated by provisions of the code, but it possesses inherent power aside from these provisions to correct matters relating to its judgments which do not affect substantial rights and are not properly cognizable on appeal. Both where a default has occurred and where there has been no default this power exists. *Easling v. Independent Brewing Co.* (1916), 98 Misc. 46, 162 N. Y. Supp. 351.

A trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting a judgment. It cannot, by amendment, change a judgment in matter of substance for error committed on the trial or in the decision, or limit the legal effect of it to meet some supposed equity subsequently called to its attention or subsequently arising. It cannot correct judicial errors either of commission or omission. Those errors are, under our system of procedure, to be corrected either by the vacating of the judgment or by an appeal. This rule is not in conflict with the provisions of §§ 723, 724. Those provisions are not intended to affect the substantial rights of parties. *Herpe v. Herpe* (1919), 225 N. Y. 323.

Copy of summons entitled in county court instead of in supreme court; it is not void under § 417, where defendants are not misled or prejudiced, but voidable under § 426; and the supreme court can permit amendment. *Sivaslian v. Akulian* (1917), 166 N. Y. Supp. 535.

An affidavit of one of plaintiff's attorneys to the effect that at the opening of the trial the complaint was dismissed on defendant's motion, which dismissal was later set aside upon condition that plaintiff apply at special term within 15 days and obtain leave to serve an amended complaint, with the proposed amended complaint annexed thereto, is insufficient to warrant the granting of leave to amend. *Congregation Rodeph Shalom v. Bradley Contracting Co.* (1916), 159 N. Y. Supp. 70.

Judgment exceeding issue.—A decision and judgment of the court may be vacated, set aside and corrected where the relief granted by the decision and judgment ex-

ceeds the issue which was tried by the court. *Easling v. Independent Brewing Co.* (1916), 98 Misc. 46, 162 N. Y. Supp. 351.

Insufficient reason for amending complaint. *Rodman Improvement Co. v. Krabe* (1918), 185 App. Div. 882, 171 N. Y. Supp. 617.

Where it appears that a plaintiff has no title to the cause of action, which passed to the trustees appointed on his bankruptcy, it is proper for the court to allow the defendant to amend by setting up said defense with counterclaims for moneys paid on the faith of the plaintiff's title. *Nevins v. Brooklyn Citizen* (1916), 171 App. Div. 643, 157 N. Y. Supp. 155.

Referee may not grant amendment.—On a reference to hear and determine, the referee has no power to grant an amendment to the complaint setting up a new cause of action. *Kelly v. St. Michael's Roman Catholic Church* (1912), 148 App. Div. 757, 133 N. Y. Supp. 328.

A referee has no power to amend a complaint seeking compensation due under a contract so as to change the action to one for damages for a breach of the contract or by adding a second cause of action for such damages. The plaintiff should apply to the special term for leave to amend. *Conway v. Farish-Stafford Co.* (1913), 157 A. D. 481, 142 N. Y. Supp. 572.

A referee has no power to allow an amendment to a complaint which in effect changes the action from one in which a reference is proper to one which is not referable. *Conway v. Farish-Stafford Co.* (1916), 171 A. D. 669, 157 N. Y. Supp. 597.

An action in equity should not fail because of some defect in allegations in the complaint. An amendment will be allowed if necessary. *Neagle v. Hudson* (1913), 144 N. Y. Supp. 221.

Result same.—In equitable suits the courts have power to direct an amendment of a complaint although it changes the cause of action and substitutes another belonging to a different class, where the result sought to be reached is the same as set forth in the original pleading. *Merrihew v. Kingsbury* (1912), 150 App. Div. 40, 134 N. Y. Supp. 452.

Application at special term.—Where the defect in a complaint is not one merely of form, the trial court should give leave to the plaintiff to apply at special term for an order permitting the service of an amended complaint, where proper terms may be imposed. *Steffe v. Heinzer* (1913), 156 App. Div. 575, 141 N. Y. Supp. 584.

Insufficiency of application.—Where a motion for leave to amend a complaint is upon the affidavit of the managing clerk in the office of the plaintiff's attorney and no reason is given for failure to obtain the affidavit of the plaintiff and the amended complaint is not verified by the plaintiff, the application is insufficient and the motion will not be granted. *Driscoll v. Parker Pen Co.* (1913), 141 N. Y. Supp. 251.

Laches.—A defendant should be permitted to serve an amended answer to an amended complaint, unless he has been guilty of such laches in making the motion as will render it inequitable to the plaintiffs to permit the desired amendments to be made. *Williams Engineering & Cont. Co. v. City of N. Y.* (1912), 150 App. Div. 676, 135 N. Y. Supp. 778.

A delay of more than two years in moving for the amendment of a complaint is a sufficient ground for refusing the application. *Cordusi v. Pianisani* (1917), 164 N. Y. Supp. 560.

Amendment of pleading at trial when improper, see *Bonny v. City of New York* (1913), 156 A. D. 287, 141 N. Y. Supp. 8.

Unnecessary parties.—Where all of the necessary parties were before the court, they are bound by the judgment. Where others are unnecessarily sought to be made parties the substantial rights of no one are affected and the insertion of their names and descriptions may be disregarded. Should the plaintiff desire and so elect, these names may be stricken out by order in furtherance of justice. *McQuillan v. McQuillan* (1912), 134 N. Y. Supp. 893.

Names of parties.—Where in a summons and complaint the given names of defendant is wrong but he is the person intended to be served and judgment is taken by default, the court has power to correct the mistake and amend the papers and the judgment roll. *Corn v. Heymsfeld* (1912), 75 Misc. 478, 133 N. Y. Supp. 447.

Under this section the court may grant an order amending and correcting the summons, judgment roll, and all subsequent proceedings in the action by correcting a mistake in the name of the defendant. *Fisher v. Independent Brothers of Nieshweiser* (1914), 84 Misc. 382, 147 N. Y. Supp. 390.

A justice of the peace may amend a judgment by inserting therein the true given name in parentheses of the defendant. *Furanz v. Tramontano* (1917), 177 App. Div. 52, 163 N. Y. Supp. 700.

Where the defendant's name was not correctly given in the summons but he appeared and answered and judgment was given for the plaintiff, but was erroneously entered against the incorrect name, it was held that the mistake should have been corrected on the plaintiff's motion as in the furtherance of justice. *Kriegelman v. A'iewitz* (1915), 155 N. Y. Supp. 355.

Idem; unincorporated association.—Although an unincorporated association can-

not properly bring an action in its own name, the court may on appeal, allow an amendment of all processes and pleadings by inserting the name of the president of the association as plaintiff. *Francis v. Perry* (1913), 82 Misc. 271, 144 N. Y. Supp. 167.

Idem; copartnership.—Where a copartnership uses a name which might indicate that it is incorporated and a plaintiff has served the summons upon one of the members under the belief that he represents a corporation, he is entitled to amend the title of the summons upon discovering the facts so as to name the several partners as defendants doing business under the firm name. *De Witt v. Abraham Bros. Horse & Mule Co.* (1915), 170 App. Div. 610, 156 N. Y. Supp. 658.

When partnership sues in its partnership name defect may be cured by amendment during trial. *Baldwin & Son v. Caffisch* (1918), 182 App. Div. 477, 170 N. Y. Supp. 354.

Where defendants as partners are doing business under a trade name, said name cannot be used to bring in the partnership as an additional codefendant in an action, and, the facts appearing at trial, the court on its own motion should have stricken out the name of said defendant, although no motion to that effect was made. *Calumet & Hecla Mining Co. v. Equitable Trust Co.* (1919), 186 App. Div. 328, 174 N. Y. Supp. 317.

Failure to join necessary parties.—The test as to whether a summons and complaint should be amended so as to bring in another party is whether such party could have been joined as a party defendant originally. *Deiches v. Western Development Co.* (1913), 157 App. Div. 676, 142 N. Y. Supp. 933.

Complaint against defendants, "as trustees," may not be amended, at the trial, by striking out the quoted words. *Marks v. Herbert & Co.* (1917), 165 N. Y. Supp. 450.

Substitution of executor for administrator.—Where a widow has been appointed administratrix of her husband's estate and has brought a suit to foreclose a mortgage given to her intestate, and owing to the existence of a will which was subsequently admitted to probate the mortgagor has been appointed executor of the estate, the widow is not entitled to an order substituting the executor in her place as plaintiff in the foreclosure action and permitting her to intervene as an interested person, because such order would compel the defendant executor in his representative capacity to prosecute an action against himself individually. *Morris v. Morris* (1916), 172 App. Div. 719, 158 N. Y. Supp. 361.

Error in name of county.—A plaintiff may amend his notice of trial *nunc pro tunc* to read "at a trial term appointed to be held in and for the county of Bronx," instead of "the county of New York,"

where it clearly appears from the notice that the reference to New York is a clerical error. *De Suret v. Niles* (1915), 156 N. Y. Supp. 164.

Irregularities cured by amendment.—Although an order for the examination of the president of a corporation before trial should direct the examination of the corporation by its president instead of directing the examination of the president of the corporation, a mistake in this respect is a mere irregularity which may be cured by amendment. *Palumbo v. L'Araldo Italiano Pub. Co.* (1912), 150 App. Div. 221, 134 N. Y. Supp. 655.

Technical defects.—Where a complaint contains two defects, one technical and the other substantial, plaintiff will not be allowed to amend merely to correct the technical defect where the other will remain. *Posner v. Rosenberg* (1912), 152 App. Div. 249, 137 N. Y. Supp. 1084.

The defendant, where the amendment is more than formal, and presents a new issue, should be accorded the same unrestricted right to move or plead as he had when the original pleading was served. No burden or restriction should be imposed upon one party as a condition of granting a favor to the adverse party. The effect of the amendment of 1900 is to authorize the court in a proper case to allow the cause to retain its place on the general calendar of issues of fact, without a new note of issue or a notice of trial. The court having control over the calendar may, in a proper case, order that it retain its place on the day or call calendar, or that it be set for trial for a day certain, subject, however, to the right of the party opposing the amendment to move or plead as he may be advised, and then, when an issue of fact shall be joined on the amended pleading, the cause may be brought to trial as contemplated by the order granting leave to amend. *Tatum v. Farson* (1915) (App. Div.), 152 N. Y. Supp. 817.

Issues not to be changed by amendment.

—A trial court having determined that the complaint does not state facts sufficient to constitute a cause of action should not allow an amendment unless the defect is one of form which can be cured on the trial, without changing the issues or prejudicing the defendant. *Steffe v. Heinzer* (1913), 156 App. Div. 575, 141 N. Y. Supp. 584.

New cause of action.—A counterclaim of conversion cannot be amended at the trial by setting forth as ground for recovery an entirely new and distinct tort from that which was originally alleged. *Mayer v. Monzo* (1912), 151 App. Div. 866, 137 N. Y. Supp. 616.

Where a plaintiff having the alternative to sue either for breach of contract or for fraud, chooses the former, he should not be allowed to change his election by amendment at the trial. So, a plaintiff should

not be allowed to serve an amended complaint at the trial changing the action from one upon contract to one for conspiracy and fraud where the defendant will be injuriously affected by losing his right to judgment on the pleadings. *Cordusi v. Piarrisani* (1917), 164 N. Y. Supp. 560.

This section does not permit an amendment upon the trial which changes substantially the cause of action, or sets up a new defense. *People v. Raquette Falls Land Co.* (1916), 93 Misc. 582, 158 N. Y. Supp. 467.

Plaintiff will not be permitted to amend the complaint in such manner as to set up a judgment recovered in another action for the same materials and to enforce the lien thereof; such an amendment would enable plaintiff to entirely change his action both as to facts and theory. *Weaver Hardware Co. v. Solomovitz* (1917), 98 Misc. 413, 163 N. Y. Supp. 121.

Amendment at trial which substitutes a different cause of action from that originally asserted, should not be allowed. *Konner v. State* (1917), 180 App. Div. 837, 168 N. Y. Supp. 345.

Setting up new cause of action based on same facts.—There can be no question of the power of the court to grant a motion to amend the complaint by setting up an additional cause of action based upon the state of facts out of which the cause of action already stated in the complaint grew, even though the proposed cause of action would be barred by the statute of limitations if sued on at that time. *Gropp v. Great Atlantic, etc. Tea Co.* (1913), 83 Misc. 374, N. Y. Supp. 959.

Original answer denying allegations of proposed pleading.—Where the original answer of a defendant charged with conversion denied every allegation sought to be denied by a proposed amended pleading, leave to amend should be denied. *Colwell Lead Co. v. Home Title Ins. Co.* (1913), (No. 1), 154 App. Div. 92, 138 N. Y. Supp. 744.

The distinction between an amended and a supplemental complaint is that in an amended complaint allegations of fact existing when the action was commenced may be incorporated, while a supplemental complaint is necessary when it is sought to allege material facts which occurred after the original complaint was made. *Brinberg v. Oliver Typewriter Co.* (1916), 174 App. Div. 511, 161 N. Y. Supp. 226.

Costs; payment on amendment.—Where a court rules that the answer is insufficient and permits the defendant to withdraw a juror, and apply at special term for an amendment, the order entered upon such motion should provide as a condition, that the defendant pay the costs of the action antecedent to the granting of the order. *United States Drainage and Irrigation Co. v. Lucas* (1913), 156 App. Div. 49, 141 N. Y. Supp. 50.

A trial court on granting leave to a defendant to withdraw a juror in order to apply to the special term for leave to amend an answer alleging a new defense cannot determine the amount of costs, which should be awarded by the special term. *Smith v. Luckenbach* (1913), 158 App. Div. 485, 143 N. Y. Supp. 592.

Idem; plaintiff without funds.—Where a plaintiff is destitute and entirely without funds, the court, when granting costs to the defendant as a condition for allowing an amendment to the complaint, may, in its discretion, direct that payment shall abide the event of the action. *Ensanian v. New York Central, etc. R. Co.* (1915), 169 App. Div. 842, 155 N. Y. Supp. 721.

Increasing demand for damages.—Where, before the commencement of an action to recover for injuries and for damages to his automobile, plaintiff had fully recovered and the automobile had been repaired, he should not have been permitted at the opening of the trial to amend his complaint by increasing his demand for damages without an affidavit giving the ground for such change. *Sandusky v. Erie Railroad Co.* (1915), 91 Misc. 87, 153 N. Y. Supp. 612.

Where the word "him" is omitted from a constable's certificate of service, the court can disregard the omission or direct an amendment of the certificate. *Lonas v. Myers* (1916), 98 Misc. 476, 163 N. Y. Supp. 390.

The complaint in an action for breach of a contract alleged to have been made with plaintiff, a corporation, may be amended so as to allege a contract with certain individuals as partners and that plaintiff had become the owner of all the assets of said partnership, including all rights under the contract in suit; such amendment neither changes the cause of action nor its nature. *Old & Wallace, Inc. v. Joseph R. Marquette, Jr., Inc.* (1918), 183 App. Div. 583, 170 N. Y. Supp. 84.

Account stated; where amounts are same.—A plaintiff, after the service of an answer, may upon proper terms amend his complaint by setting up as a second cause of action an account stated between himself and defendant, the amount whereof is exactly the same as that claimed under the first cause of action. *Salvage v. Hartley Silk Mfg. Co.* (1912), 153 App. Div. 736, 138 N. Y. Supp. 800.

Employer's liability.—Amendment of complaint in action based on the common law as modified by the state statute so as to bring the action under the Federal Employers' Liability Act. *Hughes v. New York, Ontario & Western R. Co.* (1913), 158 App. Div. 443, 143 N. Y. Supp. 608.

Mechanic's lien.—While, in a suit to foreclose a mechanic's lien, it is necessary that the complaint allege that no other action had been brought upon the debt, it is within the discretion of the court, to permit an amendment of the complaint upon the trial by inserting such an allega-

tion. *Douglass v. Carlin Construction Co.* (1912), 149 App. Div. 856, 134 N. Y. Supp. 709.

A complaint in a suit to foreclose a mechanic's lien may be amended under § 723 so as to include an allegation that "no other action has been had for the recovery of the said sum of money or any part thereof." *Kalt Lumber Co. v. Dupignac* (1912), 150 App. Div. 400, 134 N. Y. Supp. 1098.

Where the objection, in an action to foreclose a mechanic's lien, that the complaint did not allege that no other action had been brought to recover any part of the debt is not raised by demurrer, and the case is tried without a jury, the court under § 723 will amend the complaint by the insertion of such an allegation. *Schultz v. Teichman Engineering & Const. Co.* (1913), 79 Misc. 357, 140 N. Y. Supp. 429.

Personal injuries; extent of injuries.—In action for personal injuries the plaintiff moved at the trial to amend her complaint by inserting allegations as to the extent of her injuries. The motion was granted and it was ordered that the answer to the original complaint should be deemed the answer to the amended complaint. *Kyle v. City of New York* (1913), 155 App. Div. 401, 139 N. Y. Supp. 1080.

Statute of frauds; amendment to plead.—Where a complaint on an account stated alleged a written statement of account, but the proof showed an account stated by implication resting on parol evidence, the defendant should be allowed to amend his answer so as to plead the statute of frauds. *Lord & Taylor v. Hatch* (1912), 149 App. Div. 603, 133 N. Y. Supp. 1068.

Taxpayer's action.—The allowance of an amendment to a complaint, changing a cause of action by two individuals for reopening a street to a taxpayer's action for the same cause, is not "in the furtherance of justice" where the legislature by special act has, subsequent to the commencement of the action, made the closing of the street valid and effective, although the act excepts from its operation pending actions. *Guenther v. Patch* (1913), 155 App. Div. 27, 140 N. Y. Supp. 223.

In proceedings to dispossess a tenant, where the defendant admitted allegations in the complaint that on April 21 he made an agreement for the lease of the premises for one month and also alleged as an affirmative defense that on April 19 he leased the premises for a year, and the trial judge denied the defendant request to amend the answer to deny the allegation of the complaint as to the lease for one month, it was held to be erroneous to allow the defendant to prove his affirmative defense. *Barvo & Potter, Ltd. v. Rothman* (1916), 162 N. Y. Supp. 347, 97 Misc. 666.

Action for separation.—Where a complaint in an action for separation fails to show that the court has jurisdiction by omitting to allege that the marriage was

performed in this state, the court may allow the defect to be cured by amendment. *Dulso v. Dulso* (1915), 170 App. Div. 67, 156 N. Y. Supp. 90.

Warrant of attachment held amendable by addition of an allegation that the removal was with intent to defraud creditors. *Ingalls v. Nutter* (1918), 172 N. Y. Supp. 210.

Notice of appeal.—Defects in a notice of appeal may be disregarded under this section. *Matter of Eckert v. Truman* (1914), 163 App. Div. 17, 148 N. Y. Supp. 48.

A provision withholding or awarding costs is a substantive part of a judgment in an action in equity and cannot be amended. Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected by the trial court through an amendment. *Herpe v. Herpe* (1919), 225 N. Y. 323.

Section cited.—*Matter of Public Service Commission* (1915), 170 App. Div. 423, 155 N. Y. Supp. 950.

§ 724. Relief against omissions, etc.; amendments to conform proceedings.

Effect of modifications on appeal.—Where parties by mutual consent, in effect, modify the pleadings on the trial, they are bound thereby on appeal. *Montague v. Hotel Gotham Co.* (1912), 149 App. Div. 687, 133 N. Y. Supp. 954.

Change of cause of action.—Where judgment in favor of a plaintiff in an action against a common carrier for breach of contract has been reversed, plaintiff will not be allowed to amend his complaint so as to change the cause of action to one of conversion, where the tort action is barred by the statute of limitations. *Nathan v. Woolverton* (1912), 149 App. Div. 791, 134 N. Y. Supp. 469.

Mere "change of mind."—Commissioners appointed under the Palisades Interstate Park acts (L. 1900, ch. 170; L. 1906, ch. 691; L. 1910, ch. 381) to acquire lands for certain park purposes cannot, after proceedings have been instituted, and after they have voluntarily applied to the court to confirm the report of the appraisers and have obtained the same, have the order set aside simply because they "changed their minds," as the proceedings are substantially the same as under other provisions relating to condemnation. *Matter of Commissioners of Palisades Interstate Park*, 216 N. Y. 104.

Costs; when allowed as condition for amendment.—The plaintiff should not be charged with costs as a condition for an amendment of his complaint, if the cause of action is not changed and the amendment would have been allowed at trial if justified by the proof. *Pomeroy Co. v. Wells Brothers Co.* (1912), 149 App. Div. 673, 134 N. Y. Supp. 353.

Judgment dissolving marriage.—Provisions of this section are not amended or their scope and force curtailed by the provisions of § 1774 *post*, and the court upon the return of a motion for final judgment or at any time prior to its entry may refuse to grant final judgment, open the interlocutory judgment and allow an amendment of the pleadings. *Wood v. Wood* (1913), 141 N. Y. Supp. 929.

Necessity for good excuse.—Where no meritorious excuse for the default is shown

on a defendant's motion to open his default in not being present at the trial and to vacate the judgment, the motion should be denied. *Miller v. Samson* (1914), 84 Misc. 412, 164 N. Y. Supp. 132.

Omission of venue.—The omission of the venue from a proof of loss, sworn to before a commissioner of deeds, may be supplied by amendment. *Slocum v. Saratoga & Washington Fire Co.* (1912), 149 App. Div. 867, 134 N. Y. Supp. 72.

Opening default.—A default will not be opened where it appears to have been wilfully or intentionally allowed or that both attorney and client were guilty of negligence. *Heiliger v. Ritter* (1912), 78 Misc. 264, 138 N. Y. Supp. 212.

When judgment of foreclosure may be opened where defendant has failed to appear and try out the issue of her liability. *Pratt v. Fay* (1916), 97 Misc. 434, 161 N. Y. Supp. 412.

Idem; meritorious defense or counterclaim.—Where a defendant is in default for want of an answer he will not be allowed to open his default except upon papers which include a proposed answer and affidavits showing facts from which the court can determine that a meritorious defense or counterclaim existed. *J. Liebling Furriers' Supply Co., Inc. v. Cohn* (1915), 155 N. Y. Supp. 120.

Idem; affidavit of merits.—An affidavit of merits is not necessary on a motion to open a default where the answer is verified. *Imperial Auto Touring & Taxicab Co. v. Dickenson* (1916), 161 N. Y. Supp. 352.

Idem; costs.—On a motion by the defendant in a matrimonial action to set aside interlocutory and final judgments where it appeared that she had been guilty of deception and artifice, practiced not only on the opposing party, but upon the court, it was held proper to impose costs as a condition of opening the default. *Schoeller v. Schoeller* (1916), 161 N. Y. Supp. 399.

Idem; statement of defense.—The requirement that the defendant state the facts constituting his defense on a motion to open a default is not applicable where

the entry of the default was caused by a failure of the trial court to observe the rules of court and the moving papers contained a satisfactory affidavit of merita. *Abelou v. Bradley Contracting Co.* (1916), 162 N. Y. Supp. 129.

Idem; engagement of counsel.—Although the defendant's attorney deliberately permitted an inquest to be taken with the view of obtaining the plaintiff's evidence and then moved to open the default, such a course, though reprehensible, did not authorize the court to deny a motion to open the default where the default should not have been entered owing to the engagement of the defendant's counsel in another court. *Abelou v. Bradley Contracting Co.* (1916), 162 N. Y. Supp. 129.

Actual engagement of counsel in the trial of another case is a good and valid excuse for opening a default. *Kamen Contracting Co. v. Carretta* (1916), 161 N. Y. Supp. 211.

Where it appeared without contradiction, and without question of the good faith of the defendants or their attorneys that the latter were, at the time the case was called for trial, actually engaged in another court trying another case which was begun the afternoon before the default and ultimately finished on the day of the default, and that these facts were presented to the court by affidavit, it was held that the default should be opened without terms and without costs of the appeal. *Reiter v. Miller* (1915), 155 N. Y. Supp. 307.

Actual engagement of counsel in another court at the time the case was called is a sufficient excuse for opening a default without the imposition of any terms. *Zarembowitz v. Wacks* (1917), 162 N. Y. Supp. 664.

Idem; failure to serve amended complaint.—Where, in an action to obtain the appointment of a receiver of the estate of a decedent who died a citizen of a foreign state, where his will was probated, an order is entered sustaining a demurrer to the amended complaint and granting defendant's motion for judgment, with leave to plaintiff to serve a further amended complaint within twenty days, and no amended complaint is served and no application is made for an extension of time within which to serve it, and ten days after the expiration of such time defendant moves, on notice, for final judgment, which is granted, and a further motion is made and granted for a resettlement of the order, and plaintiff appears on both of said motions but does not express any intention of serving a further amended complaint, nor ask for an extension of time to do so, he is not entitled, a month after the entry of said judgment, to have the same vacated and his default in not serving a second amended complaint opened. *Thorburn v. Gates* (1917), 177 App. Div. 474, 164 N. Y. Supp. 307.

Opening defaults as matter of course.—The practice of opening defaults as a matter of course should not be continued. Such practice has lowered respect for and injured the administration of justice, and is also a wrong to diligent attorneys and litigants who conform to the rules of court, and are entitled to the protection and favor of the court against the opposite kind of attorneys and litigants. They are not defaults, but abandonments. *Miller v. Samson* (1914), 84 Misc. 412, 146 N. Y. Supp. 132. See also notes to § 783.

§ 731. Tender after suit.

When tender after suit is insufficient by defendant's own testimony, plaintiff should be given judgment for the entire sum due with appropriate costs, the deposit to be credited. *Tenenbaum v. Goldman* (1918), 169 N. Y. Supp. 674.

An attorney, after suit has been brought has implied authority to receive payment of a demand and therefore tender may be made to plaintiff's attorney as agent of the creditor. However special circumstances may exist which will limit this agency. So where in an action for money paid, defendant counterclaimed for the return of certain diamonds held by plaintiff as collateral security, and described in very general terms in a receipt taken eight years before a tender by defendant's attorney to plaintiff's of the amount due and a demand for the return of the diamonds is ineffective to discharge plaintiff's lien where plaintiff's attorney requests that defendant be present in person at the time of the return of the diamonds. Such a request is reasonable. *Stratton v. Graham*

(1914), 164 App. Div. 348, 149 N. Y. Supp. 662, modifying 140 N. Y. Supp. 869.

Tender by tenant to landlord after commencement of summary proceedings.—The sections of the Code in regard to tender are applicable to actions for the recovery of a sum of money only. Where a tenant tendered to the landlord and delivered to the clerk of the court where summary proceedings were pending against him the exact sum which he admitted to be due for rent, but which was less than the sum actually due, as subsequently determined, which sum the landlord refused to accept, and the payment was not made for the purpose of making a defense of tender available, nor to stay the issuing of a warrant pursuant to § 2254 of the Code, it was ineffectual unless the landlord saw fit to accept it, and until acceptance it remained the money of the tenant. *Browning, etc. Co. v. Chamberlain* (1915), 210 N. Y. 270, rev'g 150 App. Div. 391, 134 N. Y. Supp. 1104.

Application to municipal court of New York.—By the provisions of § 15 of the municipal court code, §§ 731, 732, 734 of the code of civil procedure, are applicable to the municipal court, but those sections

only apply to a tender made after suit is brought and before trial. *Wagman v. Bakst* (1917), 99 Misc. 276, 164 N. Y. Supp. 28.

§ 732. Amount to be paid into court.

Tender, how kept good.—A tender in order to extinguish the debt or relieve from liability for costs and interest must be kept good by paying the amount into court. *Rush v. Wagner* (1918), 184 App.

Div. 502, 171 N. Y. Supp. 817.

Failure to keep tender good, see *Heinzer v. Klyberg* (1914), 87 Misc. 315, 149 N. Y. Supp. 949.

§ 733. Effect of sufficient tender.

Tendering payment of a portion of the amount due is insufficient to stop the running of interest. *Hoffman v. Rose Dress*

Co. (1917), 179 App. Div. 57, 166 N. Y. Supp. 172.

§ 738. Defendant's offer to compromise, proceedings thereon.

Offer of judgment.—Where an offer of judgment is not in the form provided in § 55 of the lien law, it must be presumed to have been made under § 738 of the Code. *Salerno v. Vogt* (1912), 78 Misc. 64, 138 N. Y. Supp. 664.

defendant from costs on the entry of a judgment for the amount tendered. This, because the tender did not authorize the entry of a judgment for costs in excess of the amount stated, and necessarily deprived plaintiff of his right to tax disbursements. *Stephens, Inc. v. Laykenack Realty, Inc.* (1915), 168 App. Div. 845, 154 N. Y. Supp. 413.

Offer restricting amount of costs.—An offer of judgment for a certain amount "together with the sum of fifteen (\$15) dollars costs," is not sufficient to save a

§ 743. Party bringing money into court is discharged.

Payment into court to secure attorney's claim in condemnation proceedings.—Where the defendant upon the substitution of attorneys has, pursuant to an order of the court, paid a certain amount of the recovery to the city chamberlain in order to secure the claim of the attorneys of record, it is discharged from liability to such ex-

tent. *Cunningham v. New York* (1913), 162 App. Div. 851, 148 N. Y. Supp. 170.

Trust companies designated as depositories for moneys paid into court; preference in payment of money held by such companies upon their insolvency. *Henkel v. Carnegie Trust Co.* (1914), 213 N. Y. 185.

§ 744-a. Comptroller may examine books, etc., of banks, etc.; payment of money, etc., to county treasurers, etc.

The comptroller may examine the books, accounts and vouchers of every bank and trust company or other depository or of any public official in the state, in anywise relating to moneys and securities paid into court, under an order of any court of record or directed to be paid into court by statute; and where the same has not been paid to the chamberlain of the city of New York or to any county treasurer of the state, the comptroller upon application duly made shall be entitled to an order directing the payment and transfer of all such money and securities, from any such bank, trust company, depository or public official to the treasurer of the proper county, and in the city of New York to the city chamberlain.

Added by L. 1908, ch. 182, and amended by L. 1916, ch. 442, in effect May 9, 1916. The amendment of 1916 inserted the words "or other depository or of any public official" in the second line, the words "or directed to be paid into court by statute" in the fifth line, and the words "trust company, depository or public official" in the tenth line.

Moneys collected by guardians ad litem as the proceeds of actions, and which are received directly from defendant and deposited in a savings bank in the city of New York which is not a designated depository of court funds, are not moneys "paid into court" within the meaning of § 744-a. *Matter of Harris* (1912), 77 Misc. 590, 137 N. Y. Supp. 234.

Moneys paid into court.—Where moneys, paid to a trust company under order of the court, are not "moneys and securities paid into court" within the meaning of § 744-a, the comptroller is not entitled to an order directing the transfer of the funds and

securities to the chamberlain of New York city. *Matter of Sohmer* (1913), 153 App. Div. 752, 138 N. Y. Supp. 795.

Notice not required.—Upon an application by the state comptroller, pursuant to this section, for the transfer to the chamberlain of the city of New York of all funds deposited with a trust company, pursuant to an order of the court, notice need not be given to the parties interested in the funds, unless it is apparent that it is no longer necessary to retain such funds in court. *Matter of Sohmer* (1913), 156 App. Div. 781, 141 N. Y. Supp. 740.

§ 745. Power of each court to direct payment or reinvestment of its funds.

Section cited.—*Cohen v. Bruere* (1916), 162 N. Y. Supp. 75.

§ 747. Power of each court to direct payment or reinvestment of its funds.

Each court may direct that money paid into that court in any action or proceeding brought therein, or any bond, mortgage or other security which represents property belonging to any suit or party interested therein, may, after having been deposited with the county treasurer or city chamberlain as required by section seven hundred and forty-five of this act, be paid out, transferred, invested or reinvested in any manner or form that appears to it best for the interests of the owners thereof. But such directions must be embodied in an order or decree of said court, founded upon proper and sufficient evidence satisfactory to the court that such disposition of the property is best for the interests of the owners thereof or parties interested therein. When the whole of an original deposit of money, or the whole of a distributive share thereof, or any security or other property is directed to be paid or transferred out of court, the order must direct the payment of all accrued interest or other income belonging to the party or parties to whom said deposit or distributive share or security is ordered to be paid, transferred or delivered.

Amended by L. 1892, ch. 651; L. 1908, ch. 183; L. 1916, ch. 443; L. 1917, ch. 731, in effect Sept. 1, 1917. The amendment of 1916 inserted lines 4-6, beginning with the word "after" and ending with the word "act." The amendment of 1917 added the last sentence.

Source.—L. 1848, ch. 277, § 8.

§ 751. Funds or property not to be surrendered without order.

No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court, in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition.

Amended by L. 1892, ch. 651, and L. 1917, ch. 731, in effect Sept. 1, 1917. The amendment of 1917 omitted the last sentence of the former section.

Source.—R. S., pt. 3, ch. 1, tit. 2, § 23.

This section is made applicable to all courts of record by subdivision 6 of § 3347. *Matter of People v. Maltbie* (1918), 184 App. Div. 743, 172 N. Y. Supp. 483.

Money deposited with county treasurer on sale of infant's real estate.—Where in a proceeding in the county court for the sale of an infant's real estate the proceeds are deposited with the county treasurer, an order of said court is a prerequisite

to the payment by the county treasurer of any portion of the funds to the administratrix of the infant. *People v. Brown* (1913), 83 Misc. 495, 146 N. Y. Supp. 123.

In an action to exonerate the bail from liability evidence that plaintiff induced defendant to leave the country is admissible as to whether plaintiff induced defendant to leave the jurisdiction of the court. *Ducas v. Federal National Surety Co.* (1915) (App. Div.), 153 N. Y. Supp. 803.

§ 753. Annual reports to comptroller.

Every treasurer or financial officer who has in his charge or possession or under his control, or who keeps a record of money, bonds, stocks, mortgages or any other securities or property as prescribed in this title, must, once in each year, make a report to the comptroller at the time and in the form and manner which he may prescribe, containing a true statement of his accounts for the preceding year or from the time of the last report. This report must be verified by the oath of such officer, and must be accompanied by the certificate of the proper officer of each bank or trust company, stating the exact amount on deposit with such corporation. Every savings bank, bank or trust company having in its possession, pursuant to an order of a court of record, money, bonds, stocks, mortgages or any other securities or property which were not first deposited in compliance with the provisions of section seven hundred and forty-five of this act, must, once in each year, make a report to the comptroller at such time as he shall prescribe, stating separately for each case the name of the court, the title of the action or proceeding, the date of the receipt, from whom received, for whom received, the amount of money, if any, a description of the securities or other property, each addition of interest and each change of investment, the amount so held at the date of the report, the date and description of each order directing payment and the dates and amounts of payments thereunder and to whom made. Every officer, bank or trust company mentioned in this section, shall furnish any additional report to the comptroller or to the court at such time and in such detail as may be required.

Amended by L. 1892, ch. 651, and L. 1917, ch. 731, in effect Sept. 1, 1917. The amendment of 1917 inserted the third sentence and the words "or who keeps a record of" in the first sentence.

Source.—Part of rule 83 of the General Rules of Practice of 1874. See also R. S., pt. 3, ch. 1, tit. 2, §§ 19, 20 and 25.

§ 755. Action; when not to abate.

Divorce, action for absolute.—An action for an absolute divorce is a personal one and abates upon the death of the plaintiff. A motion in action for absolute divorce, made after the death of the plaintiff, to vacate the final judgment in his favor and for a new trial upon the ground of newly-discovered evidence, must be denied for want of power and not in the exercise of discretion. *Hunt v. Hunt* (1912), 75 Misc. 209, 135 N. Y. Supp. 39.

Assault on passenger.—Where an action against a street railway company to recover damages for an assault on a passenger is based upon an alleged breach of contract to safely carry, the cause of action, upon the death of plaintiff, survives to his estate. *Daniel v. Brooklyn Heights Railroad Co.* (1912), 76 Misc. 482, 135 N. Y. Supp. 698.

Penalty; action for.—In the absence of express statutory provision, an action to

recover a penalty does not survive the death of either party. A judgment in plaintiff's favor in such an action survives the death of the defendant, and her ad-

ministratrix has a right of appeal therefrom. *People v. Newcomb* (1912), 75 Misc. 258, 135 N. Y. Supp. 151.

§ 756. Proceedings upon transfer of interest or devolution of liability.

Original parties.—The action may be continued by and against the original parties notwithstanding an assignment. *Fox v. Peacock* (1912), 153 App. Div. 887, 138 N. Y. Supp. 535.

Right of plaintiff who is adjudged a bankrupt to continue action.—Where a plaintiff, after commencing an action, is adjudged a bankrupt and the cause of action is scheduled as an asset he may prosecute the action although the trustee in bankruptcy has not appeared or been substituted as a party. *Colgan v. Finck* (1913), 159 App. Div. 57, 144 N. Y. Supp. 405.

Bankruptcy of defendant.—Where it appeared, in an action for death by wrongful act, that since the taking of an appeal by the defendant it had been adjudicated a bankrupt but the trustee in bankruptcy declined to take part in the appeal, it was held that the plaintiff's motion to dismiss the appeal would be denied. *Schoonmaker v. Pittsburgh Contracting Co.* (1916), 176 App. Div. 48, 161 N. Y. Supp. 186.

Receivers.—Where, in an action against a corporation and receivers thereof, appointed in the federal court, for the immediate possession of property occupied by such receivers, the fact that the receivers, who are necessary parties defendant, have been provisionally discharged and the property transferred to the corporation, does not entitle the defendants to an order striking out the receivers as parties defendant. *Barwin Realty Co. v.*

Batterman Co. (1915), 169 App. Div. 415, 155 N. Y. Supp. 178.

Right of defendant to order substituting or joining new plaintiff.—A new plaintiff cannot be substituted or even joined with the original plaintiff under this section upon the application of the defendant, in opposition to the original plaintiff and the person sought to be substituted or joined. *Rothbarth v. Herzfeld* (1913), 159 App. Div. 732, 144 N. Y. Supp. 974.

Where the state created a body corporate known as the board of commissioners of the state reservation at Saratoga Springs, and thereafter abolished such corporation and substituted a state reservation at Saratoga Springs with corporate powers for certain specified purposes, no reference being made to liabilities, the legislature intended that liabilities growing out of acts of the state reservation should be those of the state, and that in an action brought to recover damages against the original board of commissioners a motion to substitute the reservation in place of the board should be denied as being a motion to institute an action against the state. *Spa Baths Co. v. Comrs. State Reservation* (1917), 98 Misc. 399, 163 N. Y. Supp. 775.

Appeal in its own name.—A judgment debtor after an order of liquidation under the insurance law may appeal to the court of appeals in its own name. *Hartigan v. Casualty Co.* (1917), 180 App. Div. 193, 167 N. Y. Supp. 645.

§ 757. Idem; when sole party dies and action survives.

Assault on passenger.—Where an action against a street railway company to recover damages for an assault on a passenger is based upon an alleged breach of contract to safely carry, the cause of action, upon the death of plaintiff, survives to his estate. *Daniel v. Brooklyn Heights Railroad Co.* (1912), 76 Misc. 482, 135 N. Y. Supp. 698.

Damages for illegal dividends.—An action to recover damages for the alleged illegal declaration of dividends of a New Jersey

corporation, contrary to the stock corporation law of New York and the general corporation law of New Jersey, brought against a resident of the state of Iowa, who was personally served and appeared in the action but died before the issue raised by a demurrer to the complaint was decided, survives, and may be continued against the defendant's administrators. *German-American Coffee Co. v. Johnston* (1915), 168 App. Div. 31, 153 N. Y. Supp. 866.

§ 758. Idem; when one of several parties dies.

Sureties; contribution by legal representatives.—The right of action for contribution between sureties grows out of the original implied agreement that if one shall be compelled to pay the whole or a disproportionate part of the debt, the others will pay such a sum as will make

the common burden equal; and in case of the death of either, this obligation devolves upon his legal representatives. *Hard v. Mingle* (1912), 206 N. Y. 179.

Severance of action, against executor.—An order reviving an action, sounding in tort, against an executrix and substituting

her as a party in the place of a deceased defendant, does not prejudice a motion for a severance of the action. Where an action for tort, upon the death of one defendant, is revived against his executor, the plaintiff has the right to proceed against him and the other defendants unless the court, in the exercise of its discretion, severs the action in furtherance of

justice. *Lane v. Fenn* (1912), 76 Misc. 48, 134 N. Y. Supp. 92.

Legal representatives of a deceased wrong-doer are not to be regarded as jointly liable with a surviving wrong-doer. *German-American Coffee Co. v. O'Neil* (1918), 102 Misc. 165, 169 N. Y. Supp. 421.

§ 759. Id.; when part of cause of action survives.

Section cited.—*Van Tuyl v. Schwab* (1916), 172 App. Div. 670, 158 N. Y. Supp. 424.

§ 760. Supplemental pleadings; cross action.

Default.—Where an order permits the making of a supplemental summons and complaint and does not expressly provide that the supplemental complaint shall take the place of the former pleading, the issues made by the former complaint and answer thereto still stand and the de-

fendant is not in default for failure to answer the supplemental pleading in so far as it repeats the allegations of the former pleading. *Casassa v. Savarese* (1912), 148 App. Div. 243, 133 N. Y. Supp. 657.

§ 764. Abatement of actions; seduction; action for wrong not to abate after verdict, etc.

Action for penalty.—In the absence of express statutory provision, an action to recover a penalty does not survive the death of either party. A judgment in plaintiff's favor in such an action survives

the death of the defendant, and her administratrix has a right of appeal therefrom. *People v. Newcomb* (1912), 75 Misc. 258, 135 N. Y. Supp. 151.

§ 765. No verdict, etc., can be taken after a party's death.

A decree of a surrogates' court determining that a valid trust was not created in the codicil of a will is void as to a party and to persons claiming through her, when the decree was not entered until two months after the death of such party. *Stewart v. Franchetti* (1915) (App. Div.), 153 N. Y. Supp. 453.

Dissolution of foreign corporation.—Where, in an action upon an undertaking

given to discharge the levy of an attachment in an action against a foreign corporation, it appeared that after the levy had been released, but before judgment was recovered against the foreign corporation, it was dissolved under a statute of the foreign state, the complaint in the action upon the undertaking should be dismissed. *Sinnott v. Hanan* (1913), 156 App. Div. 323, 141 N. Y. Supp. 505.

§ 767. Definition and form of an order.

Order; recitals.—Where a judgment debtor fails to appear for examination in proceedings supplementary to execution, an order punishing her for contempt should recite that her act was calculated to, or actually did, prejudice the rights or remedies of the judgment creditor; and § 767, which authorizes a "short form order," does not excuse the omission of such recital. *Goldsmiths & Silversmiths Co. v. Haas* (1912), 76 Misc. 210, 134 N. Y. Supp. 602.

An order denying a motion to open a default judgment should recite all the papers used upon the hearing, or a short

form order, referring to the papers used by number. *Solomon v. Rothbaum* (1916), 156 N. Y. Supp. 1093.

The amendment of 1911 only applies to a motion made upon papers and not to a motion made under § 999 "upon judge's minutes." *Howard v. Robinson* (1919), 186 App. Div. 530, 174 N. Y. Supp. 330.

Entry of clerk's minutes constituting an order.—Where the defendants in actions against them for personal injuries upon the rendering of verdicts in favor of the plaintiffs, promptly moved for a new trial upon the minutes, which motion was granted and the clerk of the court at once

made entry in his minutes thereof, but the trial justice was assigned to the appellate division before making an order disposing of the motion, the entry of the clerk's minutes constituted an effective order granting said motion and was in compliance with this section. *Howard v. Robinson* (1919), 186 App. Div. 530, 174 N. Y. Supp. 330.

Determination of trial court in disposing of motion to dismiss the complaint made by two of three defendants as to whom the trial jury had reported a disagreement is not an order but a ruling made during the course of the trial. *Reade v. Halpin* (1917), 180 App. Div. 157, 167 N. Y. Supp. 624.

§ 768. Definition of a motion.

Application.—*Todd v. Silk Association of America* (1917), 100 Misc. 403, 167 N. Y. Supp. 1079; *Smith v. First National Bank* (1918), 103 Misc. 274, 170 N. Y. Supp. 127.

This section cannot be used to cure defects which go to the jurisdiction of the court. Before the court can make an order in an action to cure defects in the proceedings it must obtain jurisdiction of the cause. *Conklin v. Federal Trust Co.* (1917), 176 App. Div. 572, 163 N. Y. Supp. 570.

Alternate relief.—It is proper practice under § 768, as amended, to move at the same time for several kinds of relief in the alternative or otherwise. *Barrett Man. Co. v. Sergeant* (1912), 149 App. Div. 1, 133 N. Y. Supp. 526.

A defendant moving for judgment on the pleadings may as alternative relief ask for an order vacating an order for an examination before trial, such relief being authorized by § 768, in order to save time to the court and expense to litigants. *Chapman v. Read* (1912), 149 App. Div. 52, 133 N. Y. Supp. 625.

Defects; amendment of answer on motion to change place of trial.—Section 768 providing that a motion shall not be denied for defects in the moving papers, which can be cured upon the hearing or before entry of the order, does not permit the court, on a motion to change the place of trial, to allow the defendant to amend his answer. *Kelly v. Ward* (1912), 149 App. Div. 443, 134 N. Y. Supp. 451.

Curing defect in demurrer.—A defect in a demurrer to a complaint for defect of parties, where it does not specify the parties who should have been joined cannot be cured by motion under this section. *Feinstein v. Jacobson* (1913), 161 App. Div. 121, 146 N. Y. Supp. 525.

Failure of complaint to state a cause of action is not a "technical defect" or "insufficiency" that can be "cured or supplied without prejudice to intervening rights." *Reinboth v. Ederheimer* (1912), 134 N. Y. Supp. 16.

Additional answering affidavits.—Under this section and rule 37 of the general rules of practice where a notice of motion of ten days has been given and answering affidavits have been requested, additional answering affidavits may be filed

in the discretion of the court, if not as a matter of right, one day prior to the time at which the motion is noticed to be heard. *Joyce v. Eastman Kodak Co.* (1917), 99 Misc. 361, 163 N. Y. Supp. 623.

A notice of special appearance filed under § 78 of the New York city municipal code, is in effect a motion as defined in this section and the court may grant motion costs. *Eichhorn v. Negrin* (1916), 158 N. Y. Supp. 98.

Sufficiency of complaint; scope of decision.—When the only issue upon a motion for judgment on the pleadings is the sufficiency of the complaint, and when both parties appear and contest that issue with argument and briefs, the one maintaining that it is insufficient, there is no sense in confining the decision to a mere denial of plaintiff's motion for judgment, when the complaint fails to state a cause of action. Such a course serves only to multiply unnecessary motions and trials, and is out of harmony with the liberalizing amendments. *Lobsitz v. Lissberger Co.* (1915), 157 N. Y. Supp. 117.

Inspection of machine; motion on affidavits.—Under § 803, an order may be granted directing the defendant in an action for personal injuries, to permit a representative of plaintiff to inspect a certain machine in defendant's power-house and to take a photograph of it. Under § 768, the application for such an order may be instituted by affidavit. *Chojnacki v. Interborough Rapid Transit Co.* (1912), 76 Misc. 427, 134 N. Y. Supp. 1090.

Notice of trial; default may be opened.—Where plaintiff's attorney neither served any notice for readiness for trial nor received any notice that defendant was ready for trial, and under the rules of the court neither party was allowed to answer "ready" orally on the call of the calendar, the default will be opened without the imposition of taxable costs and motion costs. *Choenblum v. N. Y. Rys. Co.* (1915), 151 N. Y. Supp. 273.

Motion to change place of trial.—Where on a motion to change the place of trial to the county where both parties reside, as the proper county, plaintiff serves answering affidavits asking for the trial of the issue in the county where the venue is laid on the ground of the convenience of witnesses and because justice will be

thereby promoted, and the court so concludes, the motion of defendant will be denied and plaintiff's motion granted. *Buxbaum v. Paulsen* (1916), 95 Misc. 717, 159 N. Y. Supp. 427.

Where defendants move to change the place of trial, plaintiffs have the right, at least three days before defendants' motion is noticed to be heard, to serve on his attorneys a notice, with affidavits in support thereof, specifying any kind of relief to which they claim to be entitled, whether such relief is responsive or not to the relief asked for by defendant. *Bald v. Kuhnert* (1917), 166 N. Y. Supp. 84.

Where upon defendant's motion for change of venue, plaintiffs move to retain the place of trial for convenience of witnesses, plaintiffs' motion need not be withheld until after defendant's motion is granted. *Bald v. Kuhnert* (1917), 166 N. Y. Supp. 84.

Opposition to motion to change venue of action against City of New York by pleading convenience of witnesses. *MacArthur Bros. Co. v. City of New York* (1917), 101 Misc. 591, 168 N. Y. Supp. 407.

Order of arrest; omissions supplied.—Under § 768, on a motion to vacate an order of arrest for technical defects in the affidavit upon which it was founded, the court will allow the omissions to be supplied, and the motion will be denied. *Manhattan Commercial Co. v. Leuchtenberg Co.* (1912), 77 Misc. 565, 138 N. Y. Supp. 168.

Supplying deficiencies.—Under this section, as amended, the court has power to permit the supplying of deficiencies in papers upon which an order has been en-

tered. *Frank v. Gruber* (1914), 88 Misc. 297, 150 N. Y. Supp. 664.

Technical defects in affidavits on motion for examination of party before trial may be cured by amendment. *Miller v. W. K. Jahn Co., Inc.* (1918), 104 Misc. 370, 172 N. Y. Supp. 219.

Warrant of attachment; additional affidavits to cure defects.—Although under this section as amended in 1911, deficiencies in the original papers upon which a warrant of attachment has been obtained may be cured by additional affidavits, even after a motion has been made to vacate the warrant upon the original papers alone, such additional affidavits must be submitted to the scrutiny of the court so that it may judicially determine whether or not the deficiencies have, in fact, been supplied. If necessary, an adjournment of the motion may be had for the submission of such additional affidavits. *Cutler v. Allavena* (1914), 165 App. Div. 422, 150 N. Y. Supp. 790.

Notice of motion; necessity.—An order modifying an order requiring a bill of particulars may be vacated if it is not shown that notice of motion was given. *Andrews v. Columbia Telephone Co.* (1917), 164 N. Y. Supp. 783.

A motion may be withdrawn at any time before it has been finally submitted, upon tender of costs. *Simers v. Great Eastern Clay Products Co.* (1913), 82 Misc. 422, 143 N. Y. Supp. 1020.

Order authorized to be made at chambers may be made by the court. *Behl v. Greenbaum* (1918), 183 App. Div. 238, 171 N. Y. Supp. 129.

§ 775. When stay of proceedings not to exceed twenty days.

Where no appeal has yet been taken and therefore there is no "judgment appealed from," the judge cannot grant a longer stay than the twenty days allowed

by this section. *Auditorium Co. v. Sam S. Schubert Booking Agency* (1914), 148 N. Y. Supp. 769.

§ 776. Subsequent application for order after denial, etc., of prior application.

Effect of previous denial of application.—An order granting a defendant's motion to open his default should be reversed where the record shows that similar motion for the same relief has been previously denied by another justice. *Heischouer v. Polishook* (1912), 152 App. Div. 193, 136 N. Y. Supp. 567.

Denial without leave to renew.—Two motions for the same object cannot be

made upon the same state of facts where the first has been denied without leave to renew. Hence, when the court at special term refuses to grant a reference without leave to renew, it is improper to move again at special term in another county to refer the issues. *Mugler v. Castleton Hotel and Realty Co.* (1915), 168 App. Div. 492, 153 N. Y. Supp. 1023.

§ 779. Costs of a motion; how collected.

Application.—*Matter of McTevey* (1916), 93 Misc. 384, 158 N. Y. Supp. 136.

Bill of particulars; costs as condition of requiring acceptance.—Plaintiff, in an ac-

tion to recover damages for defendant's refusal to complete a contract for the purchase of goods to be manufactured by the plaintiff, should not be required to

give a bill of particulars stating the number of men employed by him, and where the bill of particulars served is sufficient, plaintiff should not be charged costs as a condition requiring defendant to accept such bill. *Pomeroy Co. v. Wells Brothers Co.* (1912), 149 App. Div. 673, 134 N. Y. Supp. 353.

A motion for judgment of dismissal made within the ten days mentioned in this section is not stayed by nonpayment of costs. *Tarpey v. Jersey Co-operative Co.* (1917), 98 Misc. 302, N. Y. Supp.

The stay does not render subsequent proceedings taken by the party required to pay the costs void, but merely irregular; and the adverse party by his subsequent actions may waive the irregularities. *Weber v. Interborough Rapid Transit Co.* (1916), 158 N. Y. Supp. 620.

Where costs have not been paid within ten days, the court will not direct defendant to accept service of a supplemental reply, where the order directed the service of an amended reply, non-payment of costs having stayed all proceedings. *Fifty-eighth St. Cafe Co. v. Noonan* (1917), 166 N. Y. Supp. 609.

In an action for separation the defendant will not be prevented under this section from securing an order requiring

plaintiff to show cause why a body execution against him should not be vacated. *Blair v. Blair* (1913), 145 N. Y. Supp. 397.

In case of a collusive settlement of decree awarding alimony by husband and wife, the attorney is not restricted in order to recover for services and costs to the remedy by motion as herein provided, but is entitled to maintain an action against the husband. *Turner v. Woolworth* (1912), 153 App. Div. 293, 137 N. Y. Supp. 1071.

Supplementary proceedings.—Costs granted on a motion to compel the filing of the deposition of a witness in proceedings supplementary to an execution are not enforceable against real property or by supplementary proceedings. *Matter of Bernhard v. Cowan* (1913), 82 Misc. 384, 143 N. Y. Supp. 757.

Waiver of defendant's rights under a stay, see *Geneva Mineral Springs Co. v. Steele* (1913), 81 Misc. 416, 143 N. Y. Supp. 331.

Waiver of stay.—Service by the defendant of a cross notice of appeal is a waiver of the stay of proceedings and when the stay has been once waived it cannot thereafter be enforced. *O'Connor v. Levine* (1915), 169 App. Div. 919, 153 N. Y. Supp. 982.

§ 780. Notice of motion to be eight days.

Cases in which notice of motion is required are not defined in this section. Whether notice of motion should be given to the adverse party is dependent in part upon the particular facts presented and the circumstances under which the application is made. *Goldreyer v. Foley* (1913), 154 App. Div. 584, 139 N. Y. Supp. 190.

Mandamus; shorter notice of motion than eight days.—Where technical objections, in that the petition did not show any reason for requiring a shorter notice

of motion than eight days, are desired to be raised to the papers on an application for a peremptory writ of mandamus, their sufficiency should be challenged at the first opportunity, and the point should be stated in the order to have been preliminarily raised and passed upon by the court, otherwise the objection will be deemed to have been waived and cannot be urged upon appeal. *Matter of Flaherty v. Craig* (1918), 184 App. Div. 428, 171 N. Y. Supp. 624.

§ 781. How time enlarged, before its expiration.

Effect of extension of time.—Where a defendant moves for an extension of twenty days in which to answer, and the court orders that his "time to plead or otherwise move herein be extended twenty days" and later the defendant serves a notice of motion for further extension of time, and an order is made granting additional time to plead or to make an application to strike out matter from the complaint, but without prejudice to the

plaintiff in raising any question under rule 22 of the general rules of practice, the defendant may, thirty-seven days after the service of the complaint, make an application to strike out matter under § 545, although the first order for an extension of time was granted without notice of motion being given to the plaintiff, as required by rule 22. *Landmesser v. Hayward* (1913), 157 App. Div. 74, 141 N. Y. Supp. 730.

§ 783. Relief, after time has expired.

Opening default.—When default will be opened. *Cascade Hotel Co. v. Orleans Real Estate Co.* (1912), 153 App. Div. 882, 138 N. Y. Supp. 1110.

Idem; for amendment of pleading;

laches.—Where attorneys having successfully conducted a case for their client, procure a judgment against him by default establishing a lien for their services and an order subsequently opening the default as

a favor to the client provides for the appointment of a referee to take testimony as to the value of the services rendered, the client, three and one-half years after serving his answer, pursuant to the order opening his default, will not be allowed to amend so as to set up the defenses of the statute of limitations, laches on the part of the attorneys and negligence. *Matter of Prentice* (1913), 155 App. Div. 480, 139 N. Y. Supp. 1027.

Idem; affidavit of merits.—A defendant's motion to open his default in failing to answer should not be granted upon a formal affidavit of merits which does not state facts; there must be a compliance with rule 23 of the general rules of practice, which require a statement of facts establishing a meritorious defense. *Rothschild v. Haviland* (1916), 172 App. Div. 562, 158 N. Y. Supp. 661.

Default in appearance at trial.—Where a plaintiff, suing for slander, failed to prosecute the action for four years and the complaint was dismissed for failure to appear on the day when the case was marked for trial on the day calendar, it was held that the default should not be opened, where it also appeared that the plaintiff had the defendant arrested and he was compelled for four years to bear the expense of a bond given in order to obtain his release upon the jail limits. *Verderber v. Stine* (1913), 162 App. Div. 152, 147 N. Y. Supp. 178.

Failure to appear at trial; dismissal of complaint.—Where the only excuse for suffering a default is that a clerk in the office of the attorney for the defendants saw in a newspaper on the morning set for the trial a statement that the reserve calendar to which he assumed the action had been transferred had been passed until a later date, the plaintiff, upon the opening of the default, should be fully indemnified by the payment of the costs and disbursements included in the judgment. *Kressh v. Novick* (1913), 162 App. Div. 891, 148 N. Y. Supp. 55.

Laches.—Where defendant, after the commencement of an action to recover the amount of certain installments due on a bond expressed a willingness to pay the full amount claimed, asked that she be allowed to make part payments on account, and by written stipulation, extending the time for payment of the balance, plaintiff's attorney agreed that she would not proceed in the action for two weeks and defendant stipulated "that she has no defense to the action" and upon the expiration of the last of four other similar stipulations judgment is entered against defendant by default for failure to serve an answer, a motion to vacate the judgment and to open the default and allow defendant to interpose an answer, setting up that the interest agreed to be paid on the obligation sued on was usurious, will be denied for laches. *Bancroft-Graham v. Halley* (1913), 80 Misc. 191, 141 N. Y. Supp. 911.

Oral stipulation as to notice.—Where the only excuse for permitting a default at the trial is an oral agreement between defendant's counsel and plaintiff's original attorney to the effect that the case should be regularly noted for trial but that neither side would move the trial without writing or telephoning to the other and giving at least a week's notice that he would try the case, and said agreement is positively denied by the attorney with whom it is said to have been made, a motion to open the default will be denied. *Empire State Pickling Co. v. Pfister* (1913), 80 Misc. 162, 141 N. Y. Supp. 817.

Where a defendant in a replevin action fails to apply for an order of interpleader before answering, as required by § 820, no good cause is shown for relieving him of the consequences of his omission, by a statement that several of the employees of the defendant's attorney are in the military service. *Sophian v. Fidelity & Deposit Co.* (1918), 184 App. Div. 553, 172 N. Y. Supp. 392.

See also notes to § 724.

§ 784. When time cannot be extended.

Extension of the time to appeal not that prescribed by statute may not be allowed by the court, and an order of resettlement granted after the time for taking an appeal had expired should not be allowed as

being an attempt to indirectly revive a right of appeal which had expired. *Louis Levin Cut Glass Co. v. Hinsberger* (1913), 144 N. Y. Supp. 741.

§ 786. Orders in certain actions; how published.

Want of notice.—Where a notice of reference to determine claims of the creditors of an Italian banker was published in a metropolitan three-cent paper not likely to reach the people of the class entitled to notice, the decree will not be opened to allow others similarly situated to come in to the prejudice of diligent cred-

itors, but the matter will be referred back for determination of claims of petitioners to the balance of the funds. Notice of the further hearing must be published in an Italian paper under the approval of the court. *Mendola v. Illinois Surety Co.* (1912), 141 N. Y. Supp. 114.

§ 787. Time for publication of notice; how computed.

Excluding date of first publication in relation to service by publication of a citation issued by a surrogate's court. *Mat- ter of Wright (1918)*, 183 App. Div. 266, 171 N. Y. Supp. 123.

§ 791. Idem; among civil actions.

Ill-health of plaintiff.—The code of civil procedure does not require the court to grant a preference in the trial of an action upon the sole ground that the plaintiff is advanced in years and is in ill-health. *McIntire v. National Nassau Bank (1912)*, 150 App. Div. 668, 135 N. Y. Supp. 760.

Age and illness do not afford a sufficient ground for granting a preference for the trial of the issues over other issues under the authority of subdivision 10 or under the inherent power of the court to control the order of the trial of issues on the calendar, which power is finally established. *Waters, Inc. v. Hatters' Fur Ex- change, Inc. (1919)*, 185 App. Div. 803, 174 N. Y. Supp. 90.

City court; status of parties or issues involved.—Where it does not appear from the pleadings in a city court action that the status of the parties or the issues involved bring the case within § 791, and, where neither notice of preference was served with the notice of trial, nor an application upon notice made for an order preferring the case under § 793, the court is not justified under § 791 in setting the case down for any particular day. *Birdsey-Somers Co. v. Sleeper (1912)*, 77 Misc. 143, 135 N. Y. Supp. 1075.

§ 793. Where an order is necessary.

Where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court, or a judge thereof, upon notice to the adverse party. A copy of the order must be served with or before the notice of trial or argument. Such an order is not appealable, but it may be vacated by the judge or judges holding the term at which the preferred cause is noticed for trial or hearing, or by such other justice, or at such other term of court, or at such other time as shall be prescribed by the general or special rules of practice. But a preliminary order is not requisite in a case embraced within subdivision first or second of the last section but one, and the order in a case embraced within subdivision six thereof be made *ex parte*, and is conclusive. Where no order is required, a claim for preference, specifying the provision of law under which the claim is made, may be inserted in the note of issue to be filed with the clerk, and it shall then be the duty of such clerk to place such cause in its proper place among the preferred causes at the head of the calendar; except that in the counties of New York, Bronx, Kings, Queens and Erie, and the seventh judicial district, no action or special proceeding shall be placed as a preferred cause upon the calendar of any circuit court or trial term or special term of any court as herein provided, but the party desiring a preference of any cause shall serve upon the opposite party, with his notice of trial, a notice that an application will be made to the court at the opening thereof, or to such justice or other term of court or at such other time as shall be prescribed by the general or special rules of practice, for leave to move the same as a preferred cause, and if the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the case is to be tried the notice must be accompanied by an affidavit showing such facts. In said counties of New York, Bronx, Kings, Queens and Erie and in the seventh judicial district, the application for a preference shall be made at the opening of the court, or to such justice or other term

of court, or at such other time as shall be prescribed by the general or special rules of practice, and if it shall appear that the cause is entitled to a preference and is intended to be moved for trial at or for the term for which the application is made, the court or justice must designate a day certain, during that term, on which day the said cause shall then be heard; if there be two or more causes so designated for trial for the same day, the said causes shall be heard in the order of their date of issue.

Amended by L. 1879, ch. 542; L. 1888, ch. 497; L. 1895, chaps. 410, 946; L. 1896, ch. 140; L. 1900, ch. 172; L. 1904, ch. 173; L. 1915, ch. 633, in effect May 14, 1915. The amendment of 1915 inserted the word "Bronx" in lines 18 and 29.

Source.—New.

Notice of motion not served with notice of trial.—An application in the county of New York for a preference upon the ground that a material witness is an aged man and is ill should be denied where the notice of motion was not served with the notice of trial as required by § 793 and rule 3 of the trial term rules. *Waters, Inc. v. Hatters' Fur Exchange, Inc.* (1919), 185 App. Div. 803, 174 N. Y. Supp. 90.

Age and illness.—While the inability of a witness to attend trial owing to advanced age or illness will warrant his examination under § 872, it does not constitute a statutory ground for a preference of the trial of the issues, nor is it ground for such a preference under the general rules of practice, or the special rules of practice in the first department. *Waters, Inc. v. Hatters' Fur Exchange, Inc.* (1919), 185 App. Div. 803, 174 N. Y. Supp. 90.

Ill-health of plaintiff.—The code of civil procedure does not require the court to grant a preference in the trial of an action upon the sole ground that the plaintiff is advanced in years and is in ill-health. *McIntire v. National Nassau Bank* (1912), 150 App. Div. 668, 135 N. Y. Supp. 760.

City court's pleadings to show necessity

of order.—Where it does not appear from the pleadings in a city court action that the status of the parties or the issues involved bring the case within § 791, and, where neither notice of preference was served with the notice of trial, nor an application upon notice made for an order preferring the case under § 793, the court is not justified under § 791 in setting the case down for any particular day. *Birdsey-Somers Co. v. Sleeper* (1912), 77 Misc. 143, 135 N. Y. Supp. 1075.

No appeal lies from an order of the special term denying an order for preference in an action for ejectment, where such right depended upon facts which did not appear in the pleadings or other papers upon which the cause was brought to be tried. Although this section provides that "such order is not appealable" an order denying such motion is also not appealable. *Empire City Racing Association v. National Fair and Exposition Association* (1915), 167 App. Div. 126, 152 N. Y. Supp. 833.

Order appealable.—In the counties enumerated an order granting or denying a preference is appealable. *Waters, Inc. v. Hatters' Fur Exchange, Inc.* (1919), 185 App. Div. 803, 174 N. Y. Supp. 90.

§ 797. Other modes of service.

Leaving a copy of an order to show cause why a judgment debtor should not be punished as for contempt for failing to appear for examination in proceedings supplementary to execution, at his city residence between five and six o'clock p. m., with a person of suitable age and discretion, is a sufficient service. *Matter of*

Barrie v. Friedman (1913), 79 Misc. 86, 139 N. Y. Supp. 337.

Deposit in a branch postoffice of a summons, complaint and order of publication, instead of in the general post office, is sufficient. *Von Der Heyde v. Ditmars* (1916), 174 App. Div. 390, 161 N. Y. Supp. 780.

§ 798. Additional time when service made through post-office.

Service of notice of rejection of claim against decedent's estate.—The service of notice of rejection of claim by mail does not increase the time within which the administrator may file his consent that the same may be heard and determined by the surrogate. *Persbacker v. Murphy*

(1913), 154 App. Div. 854, 140 N. Y. Supp. 537.

Service by mail of notice of trial in municipal court must be made eight days before date fixed for trial. *Rethy v. Orszag* (1918), 102 Misc. 540, 169 N. Y. Supp. 235.

§ 803. The court may direct discovery of books, etc.

A court of record, other than a justices' court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy or photograph of a book, document, or other paper, or to make discovery of any article or property, in his possession or under his control, relating to the merits of the action, or of the defense therein.

Amended by L. 1909, ch. 173; L. 1913, ch. 86, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "or photograph" in line 4.

Source.—R. S., pt. 3, ch. 1, tit. 3, § 21; and Code of Proc., § 385, in part.

The tendency of the courts during later years has been very properly towards liberality in extending the right of discovery and inspection, to the end that the truth might be made to appear and the cause of justice promoted. *Hoag v. Ulster & Delaware R. R. Co.* (1917), 177 App. Div. 433, 164 N. Y. Supp. 529.

Discretion of court.—The application will be granted only in the exercise of sound discretion in the ascertainment of truth and the advancement of justice. But it must appear that the evidence is unknown to the party seeking it and in the possession of the adverse party. *Murphy v. Keenan* (1917), 101 Misc. 443, 167 N. Y. Supp. 55.

Cases in which such disclosure will be granted group themselves into three classes: Where the books, papers and documents are the foundation of the action; where the applicant has a special interest in the evidence and where the books, papers or documents, in which he has no special interest, contain evidence which the party desires to enable him to prepare his pleading or to prepare for trial. *Murphy v. Keenan* (1917), 101 Misc. 443, 167 N. Y. Supp. 55.

Laches.—Where defendant in an action brought by a corporation did not move for an inspection of plaintiff's minute book or books until after the case had been set down for trial, and then only through the medium of the examination of plaintiff through its president and secretary before trial, the inexcusable laches of defendant in making a motion for a discovery and inspection of such books is an insuperable objection to the granting of the motion which cannot be remedied by an amended petition or additional affidavits. *Broadway Apartment Realty Co. v. Rickert Fenlay Realty Co.* (1915), 92 Misc. 293, 155 N. Y. Supp. 528.

Documentary evidence; subpoena duces tecum.—Where written evidence is in the possession of persons not parties to an action the only way in which the plaintiff can obtain possession of it is by subpoena *duces tecum*. *Murdock v. McCutchen* (1913), 154 App. Div. 854, 140 N. Y. Supp. 41.

Necessity that documents sought to be discovered be evidence.—The documents

sought to be discovered must themselves be evidence; it is not enough that the documents suggest or may furnish a clue to evidence. Hence a discovery of the reports of railroad employees made to their employer will not be discovered. *Falco v. New York, etc. R. Co.* (1913), 161 App. Div. 735, 146 N. Y. Supp. 1024.

Offer in evidence.—A party is not bound to offer a book or document in evidence, simply because it was produced by opposite party on the trial at his request or under his subpoena, and was inspected by him. *Saal v. Katz* (1913), 81 Misc. 239, 142 N. Y. Supp. 516.

Remedy of this and the following sections is not obtainable indirectly by order for examination under § 872. *Shogry v. Naser* (1913), 80 Misc. 145, 140 N. Y. Supp. 1014.

When plaintiff entitled to discovery of debtor's books and papers, see *Nevins v. Brooklyn Citizen* (1915), 166 App. Div. 219, 151 N. Y. Supp. 139.

Right to examine private books or papers.—An order for the discovery of books and papers which directs the defendant to produce "the books of account, documents and all other papers and books containing the transactions of said defendant" between certain dates, gives to plaintiff the right to examine any private papers or books of defendant, and in this respect is entirely too broad. The privilege of examining the private books and papers of a party to an action should not be allowed unless it is made to appear that the examination of the particular books and papers is necessary. In an application for such an examination the particular books and papers should be specified. *Hay v. Republic Trading Co.* (1918), 184 App. Div. 537, 172 N. Y. Supp. 573.

Right to discovery of books containing accounts of third persons.—A plaintiff is not entitled to an order for a discovery and inspection of all the defendant's books and papers relating to transactions made on behalf of the plaintiff, etc., where it appears that the books contain the accounts of many other customers, which are of a private and confidential nature. It seems that the production of the necessary papers should be compelled by subpoena *duces tecum* in conjunction with an examination

of the defendant. *Cohen v. Rothchild* (1913), 162 App. Div. 611, 147 N. Y. Supp. 915.

Books and papers of person not party.—A plaintiff suing a corporation for an accounting as to transactions between the defendant, as agent, and its principal, a bankrupt corporation, the rights of which were purchased by the plaintiff from the trustee in bankruptcy, is not entitled to an order for an examination of the books and accounts of an individual, not made defendant, who is alleged to have had a similar agency with the bankrupt principal, there being nothing to show that the defendant corporation assumed the obligations of the other agent. *Associated Lozier Purchases, Inc. v. Haupt, Inc.* (1916), 172 App. Div. 650, 158 N. Y. Supp. 725.

Right to discovery of all books in absence of express agreement.—In an action by a salesman to recover commissions alleged to be due under a contract of employment the plaintiff is not entitled to a discovery and inspection of all the defendant's books, with a right to take copies thereof, where the contract, as alleged by the plaintiff, is denied by the defendant, and there is no express agreement that the plaintiff shall have a right to such inspection. It seems that the plaintiff's remedy is an examination before trial, where the books can be produced under a subpoena *duces tecum*. The difference being, that the defendant will then retain the control of his books but can be required to answer in regard to each of the accounts specified in the plaintiff's list of customers, which is all that plaintiff is entitled to, and plaintiff will not be permitted to roam at large and as he will through said books. *Ortman v. Beiley* (1913), 160 App. Div. 258, 145 N. Y. Supp. 541.

Books and papers in foreign state in custody of trustee in bankruptcy.—Where the books and papers of a bankrupt defendant are in the possession of the trustee in bankruptcy appointed by the federal court in another state, the courts of this state should not order the trustee to bring the books and papers into this state and deposit them with the county clerk to be inspected by the plaintiff, irrespective of any jurisdiction of the court to make such order. *Jaffe v. Weld* (1917), 181 App. Div. 16, 167 N. Y. Supp. 1039.

Right to inspection of books and papers in order to frame complaint.—An assignee of a claim against a firm of stockbrokers suing to recover an amount deposited as margin and damages for the defendant's failure to deliver stock deposited with them as collateral, upon the ground that the defendants had not carried out the orders of the plaintiff's assignor and had furnished false statements, is not entitled to an inspection of substantially all of the defendant's books and papers, includ-

ing those in current use, in order to enable him to frame his complaint, where it is not clear that such books and papers will show anything more than the accounts which had been rendered by the brokers to the plaintiff's assignor, and the only manner in which said accounts are impeached is by the affidavit of a curb broker. If the plaintiff is unable to frame his complaint on the information in his possession, he may obtain an order for the examination of the brokers and may then subpoena them to produce their books and papers relating to the assignor's account, to enable them to testify with respect thereto, and then, if an inspection should thereafter become necessary, it could be limited to the particular parts of the defendant's books and papers relating to the assignor's account. *Redmond v. Stoneham* (1918), 182 App. Div. 307, 169 N. Y. Supp. 239.

Inspection before offering in evidence; books of account.—Where such an examination of the plaintiff has been ordered, the defendant is entitled to inspect the books and papers before offering them in evidence, the inspection of the books of account to be limited, however, to the specific accounts showing transactions between the plaintiff and the several firms and corporations mentioned in the affidavit upon which the original order was made. *Strong & Trowbridge Co. v. Defiance M. Works* (1918), 182 App. Div. 869, 170 N. Y. Supp. 414.

Application for disclosure of books, papers and documents will be granted, when relating to the merits or defense of action, to frame a pleading or to enable a party to prepare for trial where the evidence is competent, relevant, material and necessary. *Murphy v. Keenan* (1917), 101 Misc. 443, 167 N. Y. Supp. 55.

Equitable action.—Such an application will be granted even in an equitable action for an accounting between the trustee of a corporation voluntarily dissolved and the executrix of a deceased trustee where the existence of the confidential relationship which is the basis of the accounting is admitted in the pleading. *Murphy v. Keenan* (1917), 101 Misc. 443, 167 N. Y. Supp. 55.

Sufficiency of affidavits on motion for discovery in action to determine validity of probate of will, see *Hutchinson v. McCaddon* (1913), 157 App. Div. 228, 141 N. Y. Supp. 809.

Right of court to limit inspection.—Where a contract expressly provides that one party may inspect all of the records of the other, the court cannot limit the scope of the inspection. *Cream of Wheat Co. v. American Home Magazine Co.* (1913), 159 App. Div. 761, 144 N. Y. Supp. 873.

Accounting application before trial premature.—Where in a suit in equity for an

accounting, the plaintiff's right to an accounting depends upon controverted facts, an application by the plaintiff, prior to the trial, for the discovery of books and papers in the possession of the defendant is premature. *Conrady v. Buhre* (1912), 148 App. Div. 776, 133 N. Y. Supp. 245.

Discovery of books and papers of corporation containing its business transactions within the period embraced within a cause of action by an employee to recover a certain percentage of its net earnings as compensation may be granted. *Lockwood v. Bedell Co.* (1917), 178 App. Div. 695, 165 N. Y. Supp. 850.

Corporation; examination of books and officers.—Where the plaintiff must rely entirely upon evidence obtainable from the defendant's officers and books, a motion to examine certain officers and a former sales agent of the defendant before trial upon questions should be granted, although they are in another state. *Heller, Hirsh & Co. v. General Mfg. Co.* (1913), 155 App. Div. 211, 140 N. Y. Supp. 219.

Fraudulent representations in sale of stock.—The plaintiff in an action for damages resulting from the false representations of the defendant in inducing plaintiff to purchase stock in a corporation, which became bankrupt, is entitled to inspect the books of the corporation which have come into the defendant's hands. *Smith v. Rubel* (1912), 149 App. Div. 670, 134 N. Y. Supp. 400.

Personal injuries; inspection of machine.—In an action for personal injuries sustained through the explosion of a seltzer bottle, alleged to have been caused by the negligent filling and charging thereof, the plaintiff should be allowed to inspect and photograph the machine used in charging the bottle. *Donoghue v. Callanan* (1912), 152 App. Div. 162, 136 N. Y. Supp. 657.

Under § 803, an order may be granted directing the defendant, in an action for personal injuries, to permit a representative of plaintiff to inspect a certain machine in defendant's power-house and to take a photograph of it. *Chojnacki v. Interborough Rapid Transit Co.* (1912), 76 Misc. 427, 134 N. Y. Supp. 1090.

Idem; ex parte order.—An *ex parte* order, requiring a defendant to make discovery of a certain machine on which plaintiff was working when injured, and also

requiring the president and foreman of defendant to submit to an examination before trial, is irregular and should be vacated. *Gottlieb v. Entemann, Inc.* (1913), 157 App. Div. 251, 141 N. Y. Supp. 860.

Idem; examination of particular tool or appliance.—Motion for inspection of defendant's plant in action for causing death by wrongful act, should be denied, but without prejudice, where it is alleged that the decedent was injured while engaged in moving a heavy safe by reason of the negligence of the defendants, but there is no allegation that he was injured while using any particular tool or appliance. *Glowniak v. Lehigh Valley R. R. Co.* (1915), 90 Misc. 42, 152 N. Y. Supp. 740.

Idem; broken parts of article causing injuries.—In an action to recover damages for negligence based on the breaking of a rope the plaintiff may have a discovery and inspection of the broken rope ends, by which the condition of the rope fibres and the apparent cause of the break may be brought out, and not left to mere speculation. *Dugan v. American Transfer Co.* (1913), 160 App. Div. 11, 145 N. Y. Supp. 31.

In an action to reform a written contract of employment, and for an accounting as to the amount due the plaintiff under the reformed contract, an order for the examination of the defendant's books will not be granted before the plaintiff has established his right to a reformation of the contract. *Moore v. Theodore A. Crane's Sons Co.* (1916), 175 App. Div. 972, 161 N. Y. Supp. 984.

Photographs and books in archives of penitentiary.—Under this section as amended in 1913, the court in a proper case, on motion of a recent inmate of the penitentiary on Blackwells Island, may grant an order permitting a discovery and inspection of certain photographs, books and documents in the archives controlled by the warden of the institution. *People v. Hayes* (1913), 84 Misc. 263, 147 N. Y. Supp. 102.

Pledge; action to recover value.—In an action to recover the value of a pledge alleged to have been stolen from defendants' vault, plaintiff will be granted an order for the inspection under certain restrictions, of the vault. *Rosen v. Simons* (1913), 82 Misc. 407, 143 N. Y. Supp. 726.

§ 805. Petition for discovery, and order thereupon.

Order too broad.—Where a partner ousted from a firm which did a fire insurance business, by his copartner who has formed a new firm and is doing business at the same place, in order to prove the extent of the good will of the old firm alleged to have been obtained by the new firm, has obtained an order for inspection, commanding defendants to permit an inspection of all the books and papers of the new firm,

showing all the fire insurance business by that firm from the date on which the plaintiff was ousted, with or through the former customers of the old firm, including all books which will throw light on the business as done, and the value of the good will, the order is too broad and should be limited to the books and papers of the old firm. *Frear v. Lewis* (1915), 170 App. Div. 598, 156 N. Y. Supp. 794.

§ 812. Form of bond or undertaking; affidavit of sureties; approval by court or judge.

This section relates only to sureties upon bonds or undertakings given in an action or special proceeding. *Lawyers' Surety Co. v. Ayrault* (1914), 165 App. Div. 254, 150 N. Y. Supp. 800.

The concluding sentence implies that the surety is only entitled to premiums until the entry of the order relieving him from further liability, and was designed to compel the principal to make written demand upon the surety before he might maintain an action for recovery of the unearned part of the premium. *National Surety Co. v. Stallo* (1915), 171 App. Div. 206, 156 N. Y. Supp. 988.

A provision in an agreement between sureties and principal for the payment of a certain premium and a further sum annually thereafter in advance, until they shall "be furnished with [competent] written legal evidence of their discharge from liability" under the bonds, does not apply where the sureties on their own initiative procure an order terminating their further liability thereunder. Such a provision should only be given effect where the sureties continue the bonds. Under such circumstances, no premium having been paid, the sureties are only entitled to the pro-

portionate share of the premium payable on each bond from the date of its execution to the date of the entry of the order procured on their application releasing them from liability. This is true, although the order discharging the principal did not contain any provision releasing the sureties from liability. *National Surety Co. v. Stallo* (1915), 171 App. Div. 206, 156 N. Y. Supp. 988.

Proceeding by a surety company resulting in the removal of an administrator, does not relieve the latter from liability to the company for premiums on his bond, where he has failed to furnish competent legal evidence of his discharge or release from liability on the bond. *National Surety Co. v. Stallo* (1913), 156 N. Y. Supp. 987.

The undertaking for a warrant of attachment, failing to state that the sureties are householders or freeholders, may be amended after issuance, *nunc pro tunc*, pursuant to § 723. *Ingalls v. Nutter* (1918), 172 N. Y. Supp. 210.

Under the amendment of 1901 a surety will be relieved upon fulfilling the requirements as set forth. In *re Kopp's Estate* (1918), 168 N. Y. Supp. 944.

§ 813-a. Further protection for undertakings in certain cases.

Where an undertaking has been or shall be given in any action or proceeding the court may in its discretion, if justice so requires, order further or other security to be given in addition to such security. Upon cause shown the court may permit an examination or re-examination of any surety upon any such undertaking. Upon such examination or re-examination, if justice so requires, the court may require a new surety or sureties to be furnished or further or other security to be given in addition to the security already given. The court may enforce such order by any disposition of the action or proceeding that may be proper.

Added by L. 1913, ch. 85, in effect Sept. 1, 1913.

§ 814. Bonds, etc., to the people or a public officer for the benefit of a suitor.

Mechanic's lien.—In an action to foreclose a mechanic's lien which has been bonded it is unnecessary to first obtain leave to sue under § 814 of the Code. *Schultz v. Teichman Engineering & Const.*

(1913), 79 Misc. 357, 140 N. Y. Supp. 429.

See *Nies v. Fancher* (1915), 88 Misc. 630, 151 N. Y. Supp. 155.

§ 815. Bonds, etc., not affected by change of parties.

Sureties.—Sureties upon an undertaking in an action of replevin are only liable to the defendants before the court when their undertaking was given; they are not liable to a defendant subsequently brought in and

the provisions of § 815 relating to new parties have no application. *First Commercial Bank v. Valentine* (1913), 155 App. Div. 91, 139 N. Y. Supp. 1037.

§ 817. Consolidating causes in same court.

Action properly consolidated.—Two separate actions, one for liquidated and the other for unliquidated damages, both for breaches of the same contract and that must be sustained by precisely the same evidence, except as to the amount of damages, are properly consolidated. *Posner v. Rosenberg* (1912), 153 App. Div. 249, 137 N. Y. Supp. 1084.

Where all the causes of action are es-

entially the same, involve the same parties, arise out of the same transactions, are based upon the same contract and to a large extent are to be proved by the same evidence, consolidation will be enforced to prevent harassment of the defendant, particularly where it is shown that no defense is intended. *County of Sullivan v. Downie* (1918), 102 Misc. 348, 168 N. Y. Supp. 923.

§ 819. Id.; by plaintiff.

Separate actions by the same plaintiff for services, one against a husband and the other against his wife, may not be consolidated where the defendants are not

joint and several debtors within the meaning of this section. *Ulman v. Hudson* (1917), 164 N. Y. Supp. 1007.

§ 820. Interpleader by order in certain cases.

Application.—*Best v. New York City Water Front Co.* (1913), 158 App. Div. 555, 143 N. Y. Supp. 814.

Requirements upon which an order of interpleader may be granted, are as follows:

(1) That two or more persons have preferred a claim against the applicant; (2) that they claim the same thing; (3) that the applicant has no beneficial interest in the thing claimed; (4) that he cannot determine, without hazard to himself, to which of the rival claimants the thing belongs; (5) and that there is no collusion between him and any of the parties. *Singer v. New York Life Ins. Co.* (1916), 160 N. Y. Supp. 442.

Notice to intervenor.—Where the proposed intervenor was not served with notice of the application for the order it will be reversed and the motion denied. *Vyne v. Mosson* (1915), 92 Misc. 447, 156 N. Y. Supp. 274.

An order bringing in said third party as a defendant cannot be sustained under § 820 where there is no proof of service of the notice upon him. *United Shoe R. M. Co. v. Dochtermann S. W. Co.* (1919), 186 App. Div. 359, 174 N. Y. Supp. 284.

Trial by jury.—Although an order of interpleader changes an action at law to an action in equity, yet the parties to the litigation can treat it as a common-law action in which all of the issues are triable by jury. *Gleason v. Bush* (1915), 166 App. Div. 865, 152 N. Y. Supp. 54.

Arbitration; recovery of award.—Where plaintiff sues on an award made pursuant to an arbitration agreement between plaintiff and defendant, and the claims of third parties against this defendant are to a certain fund in his hands and plaintiff makes no claim upon that fund or any other in the hands of the defendant, the case is not one for interpleader. An order granting defendant permission to pay such

fund into court and directing that other parties including nonresidents be joined as additional defendants, will be denied. *Appelbaum v. Rosenblum* (1914), 150 N. Y. Supp. 472.

Chattel; action for recovery; notice to third party.—An order made pursuant to § 820, in an action to recover a chattel cannot be sustained, where no notice of application for substitution was given to the third party, and the moving affidavit failed to show that the third party's claim was without collusion, and the order contained no alternative provision for the delivery of the chattel or its value to such person as the court should direct; each of these defects is fatal. *O'Connor v. Lock* (1912), 148 App. Div. 765, 133 N. Y. Supp. 320.

Idem; substitution of bailor.—Substitution of bailor as defendant, after action of replevin by transferee of certain property against the bailee, see *Gleason v. Bush* (1915), 166 App. Div. 865, 152 N. Y. Supp. 54.

Doubt as to which of two plaintiffs is entitled to payment.—A defendant admitting its liability, but being honestly in doubt as to which of two plaintiffs in separate actions is entitled to payment, should be granted an order of interpleader under § 820. *Natowitz v. Independent Order Ahawas Israel* (1912), 149 App. Div. 607, 133 N. Y. Supp. 1065.

A motion by a life insurance company for interpleader should be granted, where it admits its liability for the amount of the loss as adjusted, and is only desirous of having determined the party rightfully entitled thereto, and where two different persons are contending for the same fund, in two separate actions against the company. *Singer v. New York Life Ins. Co.* (1916), 160 N. Y. Supp. 442.

A reasonable basis for conflicting claims is all that is required to be shown by the

applicant upon a motion for interpleader. *Singer v. New York Life Ins. Co.* (1916), 160 N. Y. Supp. 442.

Necessity for reasonable foundation of claim of third party.—The court upon a motion for an order of interpleader should be able to see that there is some reasonable foundation for the claim of the third party and that defendant cannot without peril determine to which of the claimants he should pay the fund in litigation, and where these conditions are not shown to exist the order cannot be sustained. *Vyne v. Mosson* (1915), 92 Misc. 447, 156 N. Y. Supp. 274.

Injunction restraining replevin action.—In an application for interpleader by a bailee against whom replevin actions are pending, a temporary injunction restraining the prosecution of the replevin actions may be granted. *Altman & Co. v. Comstock* (1914), 165 App. Div. 160, 150 N. Y. Supp. 662.

Action to establish claim against estate.—An interpleader will not be granted to bring in general creditors on motion of executors in an action brought against them to establish a claim against the estate

where the general creditors notify the executors that they dispute the claim, since under § 2680 neither the estate nor the executors are liable to any hazard, damage or loss if the action is prosecuted in good faith and without negligence. *Dennison v. Snyder* (1916), 98 Misc. 44, 162 N. Y. Supp. 271.

Partners.—Where, in an action by the assignee of one partner to recover a debt due to the firm, the other partner notifies the defendant not to pay the debt except to him and makes demand therefor, the defendant is entitled to an order of interpleader making the plaintiff's assignor a party defendant. *Siegel v. Goldstone* (1912), 75 Misc. 469, 133 N. Y. Supp. 453.

The city court of the city of New York has undisputable authority given to it by this section, even though the interpleader has added a question of an equitable nature and the court has no general equitable jurisdiction. *Katz v. Witt* (1911), 74 Misc. 582, 134 N. Y. Supp. 675.

Section cited.—*Greenberger v. North Side Storage Warehouse Company* (1915), 170 App. Div. 887, 154 N. Y. Supp. 450.

§ 820-a. Interpleader in actions on contract.

Application.—*Herpe v. Herpe* (1919), 225 N. Y. 323.

Basis of claim to be shown.—Where a complaint in an action of interpleader fails to show any basis of the claims of the defendants, beyond the fact that claims have been asserted, plaintiff's motion for leave to pay the money into court will be denied. *Sulzberger v. Seklir* (1912), 153 App. Div. 749, 138 N. Y. Supp. 691.

To whom remedy available.—The remedy by an action of interpleader is given only to the stakeholder and to afford him protection against adverse claims, and it is not for the benefit of claimants and may not be availed of by them. *Brown v. Arbogast, etc. Co.* (1913), 162 App. Div. 603, 147 N. Y. Supp. 998.

Dispute as to amount involved.—Where the plaintiff sets forth as the amount involved the sum of \$2,000 and some of the defendants state that that is not the correct amount because interest should be added, there does not arise thereby such a dispute as to the amount involved as would require the court to deny for that reason the motion of plaintiff. *Supreme Lodge Knights and Ladies of Honor v. Stapf* (1916), 160 N. Y. Supp. 1051.

Payment of money into court will not discharge a debtor from liability when the amount, as well as ownership, of debt is in dispute. *Empire Engineering Corp. v. Mack* (1916), 217 N. Y. 85.

§ 821. Dismissal of complaint for neglect to serve summons.

Until all the necessary parties are regularly brought before the court by the plaintiff, the case cannot be properly tried, and the complaint can be only dismissed

upon motion for delay in prosecution. *Simon v. Gibraltar Construction Co.* (1917), 179 App. Div. 273, 166 N. Y. Supp. 466.

§ 822. Dismissal of complaint for neglect to proceed.

Failure to prosecute; costs.—Costs upon dismissal of complaint for failure to prosecute. *The Bowery Bank of N. Y. v. Hart et al.* (1911), 148 App. Div. 887, 132 N. Y. Supp. 1119.

Idem; what constitutes unreasonable neglect.—Where a plaintiff has done nothing to bring an action to trial for over three years after issue joined, except to

serve a notice of trial some time after defendant moved to dismiss for failure to prosecute during which time younger issues have been tried in their regular order, a *prima facie* case of unreasonable neglect is established. *Armstrong v. Star Co.* (1912), 154 App. Div. 320, 138 N. Y. Supp. 959.

Idem; pressure of business as excuse.—

Where a plaintiff has made no effort whatever to bring his cause of action to trial for more than four years, and younger issues have been tried in their regular order, the delay is unreasonable especially if a pressure of business is the only excuse, and the complaint will be dismissed. *Tuttle v. Dubuque Fire & Marine Ins. Co.* (1913), 155 App. Div. 802, 140 N. Y. Supp. 930.

Idem; papers mislaid.—An excuse for nonprosecution of an action that the plaintiff's counsel, in moving his office, mislaid the papers, is not a legal excuse. *Hauben v. Hudson & M. R. Co.* (1916), 161 N. Y. Supp. 779.

Idem; effect of outstanding order.—Where an action was commenced February 17, 1909, and issue joined April 16 of the same year, and the plaintiff has never noticed the cause for trial and issues of a much later date have been disposed of, the fact that an order for plaintiff's examination before trial, granted January 11, 1910, is still outstanding, is no reason why a motion to dismiss the complaint for failure to proceed should not be granted. *Harris v. Reichenbach* (1912), 150 App. Div. 220, 134 N. Y. Supp. 657.

Service of notice of trial after the motion to dismiss has been made is of no avail to the plaintiff. *Hauben v. Hudson & M. R. Co.* (1916), 161 N. Y. Supp. 779.

Stay of proceedings; motion to vacate.—Where an order has been entered on behalf of the plaintiff directing the taking of certain testimony by commission, and that all proceedings be stayed until the return thereof, the defendant cannot move to dismiss the action for failure to prosecute; his remedy is to move to vacate the stay of proceedings. *Dome v. Southern Railway Co.* (1912), 152 App. Div. 134, 136 N. Y. Supp. 510.

The purpose of dismissing a complaint for unreasonable neglect to proceed is to prevent an unreasonable carrying of cases upon the calendar which are not designed to be tried. *Leap v. Associated Operating Co.* (1912), 149 App. Div. 859, 134 N. Y. Supp. 823.

Municipal court of city of New York.—This section which is applicable only to the courts specified in § 3347, subd. 4, is not applicable to the municipal court of the city of New York. But see new municipal court code. *Junk v. Moore* (1915), 88 Misc. 551, 151 N. Y. Supp. 63.

§ 826. Publication, where no newspaper, etc., in county or city.

1. Where a notice, or other proceeding, is required by law to be published in a newspaper published in a county, and no newspaper is published therein, or to be published oftener than any newspaper is regularly published therein, the publication may be made in a newspaper of an adjoining county, except where special provision is otherwise made by law.

2. Where a notice or other proceeding is required by law to be published in a newspaper in a county which contains a city having no newspaper, or to be published in a newspaper in such city, the publication, if so required to be made in the county, may be made either in the county or in a city, outside the county, adjoining such city in which no newspaper is published; or, if so required to be made in the city in which no newspaper is published, the publication may be made in such adjoining city of another county.

Amended by L. 1877, ch. 416, and L. 1917, ch. 248, in effect Sept. 1, 1917. The amendment of 1917 added subdivision 2.

Source.—R. S., pt. 3, ch. 8, tit. 17, § 10.

§ 827. Special references in certain cases.

On a reference to take and state an account written interrogatories are not authorized. *Dowd v. Hughes' Sons Towing & Transportation Co.* (1918), 183 App. Div. 580, 170 N. Y. Supp. 164.

Receiver as referee.—This section does

not confer statutory power on the court to call its receiver a referee and to send him as its visitor to search the private papers of a party litigant. *Sanford v. Richardson* (1916), 176 App. Div. 199, 161 N. Y. Supp. 1026.

§ 828. No witness to be excluded by reason of interest, etc.

A wife, merely as such, is not an "interested witness" in an action against her husband. *Green v. Altenkirch* (1916), 176 App. Div. 320, 162 N. Y. Supp. 447.

§ 829. When party, etc., cannot be examined.

Application. — *Bambauer v. Schleider* (1917), 176 App. Div. 562, 163 N. Y. Supp. 186; *Newcomb v. La Roe* (1915), 167 App. Div. 566, 152 N. Y. Supp. 635; *Palmer v. Fybush* (1915), 169 App. Div. 907, 157 N. Y. Supp. 442; *Matter of Neil* (1915), 90 Misc. 537, 153 N. Y. Supp. 647; *Levy v. Louvre Realty Co.* (1917), 222 N. Y. 14; *Matter of Fingar* (1917), 101 Misc. 516, 168 N. Y. Supp. 361.

General objection.—An objection to testimony as incompetent and immaterial is insufficient to raise the question as to the competency of the witness on the ground that a general objection to evidence is not an objection to a witness, and an objection must be directed against the witness, stating the particular grounds. *Matter of Farley* (1915), 91 Misc. 185, 155 N. Y. Supp. 63.

Judgment will not be reversed for admission of evidence incompetent under this section, where it was not material or necessary to the plaintiff's case. *Wilson v. Kane* (1917), 180 App. Div. 77, 167 N. Y. Supp. 51.

Examination before trial.—The fact that a person is disqualified is not a ground for vacating an order for his examination before trial, as objection may not be made or may be waived. *Holmes v. Crane* (1917), 167 N. Y. Supp. 735.

Interest from, through or under decedent; deposit in bank.—A bank's interest in a deposit is clearly one derived from, through or under the decedent within § 829. *Foley v. New York Savings Bank* (1913), 79 Misc. 220, 139 N. Y. Supp. 915.

Id.; assignee of insurance policy.—When this section speaks of deriving title or interest from, through or under a deceased person it contemplates property or an interest which belonged to the deceased in his lifetime and the title to which has passed by assignment or otherwise through him to the party who is protected by the section. These authorities do not contemplate a case where a party claims property from a third person which never belonged to the deceased and which in fact did not come into existence until his death. A person claiming money directly from an insurance company by virtue of a designation under a policy cannot be said to be claiming "from, through or under" the insured in said policy even though the latter has made the designation. *Wand v. N. Y. Life Ins. Co.* (1919), 225 N. Y. 314.

Idem; remainderman of trust estate.—Testimony by a remainderman of a trust estate as to a conversation between himself and a deceased life tenant of the trust estate tending to show that there was an understanding that a stock dividend should be deemed a part of the principal, is inadmissible. *Matter of Affleck* (1913), 155 App. Div. 339, 140 N. Y. Supp. 345.

Idem; execution and delivery of check.—In an action by the personal representative of the drawer of a check against a bank to recover the amount of a check paid by it after the drawer's death, the payee is not interested in the event within the meaning of § 829 so as to preclude him from testifying as to the execution and delivery of the check. *Glennan v. Rochester Trust & Safe Deposit Co.* (1912), 152 App. Div. 316, 136 N. Y. Supp. 747.

Idem; beneficial interest.—The bequest of a right of nomination to beds endowed in various hospitals by the testatrix does not give the person receiving such right such a beneficial interest in supporting the rule as to exclude him under this section from giving testimony on points not excluded under § 835. In *re Campbell's Will* (1912), 136 N. Y. Supp. 1086.

Idem; witness vitally interested.—Although the witness was vitally interested in the question in controversy, namely, whether the sale was made to the deceased as contended by the plaintiff, or to the witness, as contended by the defendants, he is not incompetent to testify against the executors. That simply goes to the credibility of his testimony and not to his competency, unless it can be said that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. *West End Brewing Co. v. Utica Trust & Deposit Co.* (1916), 175 App. Div. 477, 162 N. Y. Supp. 537.

Idem; interest of the witness contingent and uncertain.—One is not "a person interested in the event" merely because the outcome may save him the trouble of another law suit. There is a difference between an interest in the event and an interest merely in the question. To make out an interest in the event, the judgment must not merely leave open the possibility of another action. It must be evidence in the other action, and evidence adverse to the witness. *Franklin v. Kidd* (1916), 219 N. Y. 409.

Idem; promissory note; action against endorser.—In an action by a bank against an endorser of a promissory note, the maker of the note, although not a party to the action, is "interested in the event" within the meaning of this section, and is incompetent to testify to personal transactions between himself and the endorser who died during the pendency of the action. *Franklin v. Kidd* (1914), 87 Misc. 399, 149 N. Y. Supp. 767.

Idem; test of interest.—The test of interest under this section is whether the witness is interested not in the question, but in the event of the suit. *Dinnean v. Dinnean* (1915), 90 Misc. 121, 127, 152 N. Y. Supp. 587.

Idem; party repaid by administrator.—

When a party has been repaid by an administrator, so that he no longer has a claim against the estate, he is not incompetent to testify that the decedent promised to repay him moneys advanced. *Matter of Lese* (1917), 176 App. Div. 744, 163 N. Y. Supp. 1014.

Husband's interest as tenant by curtesy.—The contingent interest of a husband in property as tenant by the curtesy does not disqualify him as a witness under § 829. *Matter of Percival* (1913), 79 Misc. 567, 141 N. Y. Supp. 180.

Husband's interest in wife's contract.—In a proceeding for the sale of the property of a decedent and to establish an agreement between her and her niece for the mutual maintenance of a home, it was held that the husband of the niece, who, having no property or business, married her when he was about fifty years of age, was not incompetent as a witness. *Matter of McMillan* (1915), 167 App. Div. 817, 153 N. Y. Supp. 400.

Admissibility of testimony by a legatee under a prior will as to declarations of the testator when making said will, where there was another will intervening between said will and that offered for probate, such witness not deriving his interest under an immediately preceding will. *Lesster v. Lesster* (1917), 178 App. Div. 438, 165 N. Y. Supp. 592.

Person through whom plaintiff derives interest.—Where a bankrupt conveyed property to his son, under an agreement with his wife that, upon her advancing money, the property should be deeded to her, the husband being insane at the time of the trial, the wife's evidence as to the agreement should be excluded. She is a person through whom the son derives his interest in the property "by assignment or otherwise." *Roy v. Salisbury* (1911), 134 N. Y. Supp. 733.

Communication from decedent; reading of will.—The reading by one person of a will executed by another is not a communication from the latter to the former. *Strong v. Gainbier* (1913), 155 App. Div. 294, 140 N. Y. Supp. 410.

Defendant's secretary.—Conversation between plaintiff's intestate and defendant's secretary not inadmissible. *Griggs v. Renault Selling Branch, Inc.* (1917), 179 App. Div. 845, 167 N. Y. Supp. 355.

Conversations with deceased owner of property.—In an action by the widow of a decedent to recover money alleged to have been converted, where the defense is that said property belonged to decedent's father, now deceased, it is error to allow the plaintiff to testify to certain conversations with her father-in-law, which bear upon the questions of the ownership of said property. *Scully v. Scully* (1912), 154 App. Div. 359, 139 N. Y. Supp. 622.

In an action against an administrator, appointed as the successor of a deceased administrator, the testimony of plaintiff

as to conversations with the deceased administrator is incompetent. *Blumenthal v. Kelsey* (1916), 95 Misc. 136, 159 N. Y. Supp. 181.

In an action for goods sold and delivered, conversations with defendant's deceased partner bearing on the question of the value of the goods is inadmissible. *Weiss v. Meyer* (1916), 95 Misc. 145, 159 N. Y. Supp. 211.

Admissibility of negative testimony.—It is no more permissible under this section to swear that a certain transaction did not occur with a deceased person than it is to swear that a certain transaction did occur with such person. *Matter of Babcock* (1914), 85 Misc. 256, 147 N. Y. Supp. 268.

Erroneous exclusions; verdict not affected where evidence is cumulative.—The exclusion of testimony of a witness not interested in the event of the action on the ground that he was incompetent to testify under § 829, though erroneous, does not demand the setting aside of the verdict, where the facts attempted to be proved are merely cumulative. *Blass v. Linsley* (1912), 78 Misc. 422, 139 N. Y. Supp. 540.

Personal transactions.—Although the assignor of a mortgage is incompetent to testify to any personal transaction with the owner of the premises, such prohibition does not extend to a personal transaction with the agent of the deceased person notwithstanding the principal and agent are both dead. *McCarthy v. Stanley* (1912), 151 App. Div. 358, 136 N. Y. Supp. 386.

Idem; testimony not pertaining to.—Where a witness is not testifying to a personal communication or transaction with a deceased person in relation to the question at issue, his testimony is not incompetent under this section, although he may be interested in the event. *Matter of Hennessey* (1913), 157 App. Div. 136, 141 N. Y. Supp. 736.

Idem; testimony by testamentary trustee to transaction with testator.—Where a gift is made by will to a trustee for the use of another, the fact that the trustee undertakes to fulfill the trust does not make him the source of the beneficiary's title, and he is not incompetent to testify to a personal transaction with the creator of the trust. *Golland v. Golland* (1914), 84 Misc. 299, 147 N. Y. Supp. 263.

Idem; knowledge gained from contact with decedent.—A personal transaction or communication with a deceased person within the meaning of § 829 includes any knowledge which the witness has gained by the use of his senses from the personal presence of the deceased; the fact that the witness took no part and was not referred to in the conversation is immaterial. *Griswold v. Hart* (1912), 205 N. Y. 384.

Idem; contract with deceased person; effect of husband's testimony.—The husband of a person claiming to have had a contract as to property with a deceased per-

son, beneficial to such person, although not an incompetent witness, is nevertheless an interested witness, and his testimony may be accepted or rejected, either as a whole or in part. *Matter of Mc-Millan* (1916), 218 N. Y. 64.

Idem; presence of witness at time of conversation.—The fact that a witness took no part in the conversation with a deceased person but was merely present does not make the witness competent. *Brown v. Crossman* (1912), 206 N. Y. 471.

Id.; presence of party endeavoring to establish will does not render the testimony of a beneficiary under another will competent. *Herrmann v. Ludwig* (1919), 186 App. Div. 287, 174 N. Y. Supp. 469.

Idem; person living with decedent.—An adopted sister of a decedent who had always lived with the surviving sister is competent as a witness as to decedent's delivery of certificates of stock to the surviving sister, accompanied by appropriate words of gift, and their return to him for safe keeping. *Dinnean v. Dinnean* (1915), 90 Misc. 121, 152 N. Y. Supp. 587.

Id.; a nurse claiming a gift *inter vivos* is incompetent to testify to personal transactions with the decedent. *Matter of Housman* (1918), 182 App. Div. 37, 169 N. Y. Supp. 277; *affd.* 224 N. Y. 525.

Idem; renewal of lease.—Exclusion of testimony as to whether a person now deceased was present upon the renewal of a lease, see *Wald v. Weilhamer* (1913), 82 Misc. 455, 144 N. Y. Supp. 929.

Idem; court to determine as to nature.—The court, and not the witness, must determine as to what is a personal transaction. Hence the question, asked for the purpose of qualifying a witness to testify as to decedent's signature, "Did you see her at any time sign her name, other than in a personal transaction between you and she?" is improper. *Gerdy v. Tissot* (1912), 135 N. Y. Supp. 559.

A transaction between a party and the agent of one deceased does not come within the purview of this section. *Burke v. Higgins* (1917), 178 App. Div. 816, 166 N. Y. Supp. 199.

Id.; tending to establish consummation of gift of bank book.—In an action to establish an alleged gift *inter vivos* of a savings bank deposit made to the plaintiff by a person since deceased, it is error to allow the plaintiff to testify that when he went to the house of the donor at the time of the alleged gift he did not have the bank book in his possession and that when he left the house he did have the bank book, for it involved a personal transaction with the decedent tending to establish the consummation of the gift by the delivery of the bank book. *Wilson v. Kane* (1917), 180 App. Div. 77, 167 N. Y. Supp. 51.

Id.; incompetent person.—The provision relating to transactions with an incompetent person applies only in a case where

such person has been adjudged a lunatic and a committee has been appointed. *Clark v. Dada* (1918), 183 App. Div. 253, 171 N. Y. Supp. 205.

Waiver of benefit.—Where the court itself asks questions in violation of this section, counsel has the right to cross-examine the witness in reference to such testimony without waiving the benefit of this provision of the Code. *Fuller v. New York Central, etc. R. C.* (1913), 160 App. Div. 864, 146 N. Y. Supp. 345.

When not competent.—Efforts to obtain from witnesses conversations, including improper and incompetent statements of fact under the guise of showing the mental strength of testatrix, are condemned. *Smith v. Keller* (1912), 205 N. Y. 39.

Where certain payments were made to a deceased testator, which claimant contends should have been paid to her by the testator, she is not competent to testify that such moneys were not paid to her by the testator. *Matter of Brown* (1912), 77 Misc. 507, 137 N. Y. Supp. 978.

Claims against decedent's estate; testimony of executrix as to payment.—An executrix who has paid bills against an estate which have been objected to, is incompetent upon the judicial settlement of her accounts, to testify as to conversations between the payee and the deceased, but the creditor whose claim is paid is a competent witness to such conversations. *Matter of Mulligan* (1913), 82 Misc. 336, 143 N. Y. Supp. 686.

Contract; testimony of surviving party.—In a proceeding to charge the estate of a deceased party with a liability under a contract the survivor cannot testify as to the same. *In re Harter's Estate* (1914), 148 N. Y. Supp. 766.

Dower; action to recover; testimony as to cause of separation.—In an action to recover dower, it is not competent for plaintiff to testify that the reason she left the home of her deceased husband was because her husband had cut her with a knife and otherwise ill used her. *Smith v. Cockroft* (1912), 149 App. Div. 255, 133 N. Y. Supp. 711.

Idem; facts corroborating marriage.—Where a widow in an action to recover her dower interest in property conveyed by her husband, without her joining in the deed, relies upon a ceremonial marriage, it is reversible error to allow her to testify over objection, under this section, to facts tending to corroborate the certificate of marriage. *Fisk v. Holding* (1914), 163 App. Div. 85, 148 N. Y. Supp. 501.

Medical services; physician's books.—When books of account of physician competent in action against executors for professional services to testator. *Bellows v. Bender* (1914), 87 Misc. 187, 149 N. Y. Supp. 548.

Testimony by physician as to medical attendance, in an action to recover for services alleged to have been rendered to the

deceased, is inadmissible. Medical attendance involves a transaction as well as communications between the physician and patient. Upon the death of a patient testimony from him as to the facts of that attendance is rendered impossible, and it seems clear that the policy of the code provision prohibits testimony by the other party to the transaction. *Kennedy v. Mulligan* (1916), 173 App. Div. 859, 160 N. Y. Supp. 105.

The testimony of plaintiff, a practicing physician, is inadmissible as to personal transactions had with the deceased in an action against the executrix to recover for medical services rendered the deceased. *Titus v. Spencer* (1913), 145 N. Y. Supp. 40.

A surrogate should exclude evidence incompetent under this section, even though the disability is waived. *In re King* (1918), 172 N. Y. Supp. 868.

Probate of will.—Where on proceedings for the probate of a will, it is claimed that the will had been cancelled and annulled by a later one, a person named as beneficiary in the subsequent will is not "a person interested in the event," within the meaning of this section, and the exclusion of his testimony introduced to prove the execution of the subsequent will, the witness being dead, is reversible error. *Matter of Hennessey* (1913), 157 App. Div. 136, 141 N. Y. Supp. 736.

Idem; testimony of legatee.—The erroneous admission contrary to this section of a deposition of a legatee under a will as to the mental condition of the decedent is unavailing where no formal objection was made on that ground. *Richie v. Shepard* (1913), 158 App. Div. 192, 143 N. Y. Supp. 19.

A beneficiary and legatee under a lost or destroyed will is not entitled to testify

to a personal transaction with the testatrix. *Hollender v. Wallace* (1917), 180 App. Div. 393, 167 N. Y. Supp. 824.

Reformation of deed; conversations between grantee and plaintiff intestate.—In a suit for the reformation of deed, it is not error to exclude conversations between the defendant grantee and the plaintiff's intestate, where none of the conversations testified to by the plaintiff's witnesses related to said conversation. *Knobloch v. Kracke* (1912), 151 App. Div. 19, 135 N. Y. Supp. 381.

Services to decedent; testimony of claimant.—The value of services rendered by the plaintiff to the decedent may not be testified to by the plaintiff in an action against the estate of decedent. *Titus v. Spencer* (1914), 147 N. Y. Supp. 343.

In an action by a husband for services rendered by his wife on her own account as a nurse to one since deceased, her testimony as to transactions with the decedent is inadmissible, as that of a person "interested in the event." *Janz v. Schwender* (1916), 95 Misc. 142, 159 N. Y. Supp. 200.

Officers of corporations.—The provision that "a person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation" does not carry with it the inference that the legislature intended that the officers of corporations other than banking corporations should be disqualified. *Griggs v. Renault Selling Branch, Inc.* (1917), 179 App. Div. 845, 167 N. Y. Supp. 355.

Section cited.—*Bachman v. Pendleton* (1915), 166 App. Div. 893, 150 N. Y. Supp. 1074; *Eltonhead v. Travelers Ins. Co.* (1917), 177 App. Div. 170, 173, 163 N. Y. Supp. 838; *Matter of Higgins* (1915), 91 Misc. 387, 154 N. Y. Supp. 670.

§ 830. Testimony and exhibits upon former trial and hearing; when to be read or given in evidence at another trial or hearing.

Where a party or witness has died or become insane or, being a non-resident of this state has departed from the state or, being a resident of the state has departed therefrom by reason of military or naval service under the state or United States, since or during the trial of an action now or hereafter pending, or since or during the hearing upon the merits of a special proceeding now or hereafter pending, the testimony of the decedent or insane person or of such absentee, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, or at the same trial or hearing, either in court or before the same or a new referee, together with all exhibits and documents read in evidence in connection with, or as part of the giving of such testimony, may be given or read in evidence at a new trial or hearing or at a continuation of the same trial or hearing either in court or before the same or a new referee, or upon any subsequent trial or hearing, either in court or before the same or a new referee, of the same sub-

ject matter in the same or another action or special proceeding between the same parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing, or to such continuation of the same trial or hearing either in court or before the same or a new referee, or to such subsequent action or special proceeding either in court or before the same or a new referee, subject to any other legal objection to the competency of the witness, or to any other legal objection to his testimony or any question put to him, or to any other legal objection to such exhibits and documents. Such testimony, exhibits and documents proven by oath to have been so previously taken or read in evidence may be so given or read in evidence; or the original stenographic notes of such testimony taken by a stenographer who has since died or become incompetent may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court or officer presiding at the trial of such action or special proceeding.

Amended by L. 1918, ch. 64, in effect Sept. 1, 1918. The amendment of 1918 materially changed the section heading; inserted the words "or, being a resident of the state has departed therefrom by reason of military or naval service under the state or United States" in lines 2-4; and substituted the word "absentee" in line 7 for the words "nonresident who has departed from the state."

The party offering such prior testimony must produce proof that the requirements of this section have been complied with, which proof must be incorporated in the record so that in case of an appeal the appellate courts may be in a position to see upon what state of facts the admissibility of evidence was determined. *New York County National Bank v. Herman* (1916), 173 App. Div. 814, 160 N. Y. Supp. 422.

Objections to testimony read under this section.—Testimony so read is to be regarded as if given by the witness at the trial and is subject to any objection that may be taken at the time it is read. *Murphy v. McMahon* (1917), 179 App. Div. 837, 167 N. Y. Supp. 270.

Evidence of deceased witness on former trial; action for death caused by negligence.—In an action brought by an administratrix against a railroad company to recover for the death of her daughter, it is reversible error to refuse to permit the defendant to read the evidence of a deceased flagman of the defendant, on a former trial against the defendant by the plaintiff as administratrix of her son to recover for his death in the same accident. *Cohen v. Long Island Railroad Co.* (1913), 154 App. Div. 603, 139 N. Y. Supp. 887.

Idem; action on account stated.—In an action on an account stated, defendant's testimony in a previous trial against her husband for the same items that credit for the goods in question was given to her, is not incompetent under this section. The

evidence simply proves an admission of the defendant against her own interest. The fact that the admission was given under sanction of an oath as a witness in a civil suit does not render it incompetent. *Kaht v. Frazin* (1913), 144 N. Y. Supp. 644.

Idem; given in criminal proceeding.—The testimony of a witness, since deceased, given in a criminal proceeding instituted by plaintiffs herein against defendant herein upon suspicion that he had feloniously taken certain building blocks manufactured for him by plaintiffs, that defendant, when he sold them to the witness, represented that plaintiffs had given them to defendant in payment of a pre-existing indebtedness, is admissible in an action subsequently brought to recover the value of said building blocks, defendant having both the right and the opportunity to cross-examine said witness on the hearing of the criminal charge. *Profitos v. Comerma* (1916), 94 Misc. 334, 158 N. Y. Supp. 369.

Admissible as a condition for a new trial.—On a motion by the defendant for a new trial, the court may impose as a condition that the plaintiff may read on the new trial the testimony given by one of defendant's witnesses at the first trial, where such witness, now in a foreign state, has made an affidavit that he committed perjury on the first trial, and where he has come under the pay and resulting control of the defendant. *Fried v. New York, New Haven & H. R. Co.* (1917), 178 App. Div. 309, 165 N. Y. Supp. 495.

§ 831. When husband and wife not competent witnesses; when competent.

A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special pro-

ceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in section seventeen hundred and fifty-eight of this act, the other party is competent to testify in disproof of any such defense. A husband or wife shall not be compelled, or without consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

Amended by L. 1877, ch. 416; L. 1879, ch. 542; L. 1880, ch. 149; L. 1887, ch. 103; L. 1915, ch. 181, in effect April 3, 1915. The amendment of 1915 inserted the second sentence.

Source.—L. 1867, ch. 887, §§ 2, 3, and L. 1876, ch. 426.

Application.—*Capes v. Capes* (1916), 173 App. Div. 142, 149 N. Y. Supp. 367.

At common law the husband and wife were incompetent to testify for or against each other in actions of every kind. *Biers v. Biers* (1913), 156 App. Div. 409, 142 N. Y. Supp. 128.

Purpose of section to prevent collusion.—It seems, that § 831 makes the wife of the plaintiff in an action for criminal conversation an incompetent witness for him in order to prevent collusion between husband and wife. *Strock v. Russell* (1911), 148 App. Div. 483, 132 N. Y. Supp. 968.

Action for divorce.—Where in an action for divorce, in which the defendant set up as a counterclaim the adultery of the plaintiff, a witness for the defendant testified as to conversations with the plaintiff, in which he admitted that he had forgiven

and condoned the offenses of the defendant. it was reversible error to allow the plaintiff to testify that the conversations never took place, and that he never made the admissions. *Biers v. Biers* (1913), 156 App. Div. 409, 142 N. Y. Supp. 128.

Statements made to a witness in an action for divorce by the plaintiff tending to establish the defendant's adultery, are incompetent under this section. *Graham v. Graham* (1913), 157 App. Div. 52, 141 N. Y. Supp. 766.

This section merely prohibits a party from testifying against the other party. A party may, however, testify in favor of the other party as to matters other than proof of the marriage and disproof of the adultery. *Perweiler v. Perweiler* (1916), 160 N. Y. Supp. 785.

§ 832. Conviction for crime not to exclude witnesses; how conviction proved.

Proof of conviction of crime.—The only method of proving that a witness has been convicted of a crime for the purpose of affecting his credibility, is by the record or by his cross-examination. *People v. Cardillo* (1912), 207 N. Y. 70.

The statutes which provide that, for the purpose of affecting the credibility of a witness, the fact that he had been convicted of a crime may be proved by the record, or his admission on cross-examination, impliedly prohibit the reception of any

other or different proof. *People v. Stern* (1916), 96 Misc. 507, 161 N. Y. Supp. 1107.

A professional book-maker is not excluded from testifying to facts within his knowledge. The question of the extent to which the following of this unlawful occupation affects the credibility of the question discussed. *Matter of Jacobs* (1912), 76 Misc. 394, 137 N. Y. Supp. 155.

Section cited.—*Derrick v. Wallace* (1916), 217 N. Y. 520.

§ 834. Physicians or professional or registered nurses not to disclose professional information.

In order to lay a foundation for the objection to evidence, it must be developed that the physician attended the deceased in a professional capacity, and that the information concerning which the inquiry

is made was necessary to enable him to act in that capacity. *Sparer v. Travelers Insurance Co.* (1919), 185 App. Div. 861, 173 N. Y. Supp. 673.

Objection to admission of evidence.—The prohibition against a physician disclosing information acquired in a professional capacity while attending a patient is absolute unless expressly waived on the trial by the patient, and it is of no consequence that the defendant was not present to object to incompetent evidence given by his physician. *Weil v. Weil* (1912), 151 App. Div. 622, 136 N. Y. Supp. 190.

Idem; general objection insufficient.—A party objecting to the disclosure by a physician of information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, must show that the testimony sought to be elicited is within the prohibition of the statute. A mere general objection to the incompetency or materiality of testimony is not sufficient to raise the question of the competency of the witness to testify. *Mulligan v. Sinski* (1913), 156 App. Div. 35, 37, 140 N. Y. Supp. 835.

Sufficiency of objections to competency of a witness, a physician. *Mulligan v. Sinski* (1913), 156 App. Div. 35, 140 N. Y. Supp. 835, aff'd 214 N. Y. 678.

A dentist is not included within the provisions of this section. *Howe v. Regensburg* (1912), 75 Misc. 132, 132 N. Y. Supp. 837.

Medical officers in state institutions.—The relation arising by operation of law between a patient committed by legal process to a state institution for the insane and the official physicians in charge thereof is not within the professional relation contemplated by this section. *Liske v. Liske* (1912), 135 N. Y. Supp. 176.

Insurance policy; testimony of physician as to attendance upon insured.—In an action on a life insurance policy physicians may testify that they attended the insured in a professional capacity prior to his application and may state the number of times and dates of such attendance, such testimony not being inadmissible under § 834. *Denaro v. Prudential Insurance Co.* (1913), 154 App. Div. 840, 139 N. Y. Supp. 758.

The testimony of an attendant physician is not incompetent when plaintiff in proofs of death of an insured refers to the death certificate of a hospital physician and agrees that it shall be part of the proofs. *Klein v. Prudential Ins. Co.* (1917), 221 N. Y. 449.

Where in an action to recover upon a policy of life insurance it appears that the insured in his application stated that he had not received medical or surgical attention within the past five years, and that about three months prior to his application he had been in a hospital three weeks and there treated, the defendant's offer to prove by the operating and assistant surgeon and by the records of the hospital where the assured was operated upon

after the issuance of the policy, the condition that he was in at the time of the operation is properly excluded. The record of the case at the hospital where the assured was treated prior to his application is also properly excluded. But the plaintiff's counsel having consented, it is error for the court to exclude the defendant's offer to prove by the records of the hospital duly authenticated by the physician who made them, who was also the one who performed the operation prior to the issuance of the policy, that at said hospital at the time mentioned the said doctor performed an operation upon the assured. The doctor can not, however, describe the operation or any condition he observed which was necessarily disclosed by an inspection of the body of the insured. *Sparer v. Travelers Insurance Co.* (1919), 185 App. Div. 861, 173 N. Y. Supp. 673.

Recovery for professional services.—This section is not intended to deprive a person authorized to practice medicine or surgery of his cause of action for professional services if he can prove them by legal evidence, nor is said section limited to witnesses or qualified by § 836. *Schamberg v. Whitman* (1912), 75 Misc. 215, 135 N. Y. Supp. 262.

In an action by a physician to recover for services rendered to the defendant's wife, a nonprofessional and unregistered nurse is competent to testify as to conversations between the plaintiff, the defendant and herself, as to the patient's condition and its cause. But testimony by the plaintiff as to such conversations is inadmissible, and a judgment influenced thereby should be reversed. It is against public policy to permit a physician to make such disclosures even in an action to recover for his services. *Hobbs v. Hullman* (1918), 183 App. Div. 743, 171 N. Y. Supp. 390.

Idem; effect of incompetent evidence.—Where there is a failure of competent evidence in the case showing what services the plaintiff, a physician, performed for the decedent, because the evidence was given by the plaintiff himself, the judgment will be reversed. *Titus v. Spencer* (1915), 151 N. Y. Supp. 515.

Idem; testimony of plaintiff as to treatment by physician.—Where a plaintiff suing to recover for injury to an eye, testifies that at the time of the accident, a certain physician declined to treat the eye because of its swollen condition, but gave him a subsequent treatment, there is a waiver of the privilege of the physician, and the defendant may show by the testimony of the physician that the plaintiff had suffered from a cataract from birth, and that his present cataract was not caused by the accident. *McKenney v. American Locomotive Co.* (1914), 164 App. Div. 625, 149 N. Y. Supp. 826.

Testimony not privileged.—The physi-

cian's testimony and that of the manager of a sanatorium, that the defendant was their patient, that they attended her as such, as to how long such attendance continued, and the manager's testimony that she went to the sanatorium without a child and took one away with her, and that the alleged correspondent with her knowledge made some of the arrangements and paid all the bills, are not privileged, although they may not testify as to what defendant was treated for and as to the nature of her ailment. *Hammerstein v. Hammerstein* (1911), 74 Misc. 567, 134 N. Y. Supp. 473.

Ordinary incidents and facts.—The intention of this section is not to prohibit a person from testifying to such ordinary incidents and facts as are plain to the observation of anyone without expert or professional knowledge, and without tacitly or otherwise inviting or receiving confidences by which the incidents or facts are or may be brought to light and obtained. *Klein v. Prudential Ins. Co.* (1917), 221 N. Y. 449.

It is not every conversation with a physician that is protected by the statute. Thus, in a personal injury action, where it appeared that the plaintiff had called on a physician a few days before the trial it was held that the defendants should have been allowed to show by the physician that the visit and conversation which ensued had nothing to do with any medical treatment, but was only as to the testimony the physician would give if called as a witness. *Kelly v. Dykes* (1916), 161 N. Y. Supp. 551.

Waiver; by patient or personal representative.—The privilege of communications made by a patient to his physician in his professional capacity is not for the benefit of the physician, but for that of the patient, and may be waived by him, or, after his death, by his personal representative. *Trieber v. New York & Queens County Railway Co.* (1912), 149 App. Div. 804, 134 N. Y. Supp. 267.

Idem; by making physician a witness.—In an action to recover damages for negligence, a plaintiff by making her physician a witness as to the character and extent of her injuries resulting from the accident, waives her privilege of having him

remain silent as to what he learned upon an examination of her after his regular treatment had ceased. *Patnode v. Foote* (1912), 153 App. Div. 494, 138 N. Y. Supp. 221.

Idem; where testimony would disgrace memory of deceased.—Where, in an action upon a promissory note the defendant, executor and husband of the maker, alleged that the maker had been addicted to the use of intoxicating liquors to such an excess as to make her incompetent and irresponsible for her actions, a physician who treated her prior to her death is not competent to testify as to the incompetency of the deceased to sustain the allegations of the answer, and the defendant cannot waive this incompetency, since such testimony, if given, would disgrace the memory of the deceased. *Mulligan v. Sinaki* (1913), 156 App. Div. 35, 140 N. Y. Supp. 835.

Idem; where plaintiff places his person before jury as basis for damages.—Where a plaintiff, suing to recover for personal injuries, places his person before the jury as a basis for damages and has his condition described by his own physician, he thereby waives any privilege not only as to the physicians called by him, but as to other physicians who examined him at about the same time. *Dewey v. Cohoes & Lansingburgh Bridge Co.* (1915), 170 App. Div. 117, 155 N. Y. Supp. 887.

Id.; cross-examination.—Where defendant's counsel on cross-examination of plaintiff brought out the fact that both before and after he had been treated by defendant he had been treated by another physician, his explanation of the transaction on redirect examination is not a waiver of his privilege and the testimony of the said physician as to the treatment he gave plaintiff and as to what ailed him was properly excluded. *Gunn v. Robinson* (1918), 103 Misc. 547, 171 N. Y. Supp. 692.

Physician of incompetent person.—A physician in attendance upon a patient may not permit himself to be hired by another and go and make an examination of the patient for the purpose of testifying against him as to his competency. *Matter of Gates* (1915), 170 App. Div. 921, 154 N. Y. Supp. 782.

§ 835. Attorneys and counsellors not to disclose communications.

When section not applicable.—*Baxter v. Baxter* (1915), 92 Misc. 567, 156 N. Y. Supp. 521.

Communication disclosed by acquiescence not incompetent.—This section does not prohibit an attorney at law from testifying as to a communication made by his client to him or his advice given thereon in the course of his professional employment, but provides only that he shall not be permitted to disclose such a communi-

cation. When the same has already been disclosed with the acquiescence or consent of the client or at the latter's direction, the testimony is competent and is not prohibited. *Matter of Reinhardt* (1915), 95 Misc. 413, 160 N. Y. Supp. 828.

Communications and conclusions therefrom.—As to all evidence of communications between attorney and client in the course of their relations as such, and the conclusions drawn by the attorney there-

from, he is incompetent to testify under § 835. *Rintelen v. Schaefer* (1912), 152 App. Div. 727, 137 N. Y. Supp. 527.

Extension of privilege.—The privilege which exempts one from giving testimony, except in so far as it is embodied in statutory provisions, cannot be extended to cover cases not within the reason upon which the privilege rests. *Baumann v. Steingester* (1915), 213 N. Y. 328, 333.

Idem; confidential communications.—The provisions of §§ 835 and 836 apply only to those communications which are confidential in their nature. *Baumann v. Steingester* (1915), 213 N. Y. 328, 333.

Idem; when not acting as attorney.—Testimony as to conversations between an attorney and a decedent, which took place at a time when he was not acting for the decedent in a professional capacity, should not be excluded under this section. *Rintelen v. Schaefer* (1913), 158 App. Div. 477, 143 N. Y. Supp. 631.

Only confidential and professional relations are to be excluded. Policy of excluding the testimony of lawyers drawing wills discussed. In *re Campbell's Will* (1912), 136 N. Y. Supp. 1086.

The testimony of two clerks and a stenographer of the attorneys for the testatrix tending to show that she executed a will pursuant to the alleged contract, and that a certain purported copy produced from the files of the attorneys is a copy of said will, is incompetent. *Wallace v. Wallace* (1913), 158 App. Div. 273, 137 N. Y. Supp. 43.

Presence of attorney when transaction took place.—An attorney summoned to attend an interview between a vendor and vendee of land and who prepared a receipt showing part payment of the purchase price is not incompetent to testify as to what took place at the interview. *Sullivan v. Franzreb* (1912), 148 App. Div. 728, 132 N. Y. Supp. 1117.

Will; testimony of attorney who prepared.—An attorney, the draftsman of a will, but not a subscribing witness thereto, is incompetent to testify as to what he heard or saw in connection with the drawing of the will. *Matter of Seymour* (1912), 76 Misc. 371, 136 N. Y. Supp. 942.

Idem; copy of, from files of attorney.—In a suit to establish a contract by a decedent with her husband, to make mutual wills, the testimony of two clerks and a stenographer of the attorneys for the testatrix tending to show that she executed a will pursuant to the alleged contract, and that a certain copy produced from the files of the attorneys is a copy of said will, was incompetent under this section. *Wallace v. Wallace* (1913), 158 App. Div. 273, 137 N. Y. Supp. 43.

Idem; directions as to preparation in presence of third person.—Directions for the preparation of a will given by a testatrix to an attorney in the presence of a third person are not privileged communications within the meaning of this section. *Matter of Bennett* (1915), 166 App. Div. 637, 152 N. Y. Supp. 46; *Matter of King* (1915), 89 Misc. 638, 645, 154 N. Y. Supp. 238. When instructions of testatrix to attorney who drew will not privileged, see *Baumann v. Steingester* (1915), 213 N. Y. 328.

Idem; consultation with reference to drafting mutual wills.—Where a husband and wife consulted an attorney with reference to the drafting of mutual wills containing reciprocal provisions, the provisions of this section preventing an attorney from divulging communications from a client does not apply in a controversy between beneficiaries under such wills, such disability existing only when the communications are intended to be confidential. *Wallace v. Wallace* (1915), 216 N. Y. 28.

§ 836. Application of the last three sections.

Objection; express waiver required.—The prohibition against a physician disclosing information acquired in a professional capacity while attending a patient is absolute unless expressly waived on the trial by the patient, and it is of no consequence that the defendant was not present to object to incompetent evidence given by his physician. *Weil v. Weil* (1912), 151 App. Div. 622, 136 N. Y. Supp. 190.

Application to action for professional services.—Section 834 is not intended to deprive a person authorized to practice physic or surgery of his cause of action for professional service if he can prove them by legal evidence, nor is said section limited to witnesses or qualified by § 836. *Schamberg v. Whitman* (1912), 75 Misc. 215, 135 N. Y. Supp. 262.

Waiver.—In an action to recover dam-

ages for negligence, plaintiff by making her physician a witness as to the character and extent of her injuries resulting from the accident, waives her privileges of having him remain silent as to what he learned upon an examination of her after his regular treatment had ceased. *Patnode v. Foote* (1912), 153 App. Div. 494, 138 N. Y. Supp. 221.

Defendant does not waive the prohibitions by permitting witnesses to give similar testimony without objection in a prior action. *Wallace v. Wallace* (1913), 158 App. Div. 273, 137 N. Y. Supp. 43.

The privilege of communications made by a patient to his physician in his professional capacity is not for the benefit of the physician, but for that of the patient, and may be waived by him, or, after his death, by his personal representative.

Trieber v. New York & Queens County Railway Co. (1912), 149 App. Div. 804, 13 N. Y. Supp. 267.

Where the husband of testatrix who filed objections to the probate of her last will and testament died before the matter came on for hearing, his executor, who was made a party to the proceeding, was a "party in interest" and his waiver was sufficient to warrant the reception of the testimony of the physician who attended testatrix immediately before her death that at the time she executed the will she lacked testamentary capacity. *Matter of Mele* (1916), 94 Misc. 555, 157 N. Y. Supp. 669.

For the purpose of determining intention declarations of the testator, including a statement made by him to his attorney at the time the will was prepared to the effect that he wished to make a person, who resided with him, a residuary legatee, are admissible where such communications are

not privileged in that the attorney was a subscribing witness. *Matter of Coughlin* (1916), 171 App. Div. 662, 157 N. Y. Supp. 630.

Testimony which would disgrace the memory of the deceased.—A defendant cannot waive the incompetency of such testimony given by a physician who treated the deceased. *Mulligan v. Sinski* (1913), 156 App. Div. 35, 140 N. Y. Supp. 835, *aff'd* 214 N. Y. 678.

Annuling will as revoking waiver.—Where a testator waives the seal of confidence by requesting his attorney to witness his will, he may annul such waiver by revoking the will and the attorney thereby becomes incompetent to testify as to its execution, notwithstanding the provisions of this section. *Mead v. Cavanagh* (1913), 161 App. Div. 177, 146 N. Y. Supp. 353.

§ 837. When witness not excused from testifying.

A witness is privileged to refrain from divulging, not only all the facts and circumstances which might subject him to successful prosecution for a crime, but to refrain from furnishing a single link in a chain of facts capable of being used to his detriment or peril. *Am. Blue Stone Co. v. Cohn Cut Stone Co.* (1916), 97 Misc. 428, 161 N. Y. Supp. 667.

Provision may be waived.—The privilege to refuse to answer a question on the ground that it will tend to incriminate the witness is a personal privilege that may be waived, and is waived, unless the privilege

is claimed. And where the statute of limitation has run against the crime which the witness has committed there is no criminal fact to be privileged from disclosure; a legal limitation of the time of prosecution is in effect an expurgation of the crime; and after the lapse of the time fixed by law the claim of privilege may not be granted. *Meyer v. Mayo* (1916), 173 App. Div. 199, 157 N. Y. Supp. 1135; but see 166 N. Y. Supp. 284.

Section cited.—*Matter of Rouss* (1917), 221 N. Y. 81, 89.

§ 840. Seal, presumptive evidence of consideration.

Application.—*Thompson v. De Visser* (1919), 106 Misc. 165, 175 N. Y. Supp. 276; *Smith v. Wagner* (1919), 106 Misc. 170, 174 N. Y. Supp. 205.

While an executory instrument under seal is only presumptive evidence of consideration which may be rebutted, an actual assignment of a legacy made under seal

by the legatee, which recites a valuable consideration, is not an executory instrument when the transfer is completed by delivery of the assignment, and the rules of the common law apply so that the assignor cannot assert a failure of consideration. *Hull v. Hull* (1916), 172 App. Div. 287, 158 N. Y. Supp. 743.

§ 841. Presumption of death in certain cases.

A person possessed of personal property in this state or upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning such property or the administration of the estate of such person, unless it is affirmatively proved that he was alive within that time. And where in any action of partition in this state any portion of the proceeds of the sale of real property is or has been paid into court, or paid to the treasurer of any county for any unknown heirs, and has remained unclaimed for twenty-five years, after such payment by any person entitled thereto, the lapse of twenty-five years after such payment raises the pre-

sumption of the death of such unknown heirs at the time of the sale of such real property and before such payment, and after the lapse of twenty-five years after such payment it shall be presumed that there were no such unknown heirs living at the time of such sale or payment, and in any action or proceeding taken for the purpose of distributing and paying over such proceeds, all such unknown heirs are presumed and they shall be presumed to have been dead at the time of such sale and before such payment into court, or to the treasurer of any county.

Amended by L. 1918, ch. 318, in effect Sept. 1, 1918. The amendment of 1918 inserted the words "possessed of personal property in this state or" in lines 1 and 2; substituted the word "such" in line 5 for the word "the;" and substituted the words "or the administration of the estate of such person" in line 5 for the words "in which his death comes in question."

Application.—Matter of Rowe (1918), 103 Misc. 111, 170 N. Y. Supp. 742.

Death of person whose estate is to be administered.—The surrogate may presume the death of the person whose estate is to be administered, where it is established that such person being in ill health and of dissipated habits disappeared more than seventeen years ago and has not been heard from or seen since. The presumption of death applies as to an unexplained and continued disappearance for more than seven years, the same as to an established departure. Presumption of death does not necessarily fix the exact date of death. Matter of Smith (1912), 77 Misc. 76, 136 N. Y. Supp. 825.

Death of heirs or next of kin of intestate.—A surrogate will not presume the death of any person other than the one whose estate is being administered. Testimony of disappearance of intestate's sister, of diligent search by the public administrator and that the intestate shortly before his

death had declared that both his sisters were dead, is insufficient to raise a conclusive presumption that the missing sister is dead. Matter of Matthews (1912), 75 Misc. 449, 136 N. Y. Supp. 636.

Death presumed.—Where an unmarried woman disappeared without a known cause, leaving her personal effects behind her, and nothing concerning her can be discovered after diligent search, she is presumed to be dead after the expiration of seven years from the date of her disappearance. Matter of Benjamin (1913), 155 App. Div. 233, 139 N. Y. Supp. 1091.

Rebuttal of presumption.—The presumption of death after seven years' absence or disappearance is one of fact which may be rebutted by any inherent circumstance and should be applied only when it is an irresistible inference from facts otherwise found. Matter of Benjamin (1912), 77 Misc. 434, 137 N. Y. Supp. 758.

Section cited.—Butler v. Mutual Life Ins. Co. (1919), 225 N. Y. 197.

§ 841-b. Trial and burden of proof of contributory negligence.

On the trial of any action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant.

Added by L. 1913, ch. 228, in effect Sept. 1, 1913.

Application.—Skelton v. Lehigh Valley Railroad Co. (1916), 171 App. Div. 91, 156 N. Y. Supp. 835; Markert v. Long Island R. Co. (1916), 175 App. Div. 467, 161 N. Y. Supp. 926; Kanya v. Pennsylvania R. Co. (1917), 167 N. Y. Supp. 765. This section operates only as a change of procedure and applies to an action to recover damages for death, although the accident causing death and the commencement of the action antedated the enactment thereof. Sackheim v. Pigueron (1915), 215 N. Y. 62, rev'g 163 App. Div. 180, 148 N. Y. Supp. 27.

The change in order of proof effected by this section does not operate to permit a plaintiff to recover in an action for death resulting from an accident, unless the proximate cause of the accident was the

negligence of the defendant. Sackheim v. Pigueron (1915), 215 N. Y. 62.

Action commenced before section became effective.—This section applies where the action was commenced before but tried after the said section became effective. Nicholson v. New York (1914), 85 Misc. 563, 147 N. Y. Supp. 779.

This section is not retroactive. DeBaud v. Long Island Railroad Co. (1914), 163 App. Div. 600, 148 N. Y. Supp. 581; Skelton v. Lehigh Valley R. R. Co. (1914), 164 App. Div. 789, 150 N. Y. Supp. 97.

Although the accident and the beginning of the action took place prior to the enactment of this section, it nevertheless applies. Zimmermann v. Ullmann (1916), 173 App. Div. 650, 160 N. Y. Supp. 81.

Section applicable to actions pending

when enacted.—*Gazzola v. O'Brien* (1915), 169 App. Div. 602, 155 N. Y. Supp. 350.

Degree of proof of contributory negligence.—Less evidence is required as to freedom of an intestate from contributory negligence than if he were alive and able to testify. *Mullen v. Schenectady Railway Co.* (1915), 214 N. Y. 300, 305.

If the evidence be evenly balanced, the defendant has not sustained the burden of proof resting upon him. *McCullough v.*

Pennsylvania R. Co. (1916), 158 N. Y. Supp. 4.

Contributory negligence must be pleaded.—In an action against a master for negligently causing the death of an employee, contributory negligence of the deceased, if relied on as a defense, must be pleaded, and the burden of proof is upon the defendant. *Rinando v. Weeks & Son* (1916), 172 App. Div. 319, 158 N. Y. Supp. 365.

§ 841-b. Recitals as to heirship in deeds.

Hereafter, in any proceeding, suit or action pending or hereafter brought, in any of the courts of this state, any deed, mortgage, lease, release, power of attorney, or other instrument more than thirty years old, executed for the purpose of transferring the title to or interest in lands, tenements or hereditaments situated within this state, which contains recitals that the grantors, grantees, or either, or both, are the heirs-at-law of a prior owner of the title or interest described in said instrument, shall be presumptive evidence of said heirship as therein recited, if such instrument be duly acknowledged or witnessed and proved in any manner required or permitted at the date of the execution thereof, and be duly recorded in any county where any part of the lands described therein shall be located, or duly recorded in the office of the secretary of state of the state of New York.

Added by L. 1913, ch. 395, in effect Sept. 1, 1913.

§ 842. Before whom oaths and affidavits may be taken.

An oath or affidavit, required or authorized by law, except an oath to a juror or a witness upon a trial, an oath of office, and an oath or acknowledgment required by law to be taken before a particular officer, may be taken before a judge, clerk, deputy clerk, or special deputy clerk, of a court, a notary public, mayor, justice of the peace, a city magistrate of any of the cities of this state, or police justice thereof, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, special deputy county clerk, or commissioner of deeds, within the district in which the officer is authorized to act, except that a justice of the peace may take such oath or affidavit anywhere in the county containing the town or city in which he is authorized to act; and when certified by the officer, to have been taken before him, may be used in any court, or before any officer or other person.

Amended by L. 1911, ch. 670; L. 1915, ch. 146, in effect Sept. 1, 1915. The amendment of 1915 inserted the words "except that a justice of the peace may take such oath or affidavit anywhere in the county containing the town or city in which he is authorized to act," in lines 9, 10 and 11.

Source.—R. S., pt. 3, ch. 3, tit. 2, § 49.

§ 850. Court may examine witness.

When a child of such tender years that his competency is in doubt is called as a witness, it is the duty of the presiding justice to examine him before he is sworn,

to ascertain his capacity and the extent of his knowledge. *Olshansky v. Prenskey* (1918), 185 App. Div. 469, 172 N. Y. Supp. 856.

§ 852. Mode of serving subpoena issued out of a court.

Written evidence.—Where written evidence is in the possession of persons not parties to an action the only way in which the plaintiff can obtain possession of it is by subpoena *duces tecum*. *Murdock v. McCutchen* (1913), 154 App. Div. 854, 140 N. Y. Supp. 41.

Exhibition of the original subpoena is essential to constitute valid service. *Matter*

of *Jones* (1916), 174 App. Div. 919, 160 N. Y. Supp. 1134.

Amount of fees is fixed by § 3318. *Todd v. Silk Association of America* (1917), 100 Misc. 403, 167 N. Y. Supp. 1079.

Requirement for payment of fees is mandatory. *Quimby v. Ellithorp* (1918), 170 N. Y. Supp. 969.

§ 853. Penalty for disobedience.

Striking out pleading for failure to comply with order for examination before trial. *Todd v. Silk Association of*

America (1917), 100 Misc. 403, 167 N. Y. Supp. 1079.

§ 854. Subpoena to be issued by judge, etc.

Right of judge issuing subpoena to pass on admissibility of evidence.—It is for the trial court and not for the judge or justice to whom an application for a subpoena is made to rule upon the competency and admissibility of evidence. Hence the judge before whom an application is made cannot refuse to issue the subpoena on the ground that the records are privileged, for

evidence which is privileged may become admissible. *Friedeberg v. Haffen* (1913), 162 App. Div. 79, 147 N. Y. Supp. 1.

In supplementary proceedings a subpoena not issued under the hand of the judge is a nullity. *Gaynor v. New York Breweries Co.* (1912), 154 App. Div. 881, 138 N. Y. Supp. 899.

§ 856. When witness to be imprisoned.

Application.—*Quimby v. Ellithorp* (1918), 170 N. Y. Supp. 969.

The question propounded must be pertinent to the issues in order that the refusal of the witness to answer the questions may be a contempt. However, if the questions

are legal and pertinent he is not excused from answering them on the ground that his examination will tend to convict him of the commission of a fraud. *People ex rel. Roache v. Hanbury* (1913), 145 N. Y. Supp. 483.

§ 866. Records not to be removed by virtue of subpoena.

Stipulation for production of copy or record.—Where the production of an original record is not necessary, it is expected that the attorneys will readily enter into a stipulation for the use of a copy or an abstract of the record; and any party re-

fusing so to do subjects himself to the risk of liability for the cost or expense of requiring the production of the original by the subpoena *duces tecum*. *Friedeberg v. Haffen* (1913), 162 App. Div. 79, 147 N. Y. Supp. 1.

§ 867. Production, etc., of book of account.

Inspection before trial.—Books and papers produced under subpoena *duces tecum* upon examination of defendants before

trial may not be inspected. *Bigio v. Zrike* (1918), 102 Misc. 561, 170 N. Y. Supp. 90.

§ 867-a. Subpoena duces tecum relating to hospital records.

Where a subpoena *duces tecum* shall be served upon a public hospital, or superintendent or officer thereof, requiring the production of any books of such hospital, showing certain entries or records therein, or any other record or data relating to the physical condition or treatment of a patient, a transcript of such entries or records or data duly certified by the superintendent of such hospital or his assistant and delivered to the court or tribunal requiring it shall be deemed sufficient compliance with such

subpoena, unless otherwise ordered by the court, and any such transcript authenticated and produced as herein provided, shall be deemed evidence as if the original of such books, entries or records were produced.

Added by L. 1915, ch. 325, in effect Sept. 1, 1915.

§ 870. Deposition of a party, or person who expects to be a party.

History of article.—The provisions of this and following sections relating to the examination of an adverse party constitute a substitute for the bill of discovery. *Lotz v. Standard Vulcanite Pan Co.* (1917), 102 Misc. 68, 168 N. Y. Supp. 446.

Deposition before trial; action for salary.—Where in an action to recover a balance of salary due under a written contract, the amount of which is to be determined by facts peculiarly within the knowledge of the defendant, the plaintiff is entitled as a matter of right to examine the defendant before trial. *Oppenheimer v. Van Raalte* (1912), 151 App. Div. 601, 136 N. Y. Supp. 197.

Action for accounting; issues involving right.—A plaintiff may examine the defendant upon all issues involving the right to an accounting, but not as to issues which may arise only in the event that he succeeds in establishing the defendant's duty to account. *Vejarano v. Bruning* (1914), 165 App. Div. 246, 150 N. Y. Supp. 778.

Where so-called defenses in an action involving an accounting are substantially the negative of the matters which the plaintiff will have to prove as a part of his affirmative defense, an order for the examination of the defendant before trial may be granted. But such an order allowing an examination "upon the issues in this action" is too broad. *Vejarano v. Bruning* (1914), 165 App. Div. 246, 150 N. Y. Supp. 778.

Bankruptcy, action by trustee.—Order for the examination of defendant before trial in action by trustee in bankruptcy to set aside conveyances in fraud of creditors. *Ewen v. Hoefer* (1913), 155 App. Div. 885, 139 N. Y. Supp. 1054.

Breach of promise; examination as to finances.—Where the defendant in an action for breach of promise of marriage besides a general denial pleads as a separate defense a general release which is not denied, a motion to vacate an order for the examination of defendant before trial, as to his finances will be granted. *Berger v. Herbert* (1913), 81 Misc. 360, 142 N. Y. Supp. 2.

Commissions on sales.—Examination of defendant in action to recover commissions on sales made in foreign country, see *Lyon v. Gloeckner* (1913), 80 Misc. 642, 141 N. Y. Supp. 861.

Corporations; examination of officers.—Where a corporation sues upon a promissory note of which it has become the holder, it may be examined before trial by its of-

ficers as to matters of defense alleged by the defendant, although they occurred prior to the formation of the corporation, where the officers had personal knowledge thereof. *New York Assets Realization Co. v. Pforzheimer* (1913), 158 App. Div. 700, 143 N. Y. Supp. 898.

A corporation sued for an alleged fraudulent conspiracy cannot claim exemption from an examination before trial upon the ground that the evidence which the plaintiff will seek to elicit from one of its officers will tend to involve him in a criminal offense. The privilege of said officer to refuse to answer incriminating questions is purely personal to him and he may waive that privilege; it cannot be asserted by the corporation itself. *Kellogg v. Match Supply Co.* (1915), 168 App. Div. 671, 154 N. Y. Supp. 359.

A stipulation by a corporation to produce all of its books and papers at trial does not deprive the plaintiff of the right to examine it through its officers before trial and to have the books and papers produced at such examination. *Kellogg v. Match Supply Co.* (1915), 168 App. Div. 671, 154 N. Y. Supp. 359.

A corporation not a party to an action cannot be examined before trial. *Lasher v. Hart* (1918), 170 N. Y. Supp. 931.

Divorce; examination as to acts of adultery.—The fact that the defendant in an action for divorce may exercise his constitutional privilege and refuse to testify as to the acts of adultery alleged in the complaint, is not a valid reason for denying plaintiff's right for an order for the examination of defendant before trial as to such acts, but no inquiry can be made as to his property or income. *Reynolds v. Reynolds* (1913), 81 Misc. 362, 142 N. Y. Supp. 1.

Libel, action for.—Where a complaint in an action against a corporation for libel names several individual defendants as persons who caused the article complained of to be printed and published, which is denied by the answer, the plaintiff is entitled to examine the individual defendants before trial to establish their connection with the publication. *Mason v. New York Review Pub. Co.* (1913), 154 App. Div. 651, 139 N. Y. Supp. 639.

Partnership.—Examination of surviving partner in order to frame complaint. *Riley v. McGee* (1915), 165 App. Div. 768, 152 N. Y. Supp. 485.

Separation, action for; amount of income of defendant.—In an action by the wife for a separation in which the husband sets up

a counterclaim, an order for the examination of the husband before trial to disclose the amount of his income and property in order that the amount of alimony may be determined should not be granted. *Van Valkenburgh v. Van Valkenburgh* (1912), 149 App. Div. 482, 133 N. Y. Supp. 942.

Tort action; notice of dangerous condition of premises.—Where a tenant sues her landlord to recover for personal injuries suffered by reason of the alleged negligence of the defendant in permitting a stair carpet to become worn and dangerous, the court will authorize an examination of the defendant before trial for the purpose of showing that it had notice, direct or inferential, of the defective condition of the stairway, for of such notice the plaintiff must give affirmative proof, and to that end the defendant may be required to produce documents in its possession showing actual notice. *Kessler v. North River Realty Co.* (1915), 169 App. Div. 814, 155 N. Y. Supp. 799.

Application to municipal corporation.—Quaere, as to whether §§ 870 and 872 relating to the examination of a party before trial apply to a municipal corporation. *Uvalde Asphalt Paving Co. v. City of N. Y.* (1912), 149 App. Div. 491, 134 N. Y. Supp. 50.

The provisions with reference to examinations do not apply to municipal corporations. *Davidson v. City of New York* (1916), 175 App. Div. 969, 161 N. Y. Supp. 1006.

Motion by intervenor on original complaint.—Where, after the commencement of a representative action for an accounting brought by a holder of income mortgage bonds of the defendant, another holder of bonds was allowed to intervene under § 452 and an order was entered upon a stipulation by the attorneys for all parties that the action be discontinued as to the original plaintiff, the original complaint became the pleading of the new party plaintiff who is entitled to an order for the examination of the defendants before trial. *Leighton v. New York Railways Co.* (1915), 169 App. Div. 553, 155 N. Y. Supp. 444.

Application to nonresidents.—The provisions of the Code with respect to the examination of parties before trial apply to nonresidents as well as to residents of the state, and the court may stay the proceedings of a nonresident party who refuses or fails to obey an order of the court of which he had notice, even though it has not been personally served within the state. *Wolf v. Union Waxed & Parchment Paper Co.* (1912), 148 App. Div. 623, 133 N. Y. Supp. 239; *Western Ivory Button Co. v. Silverberg Import Co., Inc.* (1918), 170 N. Y. Supp. 56.

Application in good faith.—The right to examine an adverse party before trial is

a substantial one which should not be denied if made in good faith and for the purpose of obtaining testimony to be used on the trial; it should only be denied if it is sought for some ulterior purpose. *Kornbluth v. Isaacs* (1912), 149 App. Div. 108, 133 N. Y. Supp. 737.

Whether the examination is sought in good faith or merely to harass the party sought to be examined is for the court's determination in its discretion. *Western Ivory Button Co. v. Silverberg Import Co.* (1918), 170 N. Y. Supp. 56.

Sufficiency of affidavit.—An express allegation that the applicant intends to use a deposition on the trial is not necessary; it is sufficient if it appears from the whole affidavit that the evidence which is desired is material and necessary for the party making the application. *Oppenheimer v. Van Raalte* (1913), 151 App. Div. 601, 136 N. Y. Supp. 197.

Denial of application, where evidence sought contradicts allegations of pleadings.—An application for an order to examine a defendant before trial should be denied where the facts which the applicant states he expects to prove are in exact contradiction of the facts sworn to by the defendant in his verified answer, as it will not be presumed that the defendant would testify contrary to such verified statements. *Vogel Co. v. Backer Construction Co.* (1912), 148 App. Div. 639, 133 N. Y. Supp. 225.

Bill of particulars sufficient.—Where it is alleged that the plaintiff was injured by one of defendant's wagons, which was negligently driven by its employees, and the defendant denies any knowledge or information as to the ownership of such wagon, an order for the examination of the plaintiff before trial as to such issue will not be granted as a bill of particulars would furnish the relief sought. *Crum v. Wright* (1913), 82 Misc. 419, 143 N. Y. Supp. 1080.

Effect of seeking to place cause on short-cause calendar.—The fact that plaintiff sought to place the cause on the short-cause calendar before making an application to examine defendant is immaterial. This section provides that the examination may be taken "at any time, before or during the trial." *Bannister v. Murray* (1915) (App. Div.), 152 N. Y. Supp. 192.

Evidence must be necessary.—On a motion for an order to examine defendant's managing agent before trial, it must appear that his testimony is necessary and material to the cause of action. *Cook v. People's Milk Co.* (1915), 90 Misc. 34, 152 N. Y. Supp. 465.

Confined to issues.—The examination of a party before trial should be confined to the issues raised by the pleadings. *Palumbo v. L'Araldo Italiano Pub. Co.* (1912), 150 App. Div. 221, 134 N. Y. Supp. 655.

Material evidence to be sought.—To sustain an order for the examination of an adverse party after issue joined it must affirmatively appear that the examination is material and necessary to the applicant in the prosecution or defense of the action. *Del Genovese v. Del Genovese* (1912), 149 App. Div. 266, 133 N. Y. Supp. 765.

Prying into opponent's case.—While the courts are liberal in allowing examinations before trial, a party will not be granted an order permitting such examination merely for the purpose of prying into his opponent's case or cross-examining him in advance. *Kerr v. Hammond* (1912), 153 App. Div. 681, 138 N. Y. Supp. 619.

Where it is apparent that the real purpose of an examination of the defendant in an action for alienation of the affections of plaintiff's wife is to cross-examine him and obtain knowledge of what he will testify to, a motion to vacate the order of examination will be granted. *Dryden v. Lattimer* (1914), 88 Misc. 473, 151 N. Y. Supp. 121.

Testimony from other sources.—An order for the examination of defendant before trial may be granted though the testimony sought to be elicited can be obtained from other sources. A plaintiff is entitled to an order for the examination of defendant before trial to elicit facts which though denied by the answer, the plaintiff is bound to prove in the first instance in order to make out his cause of action. *Plohn v. Columbia Amusement Co.* (1912), 76 Misc. 252, 134 N. Y. Supp. 947.

Information obtainable elsewhere.—The mere fact that from sources other than defendant plaintiff can obtain information sought by an order for defendant's examination before trial is no reason why the order should not be granted. *Scherick v. M. & L. Hess, Inc.* (1915), 91 Misc. 484, 155 N. Y. Supp. 617.

Personal knowledge of the plaintiff, or the fact that he has other evidence of the issue is no bar to his examination of the defendant. *Skidelsky v. Rosenbloom* (1915), 155 N. Y. Supp. 616.

Testimony required to establish case.—A defendant is not entitled to examine a plaintiff before trial as to matters which the plaintiff himself must establish on the trial to make out a *prima facie* case. *Siede v. Newkirk* (1912), 148 App. Div. 864, 133 N. Y. Supp. 623.

A plaintiff, except under unusual circumstances, has no right to examine a defendant before trial as to facts which must be affirmatively established as a part of the defense. *Vejarano v. Bruning* (1914), 165 App. Div. 246, 150 N. Y. Supp. 778.

Examination; necessity.—A party is entitled to an order for the examination of an adverse party before trial only upon proof that such examination is material and necessary. *Lesen Advertising Agency*

v. Perkins (1916), 93 Misc. 516, 157 N. Y. Supp. 304.

Idem; scope.—The court will grant a party to an action an opportunity to examine his adversary before trial only for the purpose of proving facts necessary to the examining party's affirmative case or defense, but not for the purpose of disproving facts which the adversary must affirmatively prove in order to succeed. *Kessler v. North River Realty Co.* (1915), 169 App. Div. 814, 155 N. Y. Supp. 799.

Idem; to frame bill of particulars.—Where the plaintiff in an action for damages for an alleged conspiracy to injure his business by enticing away patrons and employees has been ordered to give a bill of particulars, and the order provides that only those particulars of which plaintiff has knowledge need be given and as to particulars of which it has no knowledge it shall state the lack of knowledge under oath, it is not entitled to a subsequent examination of the defendant before trial for the purpose of framing the bill of particulars, for the plaintiff is protected by the terms of the original order. *Evening Herald Co. v. Kilmer* (1916), 172 App. Div. 687, 159 N. Y. Supp. 251.

While orders of examination of parties or their employees to enable an adverse party to prepare a bill of particulars should be sparingly granted, there is authority for such orders where a party has been ordered to furnish a bill of particulars as to matters of which he is ignorant and which are within the peculiar knowledge of the other party or his employees. *Larrere v. Morse Dry Dock & Repair Co.* (1916), 161 N. Y. Supp. 877.

Idem; after issue joined.—There are certain fundamental differences between an examination of an adverse party after issue joined to obtain evidence for use at the trial and an examination in order to frame a complaint, and decisions as to the former are not necessarily authoritative as to the right to the latter. The purpose of an examination after issue joined, but before trial, is to develop the truth, and where the moving papers comply with the statute the party is entitled to the order as a matter of law. *Whitley v. Speed* (1916), 171 App. Div. 102, 156 N. Y. Supp. 973.

Examination of defendant before trial in suit for foreclosure of mechanic's lien, see *Cooper & Evans Co. v. Manhattan Bridge Three-Cent Line* (1914), 164 App. Div. 64, 149 N. Y. Supp. 433. In action to recover money loaned. *Stevens v. Weygandt* (1914), 163 App. Div. 543, 148 N. Y. Supp. 958.

Idem; where plaintiff has nothing to prove except amount due.—A plaintiff who, under the pleadings in an action to recover for merchandise sold and delivered, has nothing to prove except the amount due and unpaid, is not entitled to an order for the examination of defendant be-

fore trial as to his alleged separate defense and counterclaim. *Empire Cream Separator Co. v. Diamond* (1914), 164 App. Div. 223, 149 N. Y. Supp. 649.

Idem; denial of allegations of complaint.—A plaintiff who was induced to purchase stock at a price above its value, through the misrepresentation of the defendants, is entitled to an order for the examination of the defendants before trial, although they have denied the allegations of the plaintiff by a verified answer. Such answer raises no presumption that nothing can be elicited from the defendants in support of the allegations of the complaint. *Schweimler v. Earle* (1915), 168 App. Div. 819, 154 N. Y. Supp. 456.

Id.; in representative action by stockholder to compel directors to account.—The plaintiff need not show, in order to be entitled to such examination, that the evidence is absolutely necessary. *Eckman v. Lindbeck* (1917), 178 App. Div. 720, 165 N. Y. Supp. 145.

Examination in the nature of an anticipatory cross-examination will not be allowed, nor when it is for the purpose of allowing plaintiff "to properly prepare for trial." *Sutro v. Rubber Trading Co.* (1915), 155 N. Y. Supp. 103.

To enable party to meet defense of other party.—An examination of an adverse party before trial may be allowed not only to enable the moving party to obtain testimony to establish his cause of action or defense but to meet and overcome the case or defense of the other party. *Kircher v. Goebel* (1916), 93 Misc. 130, 156 N. Y. Supp. 1101.

Where the defendants have all the information necessary to enable them to answer, a motion for an order for the examination of the plaintiffs before answering will be denied. *Sothman v. Rockefeller* (1915), 168 App. Div. 826, 154 N. Y. Supp. 449.

To enable plaintiff to frame complaint.—Ordinarily an examination of a defendant before trial will not be allowed merely to enable the plaintiff to state the amount which he claims to be entitled to recover; but where the uncontroverted allegations in the plaintiff's affidavit serve to show that he has a cause of action, but also indicate that he is without sufficient information to intelligently frame his complaint, an examination may be granted. *Mendelson v. Newborg* (1913), 155 App. Div. 892, 139 N. Y. Supp. 1052.

Effect of denial of allegations in complaint.—The mere fact that allegations of a complaint are denied by the answer does not deprive plaintiff of his right to an order for examination of defendant before trial. *Heine v. Weller* (1913), 82 Misc. 402, 143 N. Y. Supp. 752.

The city court of the city of New York is expressly authorized by this section and § 873 to appoint referees to take the examination of parties before trial. *Gedney v. Planten* (1915), 90 Misc. 275, 153 N. Y. Supp. 423.

Order for examination; when vacated.—Where a party has complied with all the requirements of the Code in moving for an order for the examination of the adverse party before trial, the order should not be vacated if the court can reasonably see that the application was made in good faith. *Blum v. Rosenbaum* (1914), 87 Misc. 292, 149 N. Y. Supp. 960.

An order for the examination of a defendant before trial may be vacated where the complaint is insufficient. *Cash v. American Specialty Tailoring Co.* (1913), 157 App. Div. 729, 142 N. Y. Supp. 767.

Inspection of books and papers cannot be obtained under this section, but only under §§ 803-809. *Quinby v. Ellithorp* (1918), 170 N. Y. Supp. 969.

§ 871. Deposition of a witness not a party.

The complaint must state a cause of action or the commission will not issue. *Price v. Tompkins* (1918), 171 N. Y. Supp. 844.

A corporation not a party to the action cannot be examined before trial. *McCormack v. Holbrook* (1917), 176 App. Div. 927, 162 N. Y. Supp. 1128.

§ 872. Application; contents of affidavit.

7. Any other fact necessary to show that the case comes within one of the two last sections. And if the party sought to be examined is a corporation, joint-stock or other unincorporated association, the affidavit shall state the name of the officers, directors, or managing agents thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers, and on such examination the books or papers, or any part or parts thereof, may be

offered and received in evidence in addition to the use thereof by the witness to refresh his memory.

Whole section amended by L. 1879, ch. 542; L. 1880, ch. 536; L. 1893, ch. 721; L. 1895, ch. 946; L. 1911, ch. 781; subd. 7 amended by L. 1913, ch. 278, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "joint-stock or other unincorporated association," in line 3, and the words "or managing agents," in line 4.

Source.—R. S., pt. 3, ch. 7. tit. 3, §§ 2, 34.

Omission of names of attorneys.—Where, in an action brought against a corporation to recover damages for a breach of warranty as to certain soda ash, the affidavit upon which an order for defendant's examination before trial was granted describes the one to be examined as "manager of the chemical department of the defendant, and who is chiefly in charge of the situation at issue," but fails to give the names of the attorneys for the respective parties and their residences or office addresses, as required by subdivision 1, and the moving affidavit upon motion to vacate said order does not deny that the one sought to be examined is such "manager," the motion will be granted unless defendant files an additional affidavit complying with said section. *Miller v. W. K. Jahn Co., Inc.* (1918), 104 Misc. 370, 172 N. Y. Supp. 219.

Technicalities removed.—An examination of a party before trial as to any or all of the issues may be had only upon a substantial compliance with the provisions of this section and rule 82 of the General Rules of Practice, disregarding all technical objections, and upon showing facts and circumstances that the testimony is material and necessary. *Behl v. Greenbaum* (1918), 102 Misc. 623, 169 N. Y. Supp. 179.

Affidavit to show that testimony is material.—To entitle a plaintiff to examine a defendant before trial it must affirmatively appear, specifying facts and circumstances, that the testimony to be taken is material and necessary for plaintiff or the prosecution of the action. *Van Ripper v. Ray* (1914), 87 Misc. 445, 150 N. Y. Supp. 947.

Affidavits sufficient for examination of defendant before trial. *Behl v. Greenbaum* (1918), 183 App. Div. 238, 171 N. Y. Supp. 129.

To sustain an order for the examination of an adverse party after issue joined it must affirmatively appear that the examination is material and necessary to the applicant in the prosecution or defense of the action. *Del Genovese v. Del Genovese* (1912), 149 App. Div. 266, 133 N. Y. Supp. 765.

Where plaintiff's moving papers state not only that he requires the testimony sought to prepare for trial, but also that he intends to use it on the trial, and the papers show that he expects to prove certain material facts in issue by the examination, they are sufficient in this respect. *Korn-*

bluth v. Isaacs (1912), 149 App. Div. 108, 133 N. Y. Supp. 737.

Failure of affidavit to state nature of defense.—An affidavit upon an application for an order for the examination of a defendant before trial which fails to state the nature of the defense does not comply with subdivision 2. Such defect is substantial, for without such a statement the necessity for, and materiality of, the examination cannot be determined. *Titus v. Schneck* (1918), 185 App. Div. 585, 173 N. Y. Supp. 230.

Addresses and names lacking. *Lasher v. Hart* (1918), 170 N. Y. Supp. 931.

The application must set forth facts and circumstances from which the materiality and the necessity of the testimony will appear. It is not sufficient to state conclusions. *Van Rensselaer v. Chism* (1917), 167 N. Y. Supp. 2.

Facts to be proved in contradiction of pleading.—An application for an order to examine a defendant before trial should be denied where the facts which the applicant states he expects to prove are in exact contradiction of the facts sworn to by the defendant in his verified answer, as it will not be presumed that the defendant would testify contrary to such verified statements. *Vogel Co. v. Backer Construction Co.* (1912), 148 App. Div. 639, 133 N. Y. Supp. 225.

Deficiencies in affidavits under this section may be supplied under § 768. *Frank v. Gruber* (1914), 88 Misc. 297, 150 N. Y. Supp. 664.

An order for the examination of a defendant corporation before trial is improper in form where instead of requiring the examination of the corporation itself it provides for the examination of its managing agent as the adverse party, if such agent is not a party to the action adverse or otherwise. Moreover, such order should not provide for the examination of a witness "concerning the matters relevant to the issues in this action" where the issues include affirmative defenses raised by the defendant's plea of *ultra vires* and lack of consideration for the obligation sued upon. The order should not give the plaintiff a right to examine the defendant as to its defenses. *Verdi v. Nocenti Co.* (1917), 177 App. Div. 489, 163 N. Y. Supp. 1133.

Moving papers sufficient.—*United States Drainage Co. v. Hawley* (1915), 166 App. Div. 942, 151 N. Y. Supp. 1148.

Sufficiency of moving papers for examination of defendant corporation before

trial. *Terry v. Ross Heater Mfg. Co., Inc.* (1917), 180 App. Div. 714, 167 N. Y. Supp. 747.

Moving papers insufficient.—*Central Trust Co. v. Weidenfeld* (1918), 183 App. Div. 375, 170 N. Y. Supp. 767.

Plaintiff unable to allege cause of action.—An order for the examination of defendants, in an action to recover for personal injuries, granted upon affidavits stating that it is material and necessary for deponent to examine the officers of the defendants for the purpose of ascertaining which of said corporations was negligent and careless in the maintaining, operating and conducting of its electrical system so that deponent may prosecute the action against the corporation responsible for his damage, and prepare his complaint, will be vacated and set aside on the ground that plaintiff, being unable to allege the cause of the accident which resulted in injury to him, was unable to allege a cause of action against either of defendants. Had the order provided for the examination of defendants as to the ownership of the equipment it would be permitted to stand, but the court has no power to modify said order. *Boyle v. Municipal Gas Co.* (1916), 96 Misc. 578, 161 N. Y. Supp. 991.

Testimony from other sources.—An order for the examination of defendant before trial may be granted though the testimony sought to be elicited can be obtained from other sources. A plaintiff is entitled to an order for the examination of defendant before trial to elicit facts which, though denied by this answer, the plaintiff is bound to prove in the first instance in order to make out his cause of action. *Plohn v. Columbia Amusement Co.* (1912), 76 Misc. 252, 134 N. Y. Supp. 947.

Corporation.—An order for the examination of a defendant corporation before trial is irregular where it does not require the examination of the defendant itself but merely authorizes the examination of certain officers. But the order will not be vacated for such irregularity, as it may be cured by amendment. *Kram v. Jewish World Publishing Co.* (1917), 176 App. Div. 840, 163 N. Y. Supp. 261.

Although an order for the examination of the president of a corporation before trial should direct the examination of the corporation by its president instead of directing the examination of the president of the corporation, a mistake in this respect is a mere irregularity which may be cured by amendment. *Palumbo v. L'Araldo Italiano Pub. Co.* (1912), 150 App. Div. 221, 134 N. Y. Supp. 655.

The books of a corporation must be produced for examination and for inspection, and for admission in evidence only where the judge has so ordered. *Varley v. Wayne Oil Tank & Pump Co.* (1916), 158 N. Y. Supp. 155.

Foreign corporation.—It seems, that where the defendant is a foreign corporation not doing business in this state, the order for the examination before trial should not require the corporation to bring its books into this state for examination, there being nothing to show that they are within the jurisdiction, and the plaintiff should be left to his remedy by commission to obtain proof of the entries in the books. *Kram v. Jewish World Publishing Co.* (1917), 176 App. Div. 840, 163 N. Y. Supp. 261.

An order for examination before trial may not be used to require a foreign corporation defendant, having no officer or office or place of business in this state, at its own expense, to bring its officers or employees and its records here for examination, instead of procuring the testimony and evidence by a commission. *Sivelli v. New River Coal Co.* (1918), 184 App. Div. 62, 171 N. Y. Supp. 429.

Municipal corporations.—This section does not apply to a municipal corporation as a party to an action. *Davidson v. City of New York* (1917), 221 N. Y. 487.

Examination; when granted.—A defendant is not entitled to examine a plaintiff before trial as to matters which the plaintiff himself must establish on the trial to make out a *prima facie* case. *Siede v. Newkirk* (1912), 148 App. Div. 864, 133 N. Y. Supp. 623.

Where in an action against co-defendants, one defendant has answered and another demurred, an application for the examination of the defendants is premature. *Frear v. Duryea* (1912), 151 App. Div. 687, 136 N. Y. Supp. 264.

The mere probability that a nonresident witness may return within the jurisdiction at a future date is not sufficient ground for vacating an order for examination before trial. *Klaw v. New York Press Co., Limited* (1912), 151 App. Div. 720, 136 N. Y. Supp. 224.

Where a witness not a party to an action is a nonresident his examination before trial can only be had by compliance with subdivision 5, which must be read in connection with § 882 which specifies what proof must be made to use the deposition upon the trial and that the special circumstances relied on must be such as to justify a well-grounded apprehension at least that the examination of the witness cannot be had on the trial as well as before. *Rudini v. North British and Mercantile Insurance Co.* (1911), 91 Misc. 486, 155 N. Y. Supp. 301.

An order for the examination of a party before trial should not be granted where most of the matters sought are neither necessary nor material and could have been obtained by a bill of particulars. *Pfeifer v. McNally* (1917), 163 N. Y. Supp. 577.

Examination of defendants before trial granted. *Oppenheim v. Abbott* (1916), 160 N. Y. Supp. 438.

Examination of defendants before trial in an action by a director on behalf of the corporation against the other two directors for waste of the assets of the corporation. See *Murray De Drago* (1917), 165 N. Y. Supp. 662.

In an action for conversion, the examination of the defendant before trial may be granted, although the effect of the allegations of the complaint is to charge the defendant with the crime of larceny, and he makes no claim of privilege. *Smart Set Shirt Co. v. Roberts* (1916), 159 N. Y. Supp. 665.

Examination not permitted to frame complaint.—*Zurich General Accident and Liability Insurance Co. v. Union Ferry Co.* (1918), 184 App. Div. 882, 170 N. Y. Supp. 758.

Purpose for which granted.—While the courts are liberal in allowing examinations before trial, a party will not be granted an order permitting such examination merely for the purpose of prying into his opponent's case or cross-examining him in advance. *Kerr v. Hammond* (1912), 153 App. Div. 681, 138 N. Y. Supp. 619.

A plaintiff is not entitled to examine the defendant merely to establish the negative of a proposition of which the defendant must establish the affirmative. *Jurow & Co. v. Westchester Fire Ins. Co.* (1917), 163 N. Y. Supp. 1069.

Examination of defendant before trial; prior adjudication that plaintiff has no interest in controversy; subsequent intervention of other plaintiffs.—The court in its discretion should not grant an order for the examination of a defendant before trial where it has been determined in another action in the federal court that the plaintiff seeking the examination of the defendant has no interest in the controversy, even though the prior adjudication is not binding upon the plaintiff because it is not also binding upon the defendant. Where the action is brought against the defendant as the manager of a syndicate, charging him with certain wrongdoing and seeking an accounting on behalf of other syndicate members who may come in and join as plaintiffs, the order for the examination before trial cannot be upheld because another person, claimed to be a syndicate member, has subsequently joined as plaintiff, if the new plaintiff has made no complaint and has presented no issue for denial by the defendant and has not joined in the application for his examination. The right of the examination depends upon the rights of the original plaintiff. *South American Securities Co. v. McKelvey* (1917), 176 App. Div. 729, 163 N. Y. Supp. 1034.

The examination of a defendant before trial will not be granted where it will simply permit the plaintiff to cross-ex-

amine the defendant as to matters constituting his alleged defense in advance of the trial. *Wallace v. White* (1916), 159 N. Y. Supp. 74; *Brucato v. Sciortino* (1916), 159 N. Y. Supp. 645.

Discretion of judge.—The granting of such examination before trial rests in the sound discretion of the judge, and it should only be ordered when the application is made in good faith and not to enable the applicant to discover whether or not he has a cause of action. *Terry v. Ross Heater & Mfg. Co., Inc.* (1917), 180 App. Div. 714, 167 N. Y. Supp. 747.

Special circumstances requiring examination.—A motion for the examination before trial of a witness for the defendant residing in this state, who in all probability will be available at the trial, should not be granted, upon the ground that the witness has close relations with the defendant, constituting "special circumstances" why such an examination should be granted within the meaning of subdivision 5 of this section, where there is nothing in the witness' relations with the defendant which would induce him to swear falsely, and where he has already freely furnished such information as has been sought from him. *Harburger v. Westchester Fire Ins. Co.* (1915), 167 App. Div. 1, 152 N. Y. Supp. 272.

Where an examination before trial of a witness not a party is applied for on the ground of special circumstances the order should be sparingly granted upon a well-grounded apprehension that the examination of the witness cannot be had at the trial, and only when it is necessary to prevent a failure of justice. Where though in an action against a railroad company to recover for personal injuries all that plaintiffs urged to sustain an order for the examination before trial of two yardmasters of the defendant would be sufficient ground for such an examination of the defendant, but it is not made to appear that plaintiffs are in danger of losing the testimony of said witnesses upon the trial or that to deny the privilege of the examination asked for would end the plaintiffs' case, a motion to vacate said order will be granted. *Barnet v. New York Central & H. R. R. Co.* (1919), 106 Misc. 198, 175 N. Y. Supp. 491.

Conduct of examination; production of books.—Books produced under a subpoena *duces tecum* on the examination of a defendant before trial are only required to refresh his memory so as to render the examination effective. *Shogry v. Naser* (1913), 80 Misc. 145, 140 N. Y. Supp. 1014.

Necessary examination means needful examination and does not mean absolutely necessary or indispensable. *Terry v. Ross Heater Mfg. Co., Inc.* (1917), 180 App. Div. 714, 167 N. Y. Supp. 747.

Necessity that statute be strictly complied with.—Where plaintiff's affidavit solely upon which an order for defendant's

examination was granted, stated that the action was brought for breach of an oral contract containing certain agreements, but nothing is stated in relation to the substance of the judgment demanded, as required by this section, an order for defendant's examination should not be granted. *Cauet v. Smith* (1914), 86 Misc. 99, 149 N. Y. Supp. 101.

Personal injuries; testimony showing that defendant was operating automobile.—Where in an action to recover for personal injuries alleged to have been caused by the negligent operation of an automobile, it is incumbent upon the plaintiff to show that the defendant was operating the vehicle, and, if not, his relation to the person who was operating it; the plaintiff is entitled to examine the defendant before trial on that question. *Brichta v. Simon* (1912), 152 App. Div. 832, 137 N. Y. Supp. 757.

Examination of defendant; libel.—Where the plaintiff in an action for libel has complied with the provisions of this section, the court cannot deprive him of his legal right to examine defendant before trial to prove if possible that he has sustained exemplary damages by the sending of an alleged slanderous letter by defendant to certain wholesale druggists calculated to deceive the public and consumers into be-

lieving that his goods were those of plaintiff, and a motion to vacate an order for the examination of defendant will be denied. *Gerney v. Planten* (1915), 91 Misc. 493, 155 N. Y. Supp. 288.

The words "about to depart from the state" in subd. 5 mean to depart without intention or reasonable likelihood of an early return. An order for the examination of a witness not a party should not be granted on the ground that he is about to depart from the state, when it appears that, although his residence is in an adjoining state, he comes regularly every week into this state for the transaction of business at an established office, and there is nothing to show that he has an intention to remain away from this jurisdiction. *Warner v. Dockendorff* (1917), 180 App. Div. 72, 167 N. Y. Supp. 247.

Accounting.—Examination of defendants before trial refused as to the dividends and income of stock until plaintiffs have established their right to an accounting. *Bamberger v. Cooke* (1918), 181 App. Div. 805, 169 N. Y. Supp. 227.

Managing agent.—A person who is the manager of the chemical department of defendant's business is "managing agent thereof." *Miller v. W. K. Jahn Co., Inc.* (1918), 104 Misc. 370, 172 N. Y. Supp. 219.

§ 873. Order for examination.

Discretion of court.—The granting of the order rests in the sound discretion of the court, although the statute says it must be granted. *Behl v. Greenbaum* (1918), 102 Misc. 623, 169 N. Y. Supp. 179.

Whether the moving papers present a case for the exercise of the power of the court is a matter for judicial determination. —In the first and second departments substantially the following rule for guidance in such judicial determination was laid down some years ago: Where an issue of fact is presented to be determined upon the trial of the action, and where it appears that a party to the action has knowledge of facts which are material in the determination of that issue, his adversary may take that party's deposition for use at the trial. The present practice is that the application will be granted if the moving papers are technically sufficient, if the essentials prescribed in the general rule above mentioned exist and if, in the opinion of the judge, upon all the facts before him the cause of justice will on the whole thereby be advanced. *Bradbury v. Gibbons* (1916), 97 Misc. 460, 161 N. Y. Supp. 685.

A special term has no authority to grant an original order under this section, it must be made by a judge. *Metera v. Foster Paving Block Co.* (1915), 171 App. Div. 957, 155 N. Y. Supp. 760.

Scope of examination.—The order of examination should be limited to issues upon which the plaintiff has the affirmative.

Goodwin v. Mirror Films, Inc. (1916), 175 App. Div. 432, 161 N. Y. Supp. 1046; *Tyler v. Twin City Power Co.* (1917), 179 App. Div. 652, 167 N. Y. Supp. 37.

Use for ulterior purposes.—An order for the examination of the defendant before trial, in an action to recover damages for alienating the affections of plaintiff's wife and for criminal conversation, should not be granted as it might be used for ulterior purposes. *Gullette v. Field* (1916), 96 Misc. 81, 159 N. Y. Supp. 646.

Municipal corporations.—This section does not apply to a municipal corporation as a party to an action. *Davidson v. City of New York* (1917), 221 N. Y. — (mem.).

Physical examination.—Under § 873 the court may not require defendant's physicians to file a report of their examination. The provisions of this section do not contemplate any examination of the examining physicians before the referee or that they file a report but only that they would be expected to testify on the trial like other witnesses if called by either party. To justify an order for an examination it must appear that defendant is ignorant of the nature and extent of injuries complained of and the court must protect plaintiff from disreputable or objectionable handling. If the nature of the proposed examination is dangerous as administration of anaesthetics, the court will not require the hazard to be taken if plaintiff objects; other directions and restrictions as

to the making of the examination may be imposed. Physician takes no oath and is entitled to no statutory fee. *Mizak v. Carborundum Co.* (1912), 75 Misc. 205, 132 N. Y. Supp. 1104.

Assuming that the general provisions of the code with respect to examinations before trial are now applicable to the surrogate's court (see § 2770), said provisions would not authorize a physical examination of a person named as executor in a will, for the purpose of establishing that he is mentally incompetent for the office. The authority for such physical examination is confined to actions for personal injuries. *Matter of Leland* (1916), 175 App. Div. 56, 161 N. Y. Supp. 315.

Where on allegations that one named as executor in a will was physically and mentally incapable of performing the duties of executor objections were filed to the issuance of letters testamentary to him, and it does not appear from the moving papers that his testimony if taken before the trial would be used upon the trial of the issue raised by the objection, and that an examination as to his mental capacity can be conducted as effectively on said trial as on an examination before trial, the application for an examination into the matter before trial will be denied. *Matter of Leland* (1916), 95 Misc. 440, 159 N. Y. Supp. 533.

Right to take photograph.—The right to an examination of witnesses before trial is purely statutory, and authority for physical examination of a party to an action does not include authority to take photograph or X-ray pictures, and this is especially true where the defendant has already, by consent of the plaintiff, had the advantage of a physical examination. *Lasher v. Bolton* (1913), 161 App. Div. 381, 146 N. Y. Supp. 321.

A plaintiff in an action for personal injuries may not be compelled to submit to an X-ray examination of his injured bones as a part of his physical examination before trial, as it is not absolutely certain that he will not be injured by the taking of the radiograph. *Gregory v. Acme Road Machinery Co.* (1916), 175 App. Div. 473, 162 N. Y. Supp. 574.

Right to direct production of books.—Upon the examination, if it appears that defendant is unable to testify from his recollection concerning the matters to which the examination is permitted, and that he can answer by referring to the books, then plaintiff may procure their production to aid the memory of the witness by the service of a subpoena *duces tecum*. This section only requires defendant to submit to the examination. It does not authorize a direction requiring the party to be examined to produce books and papers for any purpose. *Sherman v. Einhorn* (1913), 162 App. Div. 815, 147 N. Y. Supp. 1077.

Necessity that act be compelled with.—There is no inherent right in the court to

compel a physical examination of a plaintiff. Without the statute there would be no such right, and the fact that the plaintiff is an infant does not enlarge the powers of the court, nor permit it to overlook the rules under which the right is given. *Lasher v. Bolton* (1913), 161 App. Div. 381, 146 N. Y. Supp. 321.

Where no reason is stated for shortening the time service to four days, the order will be vacated. *Lasher v. Hart* (1918), 170 N. Y. Supp. 931.

Vacating order of examination.—If an order for the examination of a party before trial, together with the affidavit upon which it was granted have been served upon the party within the time directed, the order of examination should not be vacated merely because the service of said papers was not made upon the party's attorney until a later date. The service on the attorney may be made within a reasonable time before the examination, and four days is such a reasonable time. *Tur v. Arrue* (1913), 156 App. Div. 547, 141 N. Y. Supp. 586.

Modifications of order.—Where an order for the examination of defendant before trial fails to eliminate from the scope of the examination inquiries which were disallowed by the court, defendant is entitled to a modification of the order in that respect. *Brandler v. Ludewig* (1915), 92 Misc. 236, 155 N. Y. Supp. 577.

Order for examination of the president of defendant corporation modified. *Hayes v. American Bridge Co.* (1915), 171 App. Div. 894, 155 N. Y. Supp. 449.

Where the original order was too broad and on motion was modified so as to limit the examination of the defendants, they should not be charged with motion costs. *Behl v. Greenbaum* (1918), 183 App. Div. 238, 171 N. Y. Supp. 129.

Examination limited.—An order for the examination of defendant directors before trial specifying no particular subject upon which the examination is to be had, should be modified, and the examination limited to matters of which the plaintiff stockholders must make proof in order to establish their cause of action. *Seagrist v. Reid* (1916), 171 App. Div. 755, 157 N. Y. Supp. 979.

A general examination may be had, in the discretion of the judge, which need not be limited to an affirmative cause of action or an affirmative defense. *Bradbury v. Gibbons* (1916), 97 Misc. 460, 161 N. Y. Supp. 685.

Order for examination of defendant before trial limited in scope. *Northwestern Terra Cotta Co. v. Starkey & Co., Inc.* (1918), 182 App. Div. 665, 169 N. Y. Supp. 495.

An examination of the plant of a defendant cannot be obtained by an order under this section. But an inspection may be permitted under §§ 803-809. *Metara v.*

Foster Paving Block Co. (1915), 171 App. Div. 957, 155 N. Y. Supp. 760.

In a wife's action for a separation and support plaintiff is entitled to an order for the examination of defendant before trial as to his means. *Linnekin v. Linnekin* (1916), 96 Misc. 56, 159 N. Y. Supp. 767.

In an action by an agent for commissions on sales, conversations between plaintiff and defendant tending to show the amount of the sales or purchases made by plaintiff may be inquired into under an order for the examination of defendant before trial and the order should so provide. *Brandler v. Ludewig* (1915), 92 Misc. 236, 155 N. Y. Supp. 577.

Action on salary contract.—In an action to recover instalments of salary alleged to be due under a contract of employment and for damages for a wrongful discharge the plaintiff is entitled to an examination of the defendant to enable him to establish the facts of performance and discharge. *Goodwin v. Mirror Films, Inc.* (1916), 175 App. Div. 432, 161 N. Y. Supp. 1046.

In an action to reform a written contract of employment, and for an accounting as to the amount due the plaintiff under the reformed contract, it is permissible to ex-

amine the defendant as to transactions and relations between the parties up to and at the time of the making of the contract sought to be reformed but not as to matters subsequent to that date, until it is determined that the contract should be reformed. *Moore v. Theodore C. Crane's Sons Co.* (1916), 175 App. Div. 972, 161 N. Y. Supp. 984.

Defendant should not be required to file papers and facts with the clerk.—The remedy, if any, is by subpoena *duces tecum*. *Block v. Pross* (1917), 180 App. Div. 73, 167 N. Y. Supp. 1.

Foreign corporation.—An order for the examination of a defendant foreign corporation, which has not been personally served as required, can be enforced only by staying the proceedings of the defendant. *Sivelli v. New River Coal Co.* (1918), 184 App. Div. 62, 171 N. Y. Supp. 429.

Where a defendant foreign corporation had no knowledge of the service of an order for examination before trial upon its attorney, until after the time set for the examination, it was not in default. *Sivelli v. New River Coal Co.* (1918), 184 App. Div. 62, 171 N. Y. Supp. 429.

§ 874. Punishment for disobeying order.

Application.—*Quinby v. Ellithorp* (1918), 170 N. Y. Supp. 969.

Nonresidents.—While the court has no jurisdiction to punish a nonresident party for failing to appear for examination before trial, until personal services of the order has been made within the state, it is competent for the court to stay the proceedings of such nonresident party, who has notice of the order, even though it has been personally served upon him within the state. *Wolf v. Union Waxed & Parchment Paper Co.* (1912), 148 App. Div. 623, 133 N. Y. Supp. 239.

Striking out answer.—Where, upon the hearing of a motion to strike out an answer because of defendant's failure to appear at an adjourned hearing of an examination before trial, it appears that at the time of such adjourned hearing the defendant was and still is in California, and that because of illness he is unable to re-

turn to the state of New York, and although the fact of such illness was not shown with that degree of positiveness as to make it appear that there is no doubt as to the fact, yet, from statements which the court can hardly ignore and which it does not desire to overlook, the motion, if granted, would result in a judgment against the defendant by default, the motion will be denied, but without prejudice to a renewal upon other papers if it clearly appears that defendant is intentionally refusing to recognize and obey the order for his examination before trial. *Flynn v. Roache* (1916), 93 Misc. 284, 157 N. Y. Supp. 931.

Contempt for failure of secretary of corporation to appear in obedience to order for its examination before trial. *Todd v. Silk Association of America* (1917), 100 Misc. 403, 167 N. Y. Supp. 1079.

§ 875. Service of order, etc.

Order vacated when papers not served as required.—An order for the examination of a witness before trial will be vacated where the papers were not served upon the attorneys for a defendant who has appeared, or personally upon a defendant who has not appeared. The court has no authority to provide in the order that service upon the witness alone shall be suffi-

cient. *Hellman v. Gunther* (1917), 176 App. Div. 527, 163 N. Y. Supp. 245.

Service on attorney.—An order is unauthorized which directs that service upon an attorney shall be sufficient. *Western Ivory Button Co. v. Silverberg Import Co.* (1918), 170 N. Y. Supp. 56.

Neither defendant nor her attorneys served. *Lasher v. Hart* (1918), 170 N. Y. Supp. 931.

§ 880. Manner of taking and returning depositions; rules therefor.

Nature and scope of examination.—Considerable latitude should be given in examining an adverse party before trial, for it is in the nature of a cross-examination to elicit the truth and shorten the trial. *Gunther v. Ridgway Co.* (1913), 159 App. Div. 74, 143 N. Y. Supp. 891.

Right to pass on competency and admissibility of evidence.—Upon the examination of a defendant before trial only questions relating to the relevancy of the evidence to the issues and with respect to whether the witness is privileged from answering

should be considered. The competency and admissibility of the evidence are matters to be determined at the trial. *Guenther v. Ridgway Co.* (1913), 159 App. Div. 74, 143 N. Y. Supp. 961.

Action for libel; truth of article as relevant.—Upon the examination before trial of an officer of the defendant, a corporation, in an action for libel questions relating to the truth of the alleged libelous articles are relevant. *Guenther v. Ridgway Co.* (1913), 159 App. Div. 74, 149 N. Y. Supp. 961.

§ 882. Proof of witness's inability to attend.

Deposition may be read in evidence notwithstanding the party is present at the trial. *Zlinkoff v. Bonis* (1918), 171 N. Y. Supp. 228.

Nonresident witness; business requiring daily attendance in this state.—Where in an action on a policy of fire insurance the affidavit of plaintiff on a motion for an order for the examination of nonresident witness in the employ of defendant, a foreign corporation, does not comply with

§ 872(5), and it appears that the business of both requires their daily attendance at defendant's office in the city of New York, that they are in good health and have no intention of leaving this state except for the purpose of going home each evening, a motion to vacate an order for their examination before trial will be granted. *Rudini v. North British & Mercantile Ins. Co.* (1915), 91 Misc. 486, 155 N. Y. Supp. 301.

§ 885. Deposition to be used on motion.

All communications between the surrogate and his chief clerk and his stenographer arising out of the work in the consultation room of the surrogate are privileged and an application to procure the

deposition of said clerk and stenographer in regard to such communication will be denied. *Matter of Cohen* (1919), 105 Misc. 724, 174 N. Y. Supp. 427.

§ 887. When commission to issue.

Nonresidents.—The provision of the Code with respect to examination of parties before trial apply to nonresidents as well as to residents, and the party entitled to such examination is not obliged to resort to the other provisions of the Code relating to taking depositions without the state. *Wolf v. Union Waxed & Parchment Paper Co.* (1912), 148 App. Div. 623, 133 N. Y. Supp. 239.

Mandatory nature of statute.—In the absence of bad faith, the provision of the Code requiring the issuance of a commission upon interrogatories is mandatory. *Estrick v. Kobre* (1914), 84 Misc. 39, 145 N. Y. Supp. 952.

The complaint must state a cause of action or the commission will not issue.

Price v. Tompkins (1918), 171 N. Y. Supp. 844.

When commission to foreign country should be issued; sufficiency of moving papers.—In an action by the assignee of a shipper in a foreign country for damages for defendant's refusal to accept the shipped goods, the plaintiff being compelled to seek his evidence or a part thereof in a foreign country, is entitled almost as a matter of course to a commission, unless he has been guilty of laches or is seeking a delay. Papers on such an application examined, and held sufficient. It is not necessary on a motion for a commission to follow the strict rules appertaining to applications for attachments. *Ax v. Meyer & Lange* (1917), 177 App. Div. 713, 164 N. Y. Supp. 865.

§ 889. How and upon what terms granted.

Laches furnishes sufficient reason to deny a stay of proceedings but is not sufficient to justify a denial of application for commission to take deposition of nonresident

witness. *Zeggio v. Robinson et al.* (1912), 153 App. Div. 886, 137 N. Y. Supp. 1104.

Sufficiency of affidavit.—Where the affidavit upon which an order directing a

commission to examine foreign witnesses sets forth the contract sued on, that at the time of making it with certain persons in Roumania said witnesses "resided and still reside at Husi, Roumania," and "since deponent cannot procure the attendance of these witnesses upon the trial it is necessary that their testimony be taken by commission," etc., the statute has been fairly complied with, and the order will not be reversed because the moving papers did not specifically state that said witnesses were "not within the state of New York." *Estrick v. Kobre* (1914), 84 Misc. 39, 145 N. Y. Supp. 952.

Evidence immaterial.—Contestant on probate of will is not entitled to commission where evidence sought is immaterial. *Matter of Tyrrell* (1918), 184 App. Div. 871, 172 N. Y. Supp. 638.

Question involved on motion for order.—Such a motion must be decided on the affidavits presented to the court. The question is, first, does it appear that there are witnesses not in the state whose testimony is material to the application, and second, is the application made in good faith. *Matter of Shannon* (1917), 180 App. Div. 214, 167 N. Y. Supp. 472.

Commission to take deposition of witness in foreign country.—Where defendant's general manager in England, was ill and threatened with war dangers of ocean travel, and defendant's counsel in good faith awaited his arrival, and the plaintiff is fully secured, the granting of defend-

ant's motion for a commission to take the deposition of its general manager should not be conditioned upon its foregoing an application for a postponement, if the commission be not returned in time for the trial. *Granger Co. v. Universal M. Corp.* (1917), 179 App. Div. 353, 165 N. Y. Supp. 820.

Vacation of stay of proceedings pending execution and return of commission to Holland after the present war will be granted under certain conditions. *Ax v. Meyer & Lang* (1917), 179 App. Div. 615, 166 N. Y. Supp. 934.

Authority of surrogate to grant commission to take testimony of witnesses without the state is governed by this section, and the surrogate has no power in advance to prescribe any time within which a commission may be moved for and to deny any motion made thereafter. An order of the surrogate denying the motion should be reversed where it is shown that the direction of the surrogate to make the motion "at once" was an element in his decision. *Matter of Shannon* (1917), 180 App. Div. 214, 167 N. Y. Supp. 472.

A judge of the municipal court of the city of New York must grant an order for a commission to take testimony provided the moving papers, which under § 768 include the pleadings, make out a *prima facie* case and the evidence sought is material. *Anchor Realty Co. v. Bankers Trust Co.* (1915), 93 Misc. 64, 156 N. Y. Supp. 631.

§ 892. Interrogatories to be annexed; directions for return.

Extent of interrogatories, see *Zeggio v. Robinson* (1913), 155 App. Div. 893, 139 N. Y. Supp. 1070.

Pertinency of proposed questions.—While on a commission to take the deposition of witnesses without the state either party is allowed to insert questions pertinent to the issue, when the pertinency of proposed questions is challenged the proposer must show their pertinency. *Matter of Hernandez* (1913), 158 App. Div. 815, 144 N. Y. Supp. 150.

Pertinent questions must be allowed by the judge on the settlement of interrogatories. *Matter of Smith* (1913), 89 Misc. 628, 633, 142 N. Y. Supp. 151.

Evidence inadmissible under § 835.—Cross-interrogatories calling for communications between an attorney and client may be allowed, although the evidence may be inadmissible under § 835. *Percival v. Richardson* (1917), 165 N. Y. Supp. 1.

§ 893. Commission to examine wholly or partly upon oral questions.

Determination as to competency.—Where it cannot be ascertained in advance whether the testimony of witnesses will be competent or not, the court upon application for a commission for examination will not

pass upon that question, but will leave it until the time of the examination. *Trowbridge v. Townsend* (1913), 79 Misc. 65, 140 N. Y. Supp. 503.

§ 895. Depositions where adverse party is an infant or committee.

As the examination of a nonresident plaintiff can be had only on written interrogatories, a stay pending an appeal from

the order should be granted. *Parsons v. Harry Dowie Co.* (1916), 158 N. Y. Supp. 635.

§ 897. Open commission.

Commissions to examine witnesses orally will only be granted where there are peculiar circumstances warranting such a course. *McCallum v. Beau-Site Co.* (1918), 182 App. Div. 240, 169 N. Y. Supp. 601.

To ascertain defense.—Defendant should not be permitted to take testimony on an open commission merely to ascertain whether it has a defense. *McCallum v. Beau-Site Co.* (1918), 182 App. Div. 243, 169 N. Y. Supp. 603.

§ 901. Commission or order to take depositions; how executed and returned.

Open commission to examine trustee in bankruptcy in foreign state and have books and papers produced and proved.—The proper remedy of the plaintiff is an open commission to examine the trustee in the foreign state and have the books and papers produced and proved, and in case

there should be an objection to the originals being returned here with the commission, to have copies annexed as provided by subdivision 3. *Jaffe v. Weld* (1917), 181 App. Div. 16, 167 N. Y. Supp. 1039.

§ 909. Commission by consent; where return to be kept, parties may inspect.

Modification of commission.—A commission issued for the examination of a witness in a foreign country, requiring him to produce all communications between the defendant's agent and their foreign representative, containing many personal letters, covering many matters not relating to the issues, should be modified by re-

quiring the witness to attach copies of such parts of the communications as refer to the issues and requiring him to produce at the trial the complete communications or copies thereof for submission to the court. *Herbst v. Keystone Driller Co.* (1913), 158 App. Div. 503, 143 N. Y. Supp. 748.

§ 911. Deposition, etc., evidence.

Application.—*Early v. Gebbie* (1918), 170 N. Y. Supp. 117.

§ 913. Letters rogatory.

Letters issued to foreign officials.—Letters rogatory may be issued to officials of the German Empire, there being no provision of law for taking testimony by commission. *Matter of Smith* (1913), 79 Misc. 77, 139 N. Y. Supp. 522.

Stay of trial pending return of letters rogatory for examination of witness in Germany.—Where it has been determined in an action upon a bill of exchange payable in Germany that the defendants are entitled to letters rogatory to take the evidence of a witness in that country, the defendant is entitled to a stay of the trial of the action until the return of said letters, although it is evident that owing to the present war they cannot be returned

for some time to come. However, the plaintiff should be given leave to move to vacate the stay if it subsequently appears that the defendants have unreasonably delayed in procuring the execution and return of said letters. *Mitteldeutschen Privat Bank v. Chaitin* (1917), 177 App. Div. 460, 164 N. Y. Supp. 161.

Pertinency of interrogatories.—While a surrogate upon the settlement of interrogatories to be annexed to letters rogatory must pass upon the pertinency of the interrogatories, all other objections must be reserved until the trial. *Matter of Smith* (1913), 80 Misc. 628, 142 N. Y. Supp. 151.

§ 914. In what cases deposition may be taken.

Jurisdiction.—In an action to recover the amount of a loan sent to defendant at Paris at her request, the plaintiff is entitled to an examination of defendant before trial to prove that letters and telegrams were sent by defendant to plaintiff

and that money was received by her. The court may refuse to vacate an order for examination of defendant before trial, because plaintiff happened to be late at the call of the calendar. *Smith v. Smith* (1912), 76 Misc. 254, 134 N. Y. Supp. 901.

§ 915. Subpoena to witness.

Examination.—The supreme court on motion to direct a witness to answer certain interrogatories under a subpoena issued pursuant to § 915 in aid of the foreign commission will not pass on the merits of the action brought by the liquidator.

The court, on a motion to direct the witness to answer interrogatories in the foreign commission and on motion to vacate the subpoena issued in aid thereof, is bound by the foreign decisions. *Hyde v. Scott* (1912), 75 Misc. 487, 133 N. Y. Supp. 904.

§ 919. Taking and return of deposition.

Power to pass on competency and admissibility of evidence.—In the case of examinations within the state under a commission issued from a sister state, or foreign jurisdiction, the rule is well settled that the competency and admissibility of the evidence are matters to be determined by the foreign court, and that so far as the courts of this jurisdiction are con-

cerned it is sufficient if it appear that such testimony may be competent, and so far as the examination is not entirely irrelevant to the subject-matter of the action the court will not, nor is it called upon to pass upon the strict legality and competency of the evidence sought to be elicited. *Guenther v. Ridgway Co.* (1913), 159 App. Div. 74, 143 N. Y. Supp. 961.

§ 922. Certificate, etc., on file, evidence.

Inventory filed by State Superintendent of Banks is presumptive evidence of facts therein contained within the meaning of

this section. *Richards v. Robin* (1917), 178 App. Div. 535, 165 N. Y. Supp. 780.

§ 923. Notary's certificate, evidence.

Application.—*Hussey v. Sutton* (1916), 96 Misc. 552, 160 N. Y. Supp. 934.

Burden of proof.—The effect of the service of this affidavit is to place the burden of proof upon the plaintiff to establish by common-law evidence that the note had been protested for nonpayment and that due notice of protest and nonpayment was given to the indorser. *Smith v. Leiman* (1912), 133 N. Y. Supp. 1001.

Where an action is brought against an indorser who, as a defense, alleges that he was discharged from liability, in that the notes were never duly protested, and he

did not receive due notice of dishonor, and he has served an affidavit to that effect, the plaintiff was under the burden of giving due proof of notice of protest. *Oppenheimer v. Roberts* (1916), 175 App. Div. 424, 161 N. Y. Supp. 1049.

Effect of filing affidavit as to notice. *Pirl v. Cary* (1912), 134 N. Y. Supp. 1036.

Affidavit denying receipt of notice of dishonor. See *Century Bank v. Breitbart* (1915), 89 Misc. 308, 151 N. Y. Supp. 588.

Section cited.—*McGrath v. Francolini* (1915), 92 Misc. 359, 156 N. Y. Supp. 981.

§ 924. Notary's protest and memorandum; when evidence.

Where the notary claimed to have given notice of protest is dead, the fact that he mailed a notice cannot be established by a certificate which is not under his hand and official seal, but which merely bears his printed name without signature or seal. Nor can due protest be established by evidence that it was the habit and custom of the notary to protest notices which were not paid by three o'clock on the day they were due and that he was a very careful and methodical man and entered memoranda in a book, and especially so where the

book is not produced nor any evidence given as to its contents. Even where the original protest is under the hand and official seal of the notary, proof of the genuineness of these must be made. Moreover, evidence that certain figures on the back of the notice of protest, which was not personally signed, were in the handwriting of the notary and included a charge for mailing the notice, is no proof that they were actually mailed. *Oppenheimer v. Roberts* (1916), 175 App. Div. 424, 161 N. Y. Supp. 1049.

§ 933. Copies of records and papers in certain offices, presumptive evidence.

Certificates of the death of each of the subscribing witnesses to a will certified from the state department of health, are competent evidence of the death of the per-

sons named in the certificates in a proceeding to have the will admitted to probate. *Matter of Hall* (1915), 90 Misc. 216.

§ 935. Conveyance, when acknowledged, or record, or transcript of record, evidence.

Record as evidence.—It is contemplated that when a deed is recorded, the record may be used as evidence with the same effect as the original, and that such record will become presumptive evidence of its delivery. *People ex rel. Oaklawn Corporation v. Donegan* (1918), 184 App. Div. 763, 172 N. Y. Supp. 448.

§ 936. Such evidence may be rebutted.

Fraud.—When the fraud was due to the misconduct of a real estate agent and notary public, who certified the acknowledgment to the deed and sought to defraud the plaintiff out of his property, the deed is a false, fictitious and forged instrument, invalid for any purpose. *Caccioppoli v. Lemmo* (1912), 152 App. Div. 650, 137 N. Y. Supp. 643.

§ 937. What instruments may be acknowledged.

Will.—Where a testator drew his own will on an ordinary printed form, signed the same at the end thereof, and also wrote his name in the attestation clause merely for the purpose of identification, an acknowledgment of his signature to one of the witnesses with the will so folded that his signature at the end thereof was not visible, the witness seeing only his signature in the attestation clause, is insufficient and probate will be refused although his signature was properly acknowledged to the other witness. *Matter of Keffe* (1913), 155 App. Div. 575, 141 N. Y. Supp. 5.

A certificate of a notary that "the above signature of the pensioner Heinrich Kroog of Hinnebeck is hereby certified" fails to show that the document was acknowledged or proved and certified in the manner prescribed by this section. *Matter of Kroog* (1915), 89 Misc. 35, 152 N. Y. Supp. 553.

§ 941. Ordinances, etc., of cities, villages, etc.

City ordinances; judicial notice.—The courts of this state cannot take judicial notice of city ordinances. *People v. Traina* (1915), 92 Misc. 82, 155 N. Y. Supp. 1015.

Idem; proof.—Upon the trial in a magistrate's court in the city of New York for a violation of a city ordinance the ordinance must be proved. *People v. Cronin* (1915), 91 Misc. 342, 154 N. Y. Supp. 446.

Idem; ordinances privately printed.—A pamphlet containing a compilation of city ordinances, neither certified by said clerk nor printed by authority of the common council, is not such proof of an ordinance as is required. *People v. Cronin* (1915), 91 Misc. 342, 154 N. Y. Supp. 446.

§ 942. Printed copies of laws of another state, etc.

Application.—*O'Rourke v. Cunard Steamship Co., Ltd.* (1915), 169 App. Div. 943, 154 N. Y. Supp. 29; *Matter of Crum* (1916), 98 Misc. 160, 176, 164 N. Y. Supp. 149.

Failure to read statute of foreign state from official books.—In an action against a Pennsylvania corporation, statutes of said state although not read in evidence from the official books are not put in issue by the defendant's mere denial of information or knowledge sufficient to form a belief. *Koczenasz v. Lehigh Portland Cement Co.* (1918), 182 App. Div. 287, 169 N. Y. Supp. 366.

§ 944. Copies of documents on file in departments of United States.

Admissibility of U. S. Weather Bureau Records.—In an action for personal injuries received by plaintiff who while driving cross a railway track was struck by a train, it is not error to admit for what it is worth testimony by the district forecaster of the United States Weather Bureau, based on the records, as to the foggy condition of the weather at the time of the accident, although the observations were taken at the weather bureau, there being no objection that the record itself was not put in evidence. The remoteness of the place of observation goes merely to the weight of evidence. *Connors v. Long Island Railroad Co.* (1912), 149 App. Div. 830, 134 N. Y. Supp. 24.

The records of the United States Department of Agriculture as to information concerning agriculture and as to scientific experiments in agriculture and as to the collection of agricultural statistics, which are imposed upon the department by the United States revised statutes, are admissible so as to show that a certain kind of wheat is no more prolific than ordinary brands of wheat. *Russell v. Brooklyn Daily Eagle* (1915), 153 N. Y. Supp. 450.

§ 956. Documents from foreign countries; how authenticated.

This section is manifestly permissive, and § 962, entitled "saving clause," expressly provided that nothing in the preceding sections, including § 956, prevents the proof of a document according to the rules of the common law or by any other competent proof. *Rosenbaum v. Podolsky* (1916), 97 Misc. 614, 163 N. Y. Supp. 227.

Parol evidence.—Where the defendant, in an action on a promissory note, set up as a defense a written agreement and served notice on the plaintiff to produce his copy

and made a reasonable effort to obtain his own original which was in a foreign jurisdiction it was held that he might prove the agreement by parol. *Rosenbaum v. Podolsky* (1916), 162 N. Y. Supp. 227.

Copy of record of birth in foreign country must be duly authenticated. *People v. Todor* (1918), 224 N. Y. 129.

Section cited.—*Matter of Danklefsen* (1916), 171 App. Div. 339, 157 N. Y. Supp. 119.

§ 957. Form of certificate to copies, etc.

A certificate under the seal of a court of a sister state, signed by the clerk and dated, which certifies that he has compared the record with the original and that "I have found the same to be a full, exact and correct transcript therefrom, and of the whole of said original record," conforms to the requirements of this section and § 952. *Gustavus v. Dahlmer* (1917),

98 Misc. 462, 163 N. Y. Supp. 132.

The omission of revenue stamps from certificates does not affect their admissibility in state courts. *Gustavus v. Dahlmer* (1917), 98 Misc. 462, 163 N. Y. Supp. 132.

Copy of record of birth in foreign country must be duly authenticated. *People v. Todor* (1918), 224 N. Y. 129.

§ 960. Evidence, in actions for recovery of, injury to, etc., unoccupied lands and timber thereon.

The plaintiff is entitled to the benefit allowed by this section where he has proved a title extending back more than thirty years but there is no proof of actual possession by either plaintiff or defendant. It will be assumed that the property is un-

occupied, especially where this presumption is strengthened by the fact that the property is assessed as unoccupied land. *Magnetite Mining Co. v. Wilmore Realty Co.* (1913), 142 N. Y. Supp. 1094.

§ 961. Searching records in the surrogate's offices and certifying in regard thereto.

A surrogate's clerk must upon request and upon payment of or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records and dockets in the surrogate's office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper cannot be found in such office.

Amended by L. 1909, chaps. 65, 240; L. 1915, ch. 707, in effect Sept. 1, 1915. The amendment of 1915 provided that the surrogate's clerk, rather than the surrogate, perform the duties herein required.

Source.—L. 1847, ch. 470, § 40.

§ 962. Saving clause.

Effect of failure to produce documents on notice.—The effect of a failure to respond to a notice to produce documents in court is to permit the party serving the notice to give secondary evidence of the documents called for. But a failure to pro-

duce the documents is no proof that they exist, nor does it prove the case of the party calling for them. *Bissell v. Myton*, 160 N. Y. App. Div. 268.

Section cited.—*Rosenbaum v. Podolsky* (1916), 162 N. Y. Supp. 227.

§ 963. Issues defined; different kinds of issues.

Demurrer.—A demurrer may be brought to trial (1) as an issue of law under §§ 963, 965, 969 of the Code; (2) as a contested motion under § 976 of said Code, or (3) by a motion under § 547 of said Code for judgment on the pleadings. *Kramer v. Barth* (1913), 79 Misc. 80, 139 N. Y. Supp. 341.

A demurrer may be brought on for trial as an issue of law (§§ 963, 965, 969), in which case a notice of trial must be served. If the demurrer be sustained or overruled and leave given to amend or withdraw the demurrer and plead over and the privilege is availed of, costs after notice of trial and the trial fee of an issue of law are properly imposed. But if final judgment be directed, or if final judgment be entered because the privilege of amending or pleading over is not accepted, then costs before and after notice of trial and the trial of

an issue of law are taxable. While the code now provides two methods of disposing of a demurrer in addition to the trial of the issue of law, that method has not been eliminated, nor have the provisions applicable thereto been superseded. Hence, where the issue of law is brought on for trial by the service of a notice of trial, a decision of the court in writing must be filed (§ 1010), which must direct the final or interlocutory judgment to be entered thereupon, and shall contain no findings of fact but only conclusions of law. If leave be given to plead anew or amend, an interlocutory judgment should be directed, and if no other issue remains to be tried it should direct final judgment if the party fails to comply with any of the terms of the interlocutory judgment. (§ 1021.) *Taishoff v. Elkema* (1916), 171 App. Div. 288, 157 N. Y. Supp. 98.

§ 966. Order of trial, where issues of law and of fact arise in the same action.

Issue of law to be first tried.—The code contemplates that in an action where there arises an issue of law and an issue of fact the issue of law shall be first tried, unless

the court otherwise directs. *Municipal Gas Co. v. Public Service Commission* (1918), 184 App. Div. 757, 172 N. Y. Supp. 563.

§ 967. But court may direct the order, etc., of disposition of the issues.

Application.—*Simon v. Gibraltar Construction Co.* (1917), 179 App. Div. 273, 166 N. Y. Supp. 466.

Equitable issues.—If the defendant desires a separate trial of equitable issues his remedy is under § 967. *Wassermann v. Pfizer* (1912), 151 App. Div. 724, 136 N. Y. Supp. 203.

Partnership.—The court may grant a separate trial of the issue as to whether a defendant was a partner, where three former trials have resulted in a reversal of the judgment by reason of the failure to properly instruct the jury and qualify the admission of evidence, competent against the other defendants but incompetent

against this defendant unless he was a partner. *Franklin v. Leiter* (1912), 149 App. Div. 678, 134 N. Y. Supp. 399.

Reference; effect of consent to an order.—Where on a motion for the appointment of a referee to hear and determine the issues, counsel consent in open court to an order of reference, and an order reversing a judgment of the referee in favor of the plaintiff is silent as to the method of a new trial, the court is without power to grant a motion by the plaintiff under this section for a trial by jury of part of the issues. *Butterly v. Deering* (1913), 158 App. Div. 181, 142 N. Y. Supp. 1050, aff'd 210 N. Y. 551.

§ 968. What issues of fact are triable by a jury.

A plaintiff by bringing an action for negligence, demanding a judgment for a sum of money, acquires the right under the constitution and under this section, to a jury trial of every issue of fact, and if a separate trial is granted of an affirmative defense as to the execution and delivery of a release from liability executed by the plaintiff, it must be had before a jury. *McGurty v. Delaware, Lackawanna and Western R. R. Co.* (1916), 172 App. Div. 46, 158 N. Y. Supp. 285.

In an action to recover a sum of money as reimbursement for moneys necessarily expended by her for the support of herself

and children, by a wife against a husband from whom she lives apart, based upon a contract granted to have been assumed by him upon his marriage, the only possible relief is a money judgment, and she is entitled to a trial by jury. If the money judgment however cannot be rendered without the assistance of some equitable relief, it seems that the plaintiff is not entitled to a jury trial because she has only demanded part of the relief which she needs. *Whitson v. Whitson* (1916), 173 App. Div. 693, 160 N. Y. Supp. 72.

Section cited.—*Matter of Reinhardt* (1915), 92 Misc. 89, 155 N. Y. Supp. 1020.

§ 969. What issues are triable by the court.

Commissions on sales.—In action on contract where plaintiff was to receive 7 1-2 per cent. of his sales, it was error to dismiss the complaint at the close of plaintiff's case because he had not earned any commissions in five months when he had three months more to work. *Levay v. Goodwasser* (1912), 75 Misc. 461, 133 N. Y. Supp. 456.

Mechanic's lien.—An action to foreclose a mechanic's lien, where an undertaking had been given to discharge the same and where the sureties on the undertaking were parties defendant, is triable by the court without a jury. *Gersman v. Walpole* (1913), 79 Misc. 49, 139 N. Y. Supp. 1.

§ 970. Order for trial by jury, of specific questions of fact, when of right.

A jury trial will be directed upon issues framed on motion of the defendant in an action which involves both legal and equitable issues to foreclose a land contract and for a deficiency. *Maas v. Swalbach* (1916), 96 Misc. 559, 160 N. Y. Supp. 846.

When motion to frame issues denied in foreclosure action. *Manhattan L. Ins. Co. v. Hammerstein Opera Co.* (1917), 101 Misc. 608, 167 N. Y. Supp. 884.

§ 971. Trial by jury, when discretionary.

Review on appeal.—In actions triable by the court in which specific questions are submitted to a jury under § 971, the trial of the whole issue by the court is to be considered as a trial by the court without a jury, and the judgment rendered by the trial court is to be reviewed upon appeal precisely as though the case had been tried without the intervention of a jury. *Carroll v. Bullock* (1913), 207 N. Y. 567.

Equitable relief.—Where a complaint demands nothing but equitable relief and the plaintiff has noticed the case for trial before a court for which no jury can be drawn, without objection by the defendant,

the court may properly deny the plaintiff's motion made at the trial to send certain issues to a jury. *Werner v. Mohawk Condensed Milk Co.* (1912), 152 App. Div. 330, 136 N. Y. Supp. 585. It lies in the discretion of the court to seek an advisory verdict in a suit in equity. *Best v. Nathan* (1918), 183 App. Div. 393, 170 N. Y. Supp. 753.

Cancellation of a liquor tax certificate.—Issues raised by the answer to a petition therefor may not be ordered tried before the court and a jury. *Matter of Sisson* (1917), 179 App. Div. 236, 166 N. Y. Supp. 521.

§ 972. Trial of the remainder of the issues.

Promissory note.—In an action upon a promissory note, a counterclaim which is in substance one for conversion of stock pledged as collateral security for the note, is a legal rather than equitable counter-

claim, and defendant is not entitled to a separate trial thereof. *White v. Shonts* (1913), 154 App. Div. 423, 139 N. Y. Supp. 169.

§ 973. One or more issues may be ordered to be tried separately.

Application.—*O'Donnell v. Thompson-Starrett Co.* (1915), 92 Misc. 710, 156 N. Y. Supp. 342.

Separate trial.—It is correct practice in a proper case to order a separate trial of one issue prior to the trial of the other issues. *Pemberton v. McAdoo* (1912), 149 App. Div. 20, 133 N. Y. Supp. 627.

When separate trial of issue should not be granted.—Where, in an action to rescind a contract for fraud and to compel the return of moneys paid thereunder, the defendant interposes a general denial and as a separate defense alleges that after a full knowledge of the facts claimed by the plaintiff to have been falsely alleged and fraudulently concealed, the latter ratified the contract by receiving payments and by

prosecuting an action thereon, a separate trial of the issues raised by the defense should not be directed, as the evidence relevant thereto would also be involved in the trial of the other issues. *Commercial Trust Co. v. Columbia Trust Co.* (1918), 183 App. Div. 106, 170 N. Y. Supp. 552.

Discretion of court.—The power of the court to order one or more issues to be separately tried prior to trial of the other issues, rests in the legal discretion of the court. *McGurty v. Delaware, Lackawanna and Western R. R. Co.* (1916), 172 App. Div. 46, 158 N. Y. Supp. 285.

The discretion of the court to order a separate trial of such issues should only be exercised where the issue ordered to be separately tried is so independent of the

other issues that its trial will in no way involve the trial of the issues to be thereafter tried, and where the determination of that issue will satisfactorily and with practical certainty dispose of the case if decided for defendant. *Commercial Trust Co. v. Columbia Trust Co.* (1918), 183 App. Div. 106, 170 N. Y. Supp. 552.

It is an abuse of discretion for the court to refuse to grant a separate trial in a case where it appears that the issue, if determined adversely to the defendant, will end the litigation and render a trial on the merits unnecessary, and the plea has a reasonable basis on which to rest, is not interposed for delay, and does not involve a trial of the merits. *Terryberry v. Lehigh Valley R. Co.* (1915), 152 N. Y. Supp. 450.

Where reply states fact sufficient to avoid release.—Where a reply states facts sufficient to avoid a release which plaintiff admits that he executed and delivered, receiving the money consideration named therein, a case is presented wherein a separate issue as to the validity of the release should be first tried. This section has useful application to an issue which, if determined in one way, will end the litigation and render a trial upon the merits

unnecessary. *Warner v. Star Co.* (1913), 162 App. Div. 458, 147 N. Y. Supp. 803.

Defenses of *res adjudicata* and statute of limitations.—Where defendant executors and trustees allege as a defense that the issues raised by the complaint are *res adjudicata* by reason of judgments in prior actions which arose out of the same transactions and also assert the defense of the statute of limitations, it is proper for the court to order that the issues raised by said defenses be separately tried before the trial of the other issues, for if the defenses be sustained a trial of the merits will not be necessary. *Reich v. Cochran* (1916), 171 App. Div. 113, 157 N. Y. Supp. 130.

It seems, that the usual negligence case does not ordinarily present a situation calling for a separate trial of one or more of the issues therein. *McGurty v. Delaware, Lackawanna and Western R. R. Co.* (1916), 172 App. Div. 46, 158 N. Y. Supp. 285.

Surrogate's court.—The provisions of this section may authorize the separate trial of issues in the surrogate's court. *Matter of Fox* (1915), 166 App. Div. 718, 152 N. Y. Supp. 431.

§ 974. Counterclaim to be deemed an action, within the foregoing sections.

Application.—*Manhattan L. Ins. Co. v. Hammerstein Opera Co.* (1917), 101 Misc. 608, 167 N. Y. Supp. 884.

Counterclaim for conversion of collateral in action on promissory note.—In an action upon a promissory note, a counterclaim which is in substance one for conversion of stock pledged as collateral security for the note, is a legal rather than equitable counterclaim and defendant is not entitled to a separate trial thereof. *White v. Shonts* (1913), 154 App. Div. 428, 139 N. Y. Supp. 169.

Divorce; counterclaim for separation.—Where in an action for absolute divorce the court finds against the plaintiff and proceeds to try a counterclaim for separation, to which the plaintiff replied by general denial with allegations of the defendant's adultery, the procedure at trial is the same as if there had been a separate action upon the subject-matter with the parties transposed. *Barila v. Barila* (1912), 153 App. Div. 238, 137 N. Y. Supp. 1038.

Equitable counterclaim for reformation of separation agreement in an action thereon, see *Johnson v. Johnson* (1913), 157 App. Div. 289, 142 N. Y. Supp. 418.

Bringing in third parties.—A plaintiff in

an action at law cannot be compelled at the instance of the defendant to bring in third parties and litigate an equitable counterclaim, although a different rule prevails with respect to suits in equity. *Deiches v. Western Development Co.* (1913), 157 App. Div. 676, 142 N. Y. Supp. 933.

When equitable counterclaim should not be first tried at special term, see *Deiches v. Western Development Co.* (1913), 157 App. Div. 674, 142 N. Y. Supp. 932; trial of equitable counterclaim interposed in legal action. *Harrison v. Loeser & Co.* (1914), 164 App. Div. 115; *Epstein v. Rockville Center Improvement Co.* (1914), 164 App. Div. 177, 149 N. Y. Supp. 638.

An equitable counterclaim is, triable at special term before the cause is placed upon the calendar. *Brody, Adler & Koch Co. v. Hochstadter (No. 1)* (1912), 150 App. Div. 527, 135 N. Y. Supp. 550.

Where counterclaim constitutes defense.—This section governing the mode of trial of a counterclaim, applies only where the facts do not constitute a defense and are not available as such. *Loewenthal v. Haines* (1913), 160 App. Div. 503, 145 N. Y. Supp. 579.

§ 976. What issues to be tried before one judge; regulation of trial in the supreme court.

Application.—*Matter of Sisson* (1917), 179 App. Div. 236, 166 N. Y. Supp. 521.

Practice.—In a proceeding under this section or § 547, nothing more than an order

is necessary to carry out the decision of the court, which order should provide leave to plead over upon payment of, presumably, costs of motion; to be followed by

judgment if the privileges extended were not accepted. *Palito v. New York State Railways* (1915), 91 Misc. 674, 155 N. Y. Supp. 926.

Demurrer; how tried.—A demurrer may be brought to trial (1) as an issue of law under §§ 963, 965, 969 of the Code; or (2) as a contested motion under § 976 of said Code, or (3) by a motion under § 547 of said Code for judgment on the pleadings. *Kramer v. Barth* (1913), 79 Misc. 80, 139 N. Y. Supp. 341.

An issue of law arising on a demurrer may be brought on and tried at any term of court as a contested motion. *Armstrong v. Corcoran* (1915), 166 App. Div. 583, 152 N. Y. Supp. 65.

A demurrer may be brought on for hearing in three ways—under the original provisions of the code, which require that the issue be noticed for trial at special term, put on the calendar, and reached in regular order; under § 547, which authorizes a motion of judgment upon the pleadings; or under this section, which provides that the demurrer may be brought on and tried as a contested motion. *Keyes v. Lestershire Heights Realty Co.* (1916), 173 App. Div. 336, 158 N. Y. Supp. 617.

A demurrer may be disposed of by a trial of an issue of law before a judge at a term without a jury followed by findings and judgment, a trial at any term or on a motion for judgment on the pleadings under § 547. *Palito v. New York State Railways* (1915), 91 Misc. 674, 155 N. Y. Supp. 926.

Since the amendment of this section allowing an issue of law to be brought on and tried at any term of the court as a contested motion, either side may notice a demurrer as a contested motion. *Dedrick v. Port Jervis Light & Power Co.* (1916), 172 App. Div. 260, 158 N. Y. Supp. 364.

Idem; no decision or interlocutory judgment need be filed.—Where a demurrer is brought before the court on notice of motion, under this section or § 547, no written decision or interlocutory judgment need be filed or entered, but an order should be entered. *Taishoff v. Elkema*

(1916), 171 App. Div. 288, 157 N. Y. Supp. 98.

Idem; order appealable.—Since the amendment of § 547, an order overruling or sustaining a demurrer is appealable, and prior cases to the contrary are obsolete. *Kahn v. Johnston* (1917), 177 App. Div. 383, 163 N. Y. Supp. 984.

Transfer of legal cause of action to trial term.—Where a complaint shows a good cause of action and is more clearly good in the legal than in the equitable aspect, it may in the discretion of the court be transferred to the trial term calendar. *Ransome C. M. Co. v. McDonald* (1913), 207 N. Y. 383.

Power of trial term to dispose of all issues equitable as well as of law in one trial, see *City of New York v. Matthews* (1915), 213 N. Y. 563.

Costs.—Where plaintiff brings on a demurrer for hearing under the provisions of this section she is entitled to the costs that would be taxed in her favor as though she had pursued the old complicated process of bringing the demurrer on for argument. The provisions of this section were enacted to enable the plaintiff to choose a simpler and less expensive method and it would be blocking the wheels of progress to encumber this expeditious method by requiring litigants to pay the same tolls as are exacted from those who choose the older and more complicated method. *Keyes v. Lestershire Heights Realty Co.* (1916), 173 App. Div. 336, 158 N. Y. Supp. 617.

An issue of law may be brought on and tried at any term of the court as a contested motion, in which case a notice of motion and not a notice of trial is served. On the determination of the motion if the demurrer be sustained and leave given to amend, or if it be overruled and leave given to withdraw the demurrer and plead over, only ten dollars motion costs are allowed. If final judgment be entered, costs before notice of trial and the motion costs are taxable. *Taishoff v. Elkema* (1916), 171 App. Div. 288, 157 N. Y. Supp. 98.

§ 977. Notice of trial and note of issue; calendar to be prepared.

At any time after the joinder of issue, and at least fourteen days before the commencement of the term, either party may serve a notice of trial. The party serving the notice must file with the clerk a note of issue, stating the title of the action, the names of the attorneys, the time when the last pleading was served, the nature of the issue, whether of fact or of law; and, if an issue of fact, whether it is triable by jury, or by the court, without a jury, and the particular nature of the same and the object of the action. The note of issue must be filed at least twelve days before the commencement of the term. The clerk must thereupon enter the cause upon the calendar according to the date of issue. The clerk must prepare the calendar and have the necessary copies ready for distribution at least

five days before the commencement of the term. In the counties of New York, Kings, Bronx, Queens, Nassau, Richmond, Albany, Erie, Niagara, Monroe, Onondaga, Schenectady, and Westchester, where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the action must remain on the calendar until it is disposed of.

Amended by L. 1877, ch. 416; L. 1882, ch. 96; L. 1896, ch. 565; L. 1898, ch. 70; L. 1899, ch. 18; L. 1903, ch. 51; L. 1904, ch. 474; L. 1907, ch. 211; L. 1909, ch. 65; L. 1911, ch. 218; L. 1912, ch. 96; L. 1915, ch. 60, in effect March 11, 1915. The amendment of 1915 inserted the word "Bronx" in the last sentence.

Source.—Code of Proc., § 256, as amended by L. 1876, ch. 431, § 9.

Disposition of case by striking from calendar.—The provision relative to notices of trial in Albany county does not mean that the cause must remain on the calendar until tried, but merely that it shall remain there until disposed of in some manner by the court; striking the case from the calendar is such a disposition. *Frederick v. Oliver and Burr* (1912), 154 App. Div. 346, 139 N. Y. Supp. 320.

A case must be stricken from the calendar where the notice of trial was served within fourteen days of the commencement

of the term after joinder of issue by the service of an amended answer unless the amended answer was interposed for delay in which event it may be stricken out under § 542 and the case allowed to remain on the calendar. *Joyce v. Eastman Kodak Co.* (1917), 99 Misc. 361, 163 N. Y. Supp. 623.

A case may be placed upon the calendar only as herein provided. *Joyce v. Eastman Kodak Co.* (1917), 99 Misc. 361, 163 N. Y. Supp. 623.

§ 980. Either party may bring issue to trial.

Although the case is not at issue as to other defendants, defendant may notice case for trial. But unless the case is one in which a separate trial may be had between the plaintiff and the defendants who have answered, the trial itself cannot be moved until all the parties necessarily affected are properly brought into court. *Simon v. Gibraltar Construction Co.* (1917), 179 App. Div. 273, 166 N. Y. Supp. 466.

Right to compel plaintiff to proceed.—A party named in an action as defendant but not served and against whom no personal demand is made cannot compel the plain-

tiff to proceed and litigate questions where he had determined not to proceed further in the action. He would thus be rendering himself liable for expenses incident to its prosecution against his wishes, and in many cases against his interests. Such a rule would be clearly against the repeated decisions of the courts of this state holding that the plaintiff has the right to discontinue actions upon his own motion, and this is an absolute right unless there are some peculiar equities or rights of the defendant which would render such an order of discontinuance improper. *White v. White* (1914), 84 Misc. 114, 146 N. Y. Supp. 368.

§ 982. Certain actions to be tried where the subject thereof is situated.

Action involving lands of vendor in one county and of vendee in another county.—Where the complaint alleges that the plaintiff is the owner of lands in Saratoga county; that the defendant is the owner of lands in Rensselaer county; that the said defendant and the plaintiff made an agreement for the exchange of their lands; that thereafter the said defendant repudiated the agreement and fraudulently conveyed the lands owned by him to his wife, a defendant, who had full knowledge of the agreement, and the plaintiff demands judgment for a conveyance to him by the defendants of the lands in the county of Rensselaer, the action involves as subjects thereof both the lands of the vendor in Saratoga county and the lands

of the vendee in Rensselaer county, and, therefore, the action is triable in either county, and the venue was properly laid in the former county. *Smith v. Van Veghten* (1918), 184 App. Div. 813, 172 N. Y. Supp. 697.

Real property in another state; action for damages for injuries.—The courts of this state have no jurisdiction of an action for damages for injuries to real property lying without the state; this rule is not affected by the fact that the gravamen of the action to recover such damages is negligence. *Brisbane v. Pennsylvania R. R. Co.* (1912), 205 N. Y. 431. See *Jacobus v. Colgate* (1916), 217 N. Y. 235.

Change of title of real property.—The mere fact that the title to real estate is

involved in an action does not necessarily bring the case within the provisions of this section; but the section applies if the judgment demanded involves a change in the title. *Nassau Hotel Co. v. Barnett* (1914), 164 App. Div. 203, 149 N. Y. Supp. 645.

Lease of real property; action for cancellation.—An action for the cancellation of the lease of real property and for possession of the property and for an alleged trespass by defendants in possession under an assignment of said lease, must, under this section, be tried in the county where the property is situated. *Nassau Hotel Co. v. Barnett* (1914), 164 App. Div. 203, 149 N. Y. Supp. 645.

Standing timber; sale.—An action to reform a contract for the sale of standing timber by striking therefrom the timber not owned by the defendants, is an action affecting title to real property as the rights of the parties cannot be determined without first establishing the disputed question as to whether the defendants owned the timber at the time of the contract. *Stull v. Norton* (1916), 161 N. Y. Supp. 237.

Venue in condemnation proceedings should be laid in county in which the property is located. *Manhattan Railway Co. v. Farrell* (1917), 180 App. Div. 200, 167 N. Y. Supp. 526.

§ 982-a. Actions relating to real property situate without the state.

An action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state. The action must be tried in the county in which the parties or some one thereof resides, or if no party resides within the state, in any county.

Added by L. 1913, ch. 76, in effect Sept. 1, 1913.

Application.—The provision that "an action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state * * * whenever such an action could be maintained in relation to personal property without the state" is purely remedial, affecting the remedy and mode of procedure only, and intended to apply to all actions after it became operative, irrespective of the time when the cause of action arose. *Jacobus v. Colgate* (1914), 165 App. Div. 227, 150 N. Y. Supp. 1056, rev'd

in 217 N. Y. 235, holding that the section is not retroactive and has no application to wrongs committed before its passage.

Limitation of action.—The provisions in this section that the action may be maintained "whenever such an action could be maintained in relation to personal property without the state" has no bearing on the period of limitation. All that it means is that the jurisdiction shall be the same whether the subject matter is realty or personalty. *Jacobus v. Colgate* (1916), 217 N. Y. 235.

§ 983. Other actions, where the cause thereof arose.

Where cause of action arose.—In an action by an assignee of claims for services rendered by his assignors, the venue should be changed from the county of the plaintiff's residence to the county where the cause of action arose and the services were performed. *Brecht v. Jagger* (1916), 172 App. Div. 880, 158 N. Y. Supp. 1017.

Action against public officials.—An action for false imprisonment against public officials of a county should be tried in their county. *Polmanteer v. Badeau* (1916), 157 N. Y. Supp. 915.

Where the acts charged are not official acts, it is not a case for the application of subdivision 2, but is clearly within § 984. *Metropolitan By-Products Co., Inc. v. Van Name* (1917), 176 App. Div. 545, 163 N. Y. Supp. 592.

The action contemplated in subdivision 2 is one in which the public officer is sought to be held to personal responsibility either for an act done or a duty omitted.

The language of the section cannot be strained to include an action against a public officer to restrain him from official action. *Brooklyn Borough Gas Co. v. Public Service Com.* (1916), 175 App. Div. 684, 161 N. Y. Supp. 169.

The venue of an action will not be changed under the provisions of subdivision 2 at the instance of the district attorney of a county where the action is not only against such district attorney but against a state board and a state officer located in that county who are equally interested in the trial of the action. At any rate the change of venue will not be given as a matter of right in such a case. *Brooklyn Borough Gas Co. v. Public Service Com.* (1916), 175 App. Div. 684, 161 N. Y. Supp. 169.

Where a police officer of a city of the second class served a warrant in a hasty proceeding in another county and was sued in said county for false imprison-

ment, the place of trial is governed by subd. 2 of this section and is not changed by § 242 of the Second Class Cities Law. *Lawton v. Farrell* (1917), 178 App. Div. 376, 164 N. Y. Supp. 838.

Demand served with answer.—A demand to change the place of trial served with the amended answer, is reasonable. *Polman-teer v. Badeau* (1916), 157 N. Y. Supp. 915.

§ 984. Other actions according to the residence of the parties.

Where the plaintiff has the right to select his own place of trial, it will not be changed when the balance of convenience is about equal. *Harris v. Regorson Corp.* (1918), 170 N. Y. Supp. 866.

Amendment of complaint changing place of trial.—A plaintiff cannot deprive the court of jurisdiction to hear a pending motion for change of venue by serving an amended complaint changing the place of trial from the county named in the original complaint to the county where one of the parties resided when the action was commenced. *Varbera v. Quittner* (1912), 154 App. Div. 322, 138 N. Y. Supp. 1000.

A personal injury action may properly be begun in the county of plaintiff's residence, but under the authority granted by § 987 the court will grant a change of venue to the county where the action arose where such change will be for the convenience of witness. *Solberg v. Ft. Orange Const. Co.* (1913), 142 N. Y. Supp. 228.

Residence of corporation.—A corporation may be deemed to have a residence where it owns property and actually transacts a substantial part of its business and its residence is not confined to the county where its certificate of incorporation is filed. *General Baking Co. v. Daniell* (1917), 101 Misc. 382, 166 N. Y. Supp. 1070.

Transitory actions.—Transitory actions should be tried in the county where the transactions involved took place unless a greater number of witnesses reside in another county. *Red Hook Light & Power*

Co. v. Rightmyer (1912), 150 App. Div. 663, 135 N. Y. Supp. 725.

Other things being equal, a transitory action will be tried in the county where the cause of action arose. *Van Alstine v. Burt* (1912), 151 App. Div. 81, 135 N. Y. Supp. 779.

A transitory action, such as one to recover for personal injuries, should be tried in the county where the transaction involved took place. The venue should not be laid in a county in which neither of the parties resides. *Veeldorano v. Union Railway Co.* (1918), 183 App. Div. 575, 171 N. Y. Supp. 5.

Section qualified by § 987.—This section, which provides that an action to recover damages for an alleged breach of contract must be tried in the county in which one of the parties resided at the commencement of the action, is qualified by § 987 which authorizes a change of venue for various reasons, among others, for the convenience of witnesses and to promote the ends of justice. *Kellogg & Sons, Inc. v. Barber & Co., Inc.* (1919), 106 Misc. 297, 174 N. Y. Supp. 438.

The rule that railroad companies are deemed to reside in each of the counties through which their roads run, does not apply to other domestic corporations having a principal office as fixed in their certificates of incorporation, and branch offices in other counties where they transact a part of their business. *General Baking Co. v. Daniell* (1918), 181 App. Div. 501, 170 N. Y. Supp. 365.

§ 986. Defendant may demand change; proceedings thereupon.

Application.—*Assets Collecting Co. v. Equitable Trust Company* (1915), 168 App. Div. 145, 153 N. Y. Supp. 109.

Exercise of discretionary power by court.—The court may grant a change of venue on the ground that the county designated in the complaint is not the proper county, even though the defendant has failed to comply with the requirements of § 986. *Palmer v. Schwartzback* (1912), 151 App. Div. 916, 136 N. Y. Supp. 85.

A written demand must precede a motion to change the place of trial as a mat-

ter of right under § 986. If the defendant fails to give such notice, he must be deemed to have waived his right in that regard. *Hoffman v. Hoffman* (1912), 153 App. Div. 191, 138 N. Y. Supp. 356.

Change of venue to place where contract was performed, see *Upjohn v. First Methodist Episcopal Church Soc.* (1913), 156 App. Div. 147, 140 N. Y. Supp. 1104; change of venue for convenience of witnesses, see *Upjohn v. First Methodist Episcopal Church Soc.* (1913), 156 App. Div. 147, 140 N. Y. Supp. 1104.

§ 987. When court may change the place of trial.

Laches.—A motion for a change of venue to which the party is not entitled as a matter of right will be denied upon the ground of laches, where the motion was not made for more than twenty months after

the moving party had noticed the cause for trial. *Assets Collecting Co. v. Equitable Trust Co.* (1915), 168 App. Div. 145, 153 N. Y. Supp. 109.

Consent to reference as condition to

granting change of venue.—Where a defendant is entitled to a jury trial, the court on a motion to change the venue should not require as a condition for granting the same that the defendant stipulate that the issues be referred to a referee. *Climax Road Machine Co. v. Central Bank of Medina* (1916), 170 App. Div. 860, 156 N. Y. Supp. 854.

Convenience of witnesses; affidavits showing number.—Where upon motion to change place of trial to the county where the cause of action arose, the defendant names ten material and necessary witnesses and makes affidavit that nine of them live in the county where the action arose and states the substance of their testimony and the plaintiff's affidavits in opposition state on information and belief that two or more of her witnesses reside where the venue is now laid, the motion will be granted. *Jacina v. Lemmi* (1913), 155 App. Div. 397, 139 N. Y. Supp. 1034; change of place of trial for convenience of witnesses, see *Hanson v. Hanson* (1914), 88 Misc. 244, 151 N. Y. Supp. 861; *Lewis v. Town of Bethel* (1913), 156 App. Div. 894, 140 N. Y. Supp. 1041; *Wright v. Stall* (1918), 171 N. Y. Supp. 961; *Kellogg & Sons, Inc. v. Barber & Co., Inc.* (1919), 186 App. Div. 297, 174 N. Y. Supp. 438.

Change of venue for convenience of witnesses, when answering affidavits defective. *Ottley v. Jackson Memorial A. M. E. Zion Church* (1913), 157 App. Div. 222, 141 N. Y. Supp. 816.

Idem; generally.—Circumstances and convenience of witnesses justifying a change of the place of trial. *Cate v. Fisk* (1916), 175 App. Div. 235, 161 N. Y. Supp. 441.

Not justifying a change. *MacArthur Bros. Co. v. City of New York* (1917), 101 Misc. 591, 168 N. Y. Supp. 407.

Idem; plaintiffs resident in different counties.—Where each of the parties brought an action to recover for the same automobile collision, each laying the venue in the county of his residence, and these actions had been consolidated, it was held that the place of trial should be changed to the county where the accident occurred and where many of the witnesses resided, including persons who could testify to the amount of damages, owing to the fact that they had repaired the automobile. *Rogers v. Blum* (1915), 168 App. Div. 610, 154 N. Y. Supp. 336.

Where the defendant has as many and necessary witnesses in the county where the transaction occurred as the plaintiff has in the county where the action is commenced the place of trial should be changed to the place where transaction occurred. *Cole v. Ocean Accident & Guarantee Corp., Ltd.* (1917), 179 App. Div. 442, 165 N. Y. Supp. 991.

Idem; residence of expert witnesses.—The rule that the convenience of expert witnesses will not be considered on a mo-

tion for change of venue does not obtain where the experts are to testify from personal knowledge and not from an assumed state of facts. *Taylor v. Jacobs* (1915), 168 App. Div. 260, 153 N. Y. Supp. 778.

Idem; change from rural county.—Place of trial should not be changed from a rural county to the county of Kings on the ground of convenience of witnesses, where it appears that trial will be delayed if the place is changed, and that the witnesses will not be put to any great inconvenience. *Standard Building Supply Co. v. Waterman* (1917), 164 N. Y. Supp. 673; *Olinsky v. Weinstein* (1917), 166 N. Y. Supp. 613.

Where a party is not entitled to a change of venue as a matter of right the place of trial will not be changed from a rural county to the county of New York or the county of Kings. *Assets Collecting Co. v. Equitable Trust Co.* (1915), 168 App. Div. 145, 153 N. Y. Supp. 109.

The rule that the place of trial will not be changed from a rural to a metropolitan county is not inflexible, and, where the accident occurred in Bronx county, in which the plaintiff resides and where the defendant railroad company has an office in the regular transaction of business, the venue will be changed from the county of Westchester to Bronx county. *Veeldorano v. Union Railway Co.* (1918), 183 App. Div. 576, 171 N. Y. Supp. 5.

Id.; change of venue from Ulster to New York county.—Moving papers examined, and held, that the order denying the defendant's motion should be reversed in that the affidavits do not disclose the issues involved, or make it possible for the court to determine whether the convenience of witnesses and the ends of justice require that the trial be had in Ulster county. *McArthur Brothers Co. v. City of New York* (1918), 182 App. Div. 640, 169 N. Y. Supp. 767.

The rule that a court will not change a place of trial to promote the ends of justice, from a rural to a metropolitan county, does not apply where neither of the parties is a resident of this state, and where although the venue has been laid in a rural county as a matter of fact both parties and their attorneys and most of the witnesses reside in the county of New York. *Broderick v. de Mesa* (1917), 178 App. Div. 669, 165 N. Y. Supp. 809.

Idem; personal injury action.—A personal injury action may properly be begun in the county of plaintiff's residence, but under the authority granted by § 987 the court will grant a change of venue to the county where the action arose where such change will be for the convenience of witnesses. *Solberg v. Ft. Orange Const. Co.* (1913), 142 N. Y. Supp. 228.

A motion to change the place of trial from Bronx county to Sullivan county in an action against a railroad company, to recover for personal injuries sustained by the plaintiff, a passenger, at a station in

the latter county, should be denied where the defendant claims to have in addition to its own employees, sixteen witnesses, residents of the place of the accident, whom it intends to call to prove the condition of the ground at the time and place where the plaintiff fell, but not one of these is claimed to have seen the accident, and it appears that the plaintiff will necessarily call two physicians who have treated her, one eye-witness to the accident, and a surveyor, all of whom live in or near the city of New York, and that the expense and inconvenience to the witnesses of the railroad company of a trial in Bronx county will be much less than that entailed upon the plaintiff by a trial in Sullivan county. *Viertels v. New York, Ontario & Western R. Co.* (1918), 182 App. Div. 92, 169 N. Y. Supp. 497.

Idem; action based on several contracts.—Where an action is based upon three contracts, one made in the county where trial is brought and the other two in a county where all three were to be performed and where the alleged breach of all three took place and where the greater number of competent and material witnesses reside, the place of trial should be changed to the latter county. *Fox v. Bernstein* (1916), 158 N. Y. Supp. 333.

Idem; action for libel.—In an action for libel, although there may be a greater number of witnesses whose convenience would be served by changing the place of trial from New York county to Greene county, the application may be denied where the cause of action arose in New York where the alleged libelous letters were received, and the plaintiff is a person of moderate means, while the defendant is a man of great influence and wealth, and has resided all his life in Catekill, the county seat of Greene county, and is acquainted with nearly every inhabitant. *Schen v. Haner* (1917), 164 N. Y. Supp. 947.

Idem; promotion of justice.—The place of trial will be changed to the county where the cause of action arose and greater number of witnesses reside, where the ends of justice will be promoted thereby. *Maucher v. Hedges et al.* (1911), 148 App. Div. 889, 131 N. Y. Supp. 1008.

Disparity in witnesses authorizing change of place of trial.—A motion by a defendant to change the place of trial for the convenience of witnesses should be granted where it appears that he has five witnesses beside himself residing in the county to which the venue is sought to be changed whose testimony will be necessary and material, and that the plaintiff has a single witness residing in the county where the venue is now laid. *Hemenway v. Fitzgerald*, 159 N. Y. App. Div. 748.

Place of trial changed to county of defendant's residence upon the ground that neither the plaintiff nor the defendant resided in the county where the venue was laid. *General Baking Co. v. Daniell*

(1918), 181 App. Div. 501, 170 N. Y. Supp. 365.

County where controversy arose.—Where in an action by a wholesale lumber dealer engaged in business in Kings county, to recover damages for defendants' refusal to deliver a balance of lumber purchased under contract, it appears that the details of the contract were arranged between plaintiff's agent and defendants either in Warren county or in the adjoining county of Essex; that the written orders called for delivery by defendants in Essex county; that the direction to defendants was to "ship to" the plaintiff "at" Brooklyn and the price agreed on was "on cars Westport," which is in Essex county, it must be held that the entire controversy arose in Essex county and that the measure of damages depends upon the conditions existing there, and, hence, the defendants' motion to change the place of trial from the county of Kings to the county of Essex should be granted, having in mind the convenience of witnesses and the ends of justice, although the plaintiff states that he expects to call fifteen lumber dealers, most of whom reside in Kings county, to prove the market price of the lumber. *Woodland Lumber & Manufacturing Co. v. Barnett* (1918), 185 App. Div. 572, 173 N. Y. Supp. 4.

Change to county where contract negotiated and parties reside.—The venue in an action for false representations incident to the sale of realty situated in the county of New York should be changed to that county from the county of Kings, where it appears that all the parties reside in the county of New York, with the exception of one plaintiff as to whom it is not alleged that he will be a witness, and all the negotiations involved in the transaction took place in said county. *Taylor v. Jacobs* (1915), 168 App. Div. 260, 153 N. Y. Supp. 778.

Sale of goods; place of trial changed.—A defendant, sued as principal for goods sold to another, is entitled to have the place of trial changed to the county where the contract of sale was made and where the witnesses reside who can give material testimony on the issue of agency. *Mayer v. Madigan* (1912), 150 App. Div. 519, 135 N. Y. Supp. 510.

Separation agreement; action to set aside; change of place of trial.—The venue of a suit to set aside a separation agreement upon the ground that the plaintiff was induced to execute it by the coercion and fraud of her husband, should be changed to the county where the defendant resides and where he and the greater number of witnesses, who will testify on the issue of coercion, reside. *Kaufman v. Kaufman* (1912), 152 App. Div. 99, 136 N. Y. Supp. 594.

Foreign corporation.—Where the venue in an action for negligence by a nonresident against a foreign corporation is laid

in a county where the defendant did not maintain an office or transact any business or work its railroad, it is entitled to have the venue changed to the county where it has its office and principal place of business. *Rubel v. Central R. R. Co. of New Jersey* (1916), 171 App. Div. 456, 156 N. Y. Supp. 1094.

Impartial trial cannot be had.—Motion for change of venue denied as matter of discretion on the ground that the court was not convinced that "an impartial trial cannot be had." *Barnes v. Roosevelt* (1914), 87 Misc. 55, 149 N. Y. Supp. 291; change of place of trial when impartial

trial cannot be had. *Barnes v. Roosevelt* (1914), 164 App. Div. 540, 149 N. Y. Supp. 291.

Service of demand to change place of trial on ground of convenience of witnesses is not necessary. *Viertels v. New York, Ontario & Western R. Co.* (1918), 182 App. Div. 92, 169 N. Y. Supp. 497.

A written demand must precede a motion to change the place of trial as a matter of right under § 986. If the defendant fails to give such notice he must be deemed to have waived his right in that regard. *Hoffman v. Hoffman* (1912), 153 App. Div. 191, 138 N. Y. Supp. 356.

§ 990. Issues of law and certain issues of fact; where triable.

An issue of law, or an issue of fact triable by the court without a jury, arising in a county where no special terms distinct from trial terms are appointed to be held for the trial of such cases, may be tried at a special term in any county within the judicial district embracing the county wherein the action is triable; but after the trial, the decision and all other papers relating to the trial must be filed, and the judgment rendered must be entered, in the last named county.

Amended by L. 1879, ch. 542; L. 1913, ch. 446, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "or an issue of fact triable by the court without a jury, arising in a county where no special terms distinct from trial terms are appointed to be held for the trial of such cases," in lines 1 and 2; and the words "at a special term," in lines 3 and 4.

Source.—New.

The amendment of 1913 does not change or limit the existing right by trial of an issue of law in any county in the same judicial district in which the venue of the action is laid. Its effect is rather to add the further right to try issues of fact in another county in the same district, pro-

vided there is not appointed to be held in the county where the action is triable, a special term, distinct from trial terms, for the trial of issues of fact. *Armstrong v. Corcoran* (1915), 166 App. Div. 583, 152 N. Y. Supp. 65.

§ 992. What rulings may be excepted to.

Counsel is within his rights in taking the exception after the jury has retired and before it has returned its verdict, since it is not necessary that the exception be taken in the presence of the jury. But the better practice is to have the exceptions

noted before the retirement of the jury, because that avoids recalling the jury in case of any modifications of the views expressed by the court. *Hunt v. Becker* (1916), 173 App. Div. 9, 160 N. Y. Supp. 45.

§ 993. Exceptions to findings of fact.

Application.—*Buczynski v. Anderson* (1916), 174 App. Div. 790, 156 N. Y. Supp. 697.

Judgment on appeal in equity suit.—Where in an appeal in an equity suit the facts are not in dispute, the court has power to direct such judgment as the parties are equitably entitled to. *Muck v. Hitchcock* (1912), 149 App. Div. 323, 134 N. Y. Supp. 271.

Judgment by the appellate division may be granted without awarding a new trial. *Church v. Wilson* (1912), 152 App. Div. 844, 137 N. Y. Supp. 1002.

Review of facts where jury trial waived.

—Where a jury trial is waived in an action at common law the appellate division, upon an appeal from a judgment entered upon a decision of the court may review the facts, although no exception was taken to the decision of the court below. *Bissell v. Myton* (1913), 160 App. Div. 268, 145 N. Y. Supp. 591.

Idem; where decision is against weight of evidence.—If the judgment entered upon the decision of the court without a jury is against the weight of evidence it may be reviewed by the appellate division, and

if any findings are without evidence to support them, they may be excepted to as a ruling upon a question of law and as such reviewed both in the appellate division and court of appeals. *Dann v. Palmer* (1912), 151 App. Div. 151, 135 N. Y. Supp. 411.

After the jury had deliberated upon the issues for some time without reaching any agreement, and both parties moved for the

direction of a verdict in their favor, and neither party asked to have any question of fact submitted to the jury, and thereupon the trial justice directed a verdict for the plaintiff, there was not a trial without a jury so as to give the appellate division power to review all questions of fact and of law. *Bozkowitz v. Continental Insurance Co.* (1916), 175 App. Div. 18, 161 N. Y. Supp. 680.

§ 994. When and how exceptions may be taken, after close of trial by court or referee.

Relief against omission to file exception within required time.—Where an appeal has been seasonably taken, the supreme court has power to relieve, as against an omission to file an exception to the decision within the ten days prescribed by the statute. *People v. Journal Co.* (1914), 213 N. Y. 1, 5.

Objection that no exception was filed may be waived.—Where a non-suit is granted, no findings are necessary, but an exception must be taken in order to review the judgment. The objection that no exception was taken, however, may be waived. *People v. Journal Co.* (1914), 213 N. Y. 1.

Order denying motion for direction of verdict entered after jury fails to agree.—Where the court reserves the decision of defendant's motion for the direction of a verdict and subsequently the jury announces that they disagree, no appeal lies from a subsequent order denying the reserved motion. This, because, as the jury disagreed, no judgment was entered, and an appeal

from a judgment is necessary for a review of such order, except in a case where it is expressly prescribed by law that a motion for a new trial may be made thereupon. *Kingsway Construction Co. v. Metropolitan Life Ins. Co.* (1913), 161 App. Div. 649, 146 N. Y. Supp. 883.

Where no question arose before the referee appointed to hear and determine the matters on an accounting proceeding as to any costs or allowances to the special guardian or to any party, and no reference thereto was made in his report, the power of the surrogate to award compensation to the special guardian on an application made to him preliminarily to the making of a decree upon the hearing of exceptions to the report of the referee presents solely a question of law, and the appellant is entitled to interpose his exception to such allowance. *Matter of Dunham* (1916), 94 Misc. 550, 160 N. Y. Supp. 217.

Section cited.—*Jackson v. Strong* (1915), 91 Misc. 429, 154 N. Y. Supp. 886.

§ 995. Id.; during the trial, or upon trial by jury.

Counsel is within his rights in taking the exception after the jury has retired and before it has returned its verdict since it is not necessary that the exception be taken in the presence of the jury. But the better practice is to have the excep-

tions noted before the retirement of the jury, because that avoids recalling the jury in case of any modifications of the views expressed by the court. *Hunt v. Becker* (1916), 173 App. Div. 9, 160 N. Y. Supp. 45.

§ 996. Ruling excepted to; how reviewed.

Where a motion was made to dismiss the complaint for want of jurisdiction, the ruling of the trial court denying the motion cannot be reviewed directly before the termination of the trial and entry of judgment. *Jackman v. Hasbrouck* (1915), 153 N. Y. Supp. 876.

Determination of trial court in disposing of motion to dismiss complaint without verdict is a mere ruling within the meaning of this section. *Reade v. Halpin* (1917), 180 App. Div. 157, 167 N. Y. Supp. 624.

§ 997. Case, when necessary; how made and settled.

Case necessary, on motion for new trial on ground of newly discovered evidence.—Where an administrator seeks to prove a claim against an estate and is unsuccessful, an order granting a new trial of the claim on the ground of newly-discovered evidence should be reversed, where the

motion was not made upon a case containing the evidence, and the affidavits did not show the nature of the administrator's claim. *Matter of Rose* (1912), 153 App. Div. 263, 137 N. Y. Supp. 1079.

Duty of appellant to procure case on appeal to be settled and signed by judge or

referee who tried it. *Dyer v. J. Y. J. Corporation* (1917), 100 Misc. 115, 165 N. Y. Supp. 221.

Exception of respondent, when to be included in record on appeal. *Bonnette v. Molloy* (1912), 153 App. Div. 73, 138 N. Y. Supp. 67, modified 209 N. Y. 167.

Case on appeal embraces bill of exceptions.—The "case" on appeal embraces what was formerly known and is still described in rule 34 of the general rules of practice as a "bill of exceptions." *Jackson v. Strong* (1915), 91 Misc. 429, 154 N. Y. Supp. 886.

A motion to set aside a verdict may be made at any special term upon any or all of the grounds permitted under § 999. *O'Connor v. Healey* (1916), 96 Misc. 278, 161 N. Y. Supp. 582.

Rule 34 of the general rules of practice as amended in 1913 does not require an appellant to propose a case containing every question put to a witness and his answer thereto as disclosed by the stenographer's minutes, as it is not to be presumed that the judges in convention assembled intended by said rule as amended to graft upon this section, a requirement beyond its plain provisions. *Balch v. Fink* (1915), 92 Misc. 47, 155 N. Y. Supp. 308.

Disqualification of referee.—Application of provision giving court right to settle case on appeal in the event of the dis-

qualification of the referee. *McCormick v. Walker* (1913), 158 App. Div. 54, 142 N. Y. Supp. 759.

Omissions of stenographer.—A party to an appeal is entitled to have his case show the facts as they really happened at trial and should not be prejudiced by an error or omission of the stenographer. *People v. Buccafurri* (1913), 154 App. Div. 827, 139 N. Y. Supp. 305.

Settlement of case where judge leaves jurisdiction.—Where a justice of the supreme court accepts an appointment as ambassador to a foreign country and leaves the jurisdiction, a case of "disability" arises under this section, and under such circumstances the case on appeal from a judgment rendered after the trial of an issue of fact by him shall be settled as the court directs. *Jermyn v. Searing* (1913), 160 App. Div. 832, 146 N. Y. Supp. 57.

Waiver of right to require case.—It is the regular practice that a motion for a new trial shall be made on a case, but if the motion is made without a case on affidavits and the opposing counsel proceeds to argument without objection on that ground, he waives his right to require a case to be made. *Schuster v. Tompkins* (1917), 180 App. Div. 503, 168 N. Y. Supp. 187.

§ 998. When appeal, etc., may be heard without a case.

This section applies to trials with juries in the surrogates courts. *Matter of Dorsey* (1916), 94 Misc. 567, 157 N. Y. Supp. 662.

Section cited. — *Jackson v. Strong* (1915), 91 Misc. 429, 154 N. Y. Supp. 886.

§ 999. Motion for new trial upon judge's minutes; appeal from order thereupon.

Purpose and scope.—This section was intended to give a speedy means of disposing of the motion for a new trial at the trial term. It does not cover any subject matter which may not be covered in the usual motion for a new trial before a special term, and is not a sole, exclusive remedy. *O'Connor v. Healey* (1916), 96 Misc. 278, 161 N. Y. Supp. 582.

A party is not entitled as a matter of right to have its motion for a new trial heard on the minutes of the trial court. Whether such a motion will be entertained rests in the discretion of the court; but every right which the appellant had to have a new trial granted could be presented by a motion at special term on a case containing exceptions, pursuant to the provisions of § 1002. It is not a reasonable inference that the legislature intended that there should be a mistrial in the event of the death of the justice presiding at the trial either before an opportunity was afforded a defeated party to ask that a motion for a new trial on the minutes be en-

tertained or pending the consideration of such a motion. *Hummel v. Fischl's Sons, Inc.* (1916), 175 App. Div. 489, 161 N. Y. Supp. 1129.

When granted.—A motion for a new trial will not be granted upon "exceptions" unless they relate to matters which affect a substantial right of a party, or on the ground that the verdict is not supported by the evidence, unless the evidence is insufficient as a matter of law to sustain the verdict, or on the ground that the verdict is against the weight of evidence where there is a conflict of evidence upon which reasonable minds might differ. *McStay v. Erie R. R. Co.* (1917), 99 Misc. 673, 164 N. Y. Supp. 565.

Error should be manifest.—A motion under this section to set aside a verdict should only be granted where the error is manifest and, where the questions are doubtful or complicated, the motion should be made on a case. *O'Connor v. Healey* (1916), 96 Misc. 278, 161 N. Y. Supp. 582.

Grounds to be considered.—Where a

plaintiff moves for a new trial upon the judge's minutes, and for fraud, she is entitled, upon an appeal from an order granting such motion, to have all the grounds therefor considered. *MacReynolds v. Coney Island & Brooklyn R. R. Co.* (1915), 170 App. Div. 314, 155 N. Y. Supp. 655.

Motion by both parties.—The fact that both sides are dissatisfied with the verdict furnishes no legal ground for interference with it by the trial court. *Genecco v. Pederson* (1915), 154 N. Y. Supp. 13.

Necessity for settled case.—Where a trial resulted in a dismissal of the plaintiff's complaint and he thereafter obtained an order to show cause from the trial justice, returnable at the trial term, why a new trial should not be granted, it was held that it was equivalent to a motion for a new trial, and a settled case should be required although the plaintiff's counsel had been rather lax in his practice through failure to recite that the motion for a new trial was made upon the judge's minutes. *Moore v. Getman Artistic Weaving Co.* (1916), 162 N. Y. Supp. 178.

Before whom made.—A motion on the minutes to set aside a verdict can only be made before the judge who presided at the trial and may not be made before him after adjournment. *O'Connor v. Healey* (1916), 96 Misc. 278, 161 N. Y. Supp. 582.

Designation of trial justice as justice of appellate division pending motion for new trial.—Where after a verdict of the jury for the plaintiff the defendant made a motion for a new trial upon the minutes and the court entertained the motion and reserved decision and directed that all proceedings upon the verdict be postponed and held in abeyance until the court should either orally hear counsel or receive their briefs, but before the motion was submitted to the justice for decision he was designated as a justice of the appellate division, a judgment thereupon entered upon the verdict against the defendant, with costs, was irregular and should be set aside because the question of costs had not been passed upon by the court. Under such circumstances, the motion having been entertained is still pending and all that is necessary is to bring it before the special term for consideration. The defendant, the moving party, may do this pursuant to §§ 999 and 1002, or the plaintiff may bring the matter up by asking a hearing of the motion or by asking that unless the defendant proceed with the motion he be permitted to enter judgment. *O'Connor v. Healey* (1916), 171 App. Div. 604, 157 N. Y. Supp. 919.

Where the trial justice is disqualified from hearing a motion to set aside a verdict. the defendant is in the same position as if he had neglected to make it before the presiding judge at the trial term, or the judge had refused to hear it. *O'Connor v.*

Healey (1916), 96 Misc. 278, 161 N. Y. Supp. 582.

Verdicts should be set aside only in exceptional situations; mere difference of judgment as to what the verdict should be between the jury and judge does not justify setting a verdict aside. The verdict must be palpably wrong, that is, it must have been impossible to reach it upon any fair consideration of the evidence. *Munday v. Nassau Electric R. R. Co.* (1917), 99 Misc. 28, 163 N. Y. Supp. 508.

Verdict in accordance with evidence.—A verdict is in accordance with the evidence, for the purpose of a motion for a new trial, when reasonable men might differ as to its being a fair conclusion from the evidence, and will be set aside, as contrary to the evidence, when no reasonable man would have reached the conclusion arrived at by the jury, uninfluenced by improper motives. *Hong v. Brooks* (1917), 164 N. Y. Supp. 388.

Laches.—After a verdict in favor of plaintiff, the court entertained a motion for a new trial to be heard at a future time, and an order was entered staying all proceedings on the part of plaintiff pending the determination of the motion, but defendants' attorney neglected to bring it on for argument before the death of the trial justice, four years later. The death of defendants' attorney occurred eight years after that of the justice and the motion for a new trial was never argued. The defendants neglecting and refusing to appoint a new attorney, after service upon them of a notice pursuant to § 65, an order was granted vacating the stay of proceedings and plaintiff entered judgment upon the verdict. Held, that a motion to vacate said judgment on the ground that plaintiff had lost his right thereto because of laches will be denied. That defendants' interests in the merits of the motion for a new trial, if any, could be protected by a new motion under § 1002. *Plumb v. Almekinder* (1917), 98 Misc. 435, 162 N. Y. Supp. 598.

Appeal from order denying new trial; when judgment has been entered.—An appeal may be taken from an order denying a motion for a new trial in an action triable by jury irrespective of whether a judgment has been entered and irrespective of whether an appeal has been taken from a judgment, if one has been entered. *Gelder v. International Ore Treating Co.* (1912), 148 App. Div. 637, 133 N. Y. Supp. 214.

Motion denied.—Motion to set aside the verdict on all the grounds stated in this section and for a new trial denied. *Barkman v. Friedman* (1918), 105 Misc. 350, 174 N. Y. Supp. 163.

Motion in appellate division, when denied by trial court.—A motion for a new trial cannot be heard by the appellate division in the first instance after such

motion has been entertained and denied by the trial court; the remedy of the defeated party is to appeal from the order and judgment if one be entered. *Babad v. Colton Dental Asso.* (1912), 150 App. Div. 561, 135 N. Y. Supp. 555.

Failure to appeal from order denying motion; effect.—Where on the trial of an action for negligence, defendant did not move to dismiss the complaint and no exception was taken to the charge or to the admission or rejection of evidence and no appeal has been taken from an order denying a motion for a new trial under § 999, no question of fact arises on an appeal to the appellate division. *Fogarty v. Pittsburg Contracting Co.* (1912), 152 App. Div. 409, 137 N. Y. Supp. 589.

Compromise verdict.—In an action to recover for an alleged breach of contract of employment, a compromise verdict in favor of plaintiff may be set aside on motion of the defendant. *Scheuer v. Manashaw* (1912), 77 Misc. 208, 137 N. Y. Supp. 534; a compromise verdict will be set aside on motion. *Feinblatt v. Unterberg* (1913), 84 Misc. 459, 146 N. Y. Supp. 188.

Direction of verdict; reversible error in action on contract of sale.—Where, by the terms of a written contract of sale of a gasoline engine, representations of the seller as to quality were to be determined by an actual test of the machine, the fact that the representations were called warranties in the contract does not make them such in the sense that the purchaser had to rely upon and believe them; and the direction of a verdict in plaintiff's favor, in an action to recover the purchase price, because of the defendant's failure to make proof of her belief in and reliance upon said representations, is reversible error. *Featherstone v. Price* (1912), 76 Misc. 1, 136 N. Y. Supp. 321.

Verdict contrary to instructions.—A verdict that is contrary to the instructions given by the court may be set aside. *Pangburn v. Buick Motor Co.*, 211 N. Y. 228, rev'g 151 App. Div. 756; a verdict contrary to the instructions of the court will be set aside. *Candee v. Pennsylvania R. Co.* (1913), 84 Misc. 506, 147 N. Y. Supp. 529.

Inconsistent verdict.—In an action against two persons jointly to recover damages for negligence where the facts are such that both or neither are liable, a verdict against one will be set aside. *Pangburn v. Buick Motor Co.*, 211 N. Y. 228.

Setting aside verdict because of misconduct of counsel.—Where it clearly appears that reference to extraneous matters by consent was made in palpably bad faith, with the plain purpose to prejudice, and with clear knowledge that the documents, the contents of which were stated, had been explicitly rejected when offered in evidence, and that such references beyond peradventure prejudiced the jury against plaintiff, the trial court on its primary responsibility for the proper conduct of a

trial should set aside a verdict in favor of the defendant. *Hoffman v. New York Railways Co.* (1914), 84 Misc. 637, 147 N. Y. Supp. 900.

Groundless charges against counsel in presence of jury.—Where on the trial of an action involving many references to books and papers, the plaintiff's counsel without ground charged the defendant's attorney in the presence of the jury with falsifying the books for the benefit of his client and physically struck the attorney, who had retorted by violent language, and refused to withdraw his charge or apologize for his action, the trial court should have granted the defendant's motion to withdraw a juror. Under the circumstances a fair trial was impossible, and it was proper for the court to set aside a verdict for the plaintiff. *Chard v. Ryan-Parker Construction Co.*, 167 App. Div. 700, 152 N. Y. Supp. 743.

Misconduct of counsel.—Where no objection was taken on behalf of the plaintiff to the conduct of the defendant's counsel during the trial before a jury, or on a motion to set aside a verdict for the defendant, the court of its own motion should not set aside the verdict on the ground that the counsel was guilty of misconduct even though his acts were in bad taste and would have justified admonition and censure. *Mulcahy & Gibson, Inc. v. National Surety Co.* (1915), 167 App. Div. 651, 153 N. Y. Supp. 37.

Motion, when made.—A motion for a new trial on the minutes must be made at the same term at which the verdict was rendered, and the court has no power to entertain the motion at a subsequent term. *Polo v. L'Achille* (1913), 157 App. Div. 294, 142 N. Y. Supp. 506; *Barnasky v. N. Y. O. & W. R. Co.* (1917), 180 App. Div. 921, 168 N. Y. Supp. 1101.

Exceptions before verdict.—A motion for a new trial upon the minutes can be made only upon exceptions taken before the jury rendered its verdict. *Polo v. D'Achille* (1913), 157 App. Div. 294, 142 N. Y. Supp. 506.

Failure to take exceptions.—Upon a motion for a new trial under this section, the trial court has authority, if the interests of justice so require, to grant a new trial, notwithstanding any failure on the part of the attorney for the plaintiff to take proper objections or exceptions or to make proper motions. *Miller v. Barnett* (1913), 158 App. Div. 862, 144 N. Y. Supp. 40.

Reduction of verdict without plaintiff's consent.—Where a motion is made at the trial to set aside a verdict as excessive, and for a new trial, the court may, in its discretion in a proper case, set aside the verdict, unless the plaintiff consents to accept a lesser amount declared by the trial court; but the court has no authority to "reduce" the amount of a verdict absolutely against the will of the plaintiff, as

such action would invade the province of the jury. *Duke v. Fargo* (1915), 172 App. Div. 746, 158 N. Y. Supp. 1009.

Judgment absolute; assessment of damages; motion for new trial.—Where after judgment absolute for the plaintiff has been rendered by the court of appeals on the defendant's stipulation and subsequently the damages of the plaintiff have been assessed under § 194, it is improper for the defendant to move to set aside the verdict on the judge's minutes and for a new trial under § 999. *Trieber v. New York & Queens County Railway Co.* (1912), 149 App. Div. 804, 134 N. Y. Supp. 287.

Error of jury as to amount awarded.—An inexcusable error on the part of the jury in the amount awarded is sufficient ground for a new trial. *Fitzpatrick v. Howard* (1912), 148 App. Div. 802, 133 N. Y. Supp. 345.

The submission of certain false issues to the jury, with the consent of the plaintiffs, does not waive their right to appeal on the ground that the verdict should be set aside on any of the grounds stated in this section. *Gerson v. Blanck* (1913), 79 Misc. 24, 139 N. Y. Supp. 47.

Costs on granting motion.—Where a trial judge grants a new trial upon the ground that the verdict is contrary to the evidence, costs should not be imposed upon the litigant to whom the relief is afforded unless the judge determine that there has

been fault or omission on the part of said litigant. *Post v. Kerwin* (1912), 150 App. Div. 321, 134 N. Y. Supp. 714.

Where a verdict in plaintiff's favor is set aside under § 999, a motion for the imposition of costs as a condition for granting a new trial will be denied. *Jones v. Mar-mac Const. Co.* (1913), 79 Misc. 368, 149 N. Y. Supp. 228.

The provisions of § 527 of the code of criminal procedure, by which the court is authorized on appeal to grant a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception should have been taken or not in the court below, are clearly the equivalents of the provisions of §§ 999 and 1317 of the code of civil procedure. *People v. Miles* (1916), 173 App. Div. 179, 158 N. Y. Supp. 819.

A municipal court has power to vacate a judgment. *Bradstreets Collection Bureau v. Nagler's Brass Works, Inc.* (1917), 180 App. Div. 511, 167 N. Y. Supp. 751.

Construction of § 129 of municipal court code of the city of New York which corresponds to this section. *N. Y. Petticoat Mfg. Co., Inc. v. Flickinger* (1918), 102 Misc. 225, 168 N. Y. Supp. 676.

Section cited.—*Hummel v. L. S. Fischl's Son, Inc.* (1916), 75 App. Div. 489, 162 N. Y. Supp. 150.

§ 1002. When motion for a new trial to be made at special term. Restrictions thereupon.

When made; grounds.—A motion to set aside a verdict may be made at any special term upon any or all of the grounds permitted under § 999. *O'Connor v. Healey* (1916), 96 Misc. 278, 161 N. Y. Supp. 582.

Laches.—After a verdict in favor of plaintiff, the court entertained a motion for a new trial under § 999 to be heard at a future time, and an order was entered staying all proceedings on the part of plaintiff pending the determination of the motion, but the defendant's attorney neglected to bring it on for argument before the death of the trial justice, four years later. The death of defendant's attorney occurred eight years after that of the justice and the motion for a new trial

was never argued. The defendants neglecting and refusing to appoint a new attorney, after service upon them of a notice pursuant to § 65, an order was granted vacating the stay of proceedings, and plaintiff entered judgment upon the verdict. Held, that a motion to vacate said judgment on the ground that plaintiff had lost his right thereto because of laches, will be denied. The defendants' interests in the merits of the motion for a new trial, if any, could be protected by a new motion. *Plumb v. Almekinder* (1917), 98 Misc. 435, 162 N. Y. Supp. 598.

Section cited.—*Hummel v. L. S. Fischl's Son, Inc.* (1916), 175 App. Div. 489, 162 N. Y. Supp. 150.

§ 1003. Application of this article to trials of specific questions by jury; specific provisions applicable thereto.

Appeal where specific questions are submitted to jury.—In actions triable by the court in which specific questions are submitted to a jury under § 971, the trial of the whole issue by the court is to be considered as a trial by the court without

a jury, and the judgment rendered by the trial court is to be reviewed upon appeal precisely as though the case had been tried without the intervention of a jury. *Carroll v. Bullock* (1913), 207 N. Y. 567.

§ 1007. Notes of stenographer may be treated as minutes of the judge.

Omissions of stenographer.—A party to an appeal is entitled to have his case show the facts as they really happened at trial and should not be prejudiced by an error or omission of the stenographer. *People v. Buccafurri* (1913), 154 App. Div. 827, 139 N. Y. Supp. 305.

§ 1009. Trial by jury; how waived.

Noncompliance with a rule of the court does not constitute waiver.—Waiver of right to trial by jury of issue of adultery in action for divorce cannot be effected by noncompliance with a rule of the supreme court requiring such issue to be settled within twenty days after issue joined. *Moot v. Moot* (1915), 214 N. Y. 204; *Stafford v. Stafford* (1914), 165 App. Div. 27, 150 N. Y. Supp. 212.

Not waived by failure to notice case for trial.—A plaintiff in an action for partition who did not notice the case for trial at special term, does not waive his statutory right to a jury trial, merely because he asked for several adjournments after the defendant had noticed the case for special term. *Barker v. Barker* (1915), 166 App. Div. 863, 152 N. Y. Supp. 356.

Prior notice of issue for trial at special term.—A motion by a plaintiff to frame issues and for a jury trial thereof, after the reversal of a judgment in its favor and the granting of a new trial, made before the action was restored to the calendar, should not be denied on the ground that the plaintiff having originally noticed the issues for trial at special term had waived the right to a jury trial. *Midtown Contracting Co. v. Goldsticker* (1915), 169 App. Div. 21, 154 N. Y. Supp. 451.

Proceedings in surrogate's court for probate.—§§ 2537, 2617 specify the act which should constitute a waiver of the right to trial by jury and exclude the application of this section. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

§ 1010. Decision upon trial by the court, when to be filed; consequence of failure.

Reconsideration of conclusions before formal decision.—A judge after delivering his opinion may reconsider his conclusions and revise his decision, or make an entirely different one, at any time before he has made the formal decision required by §§ 1010 and 1022 and to that end may permit

requests to find to be submitted under § 1023. *Dann v. Palmer* (1912), 151 App. Div. 151, 135 N. Y. Supp. 411.

No written decision on disposition of demurrer on motion under § 547 or § 976. *Kramer v. Barth* (1913), 79 Misc. 80, 139 N. Y. Supp. 341.

§ 1011. Reference by consent; when and how made.

Construction.—This section, in so far as it provides that a reference shall be made to a referee named by the stipulation of the parties, should be construed to be limited to cases in which the determination of the referee affects only the rights and interests of the parties by whom the stipulation was made. *Hicks Beach Co. v. Frost* (1917), 99 Misc. 33, 163 N. Y. Supp. 203.

Consent in open court.—A consent made

in open court has been held equivalent to a written stipulation referred to in this section. *Butterly v. Deering* (1913), 158 App. Div. 181, 152 N. Y. Supp. 1050, *aff'd* 210 N. Y. 551.

New referee.—Reversal of judgment entered on referee's report—if such referee was appointed by the court the appointment of new referee on new trial is discretionary. *Saranac Land & Timber Co. v. Roberts* (1918), 224 N. Y. 377.

§ 1012. Qualifications of the last section.

Provisions mandatory.—The provisions of this section and rule 66 of the general rules of practice are mandatory, and where one of the defendants in an action for the partition of real estate is an infant an or-

der of reference to hear and determine entered upon a stipulation designating the referee is illegal and void. *Hicks Beach Co. v. Frost* (1917), 99 Misc. 33, 163 N. Y. Supp. 203.

§ 1013. Compulsory reference for the trial of issues; in what cases it may be made.

Long account; fact must be shown.—It is not sufficient to uphold a compulsory order of reference to show that there is a pos-

sibility that the examination of a long account will be involved; that fact must be shown with reasonable certainty. *Daly v.*

City of New York (1912), 150 App. Div. 106, 134 N. Y. Supp. 754; *Amsden v. Traders National Bank* (1918), 182 App. Div. 474, 170 N. Y. Supp. 316.

Idem; suits in equity; accounts collaterally involved.—The authority for ordering a compulsory reference must be found in this section, which is applicable as well to suits in equity as to actions at law. Even in a suit in equity triable by the court, a compulsory reference cannot be ordered unless it appears that the trial will require the examination of a long account and that no difficult questions of law are involved. Moreover, a compulsory reference may not be ordered where the accounts to be examined do not directly arise in the action upon the complaint or the defense, but are merely collaterally or incidentally involved. *Kings County Lighting Co. v. Woodbury* (1917), 177 App. Div. 451, 164 N. Y. Supp. 380.

Idem; facts justifying reference.—In an action to recover the value of coal shipped by plaintiff in 3,678 freight cars over defendants' railroads during a period of three and one-half years and claimed to have been lost in transit, a motion for a compulsory reference on the ground that the trial of the action will necessarily involve the examination of a long account, etc., will be granted. *Ellsworth Collieries Co. v. Pennsylvania R. R. Co.* (1916), 94 Misc. 659, 169 N. Y. Supp. 1020; *Vega Co-operative Creamery Association v. Craft* (1917), 180 App. Div. 267, 167 N. Y. Supp. 481.

Idem; complaint determines.—The question whether or not a reference may be ordered is ordinarily determined by the complaint. If the allegations as to an account of over fifty items appearing on the face of the complaint are put in issue by a general denial, the examination and proof of a long account are directly involved, and the referable character of the issues cannot be defeated by an affidavit by the defendant's attorney that some of the matters in the account will not be questioned. *Krinski v. Menschel* (1915), 168 App. Div. 491, 153 N. Y. Supp. 996.

Idem; mechanic's lien action.—A complaint by a building contractor in a suit against the owner for the foreclosure of a mechanic's lien, alleging that it had two claims for a balance due under the contract, and making a further demand for extras, does not state a long account, and a reference should not be ordered. *Mugler v. Castleton Hotel and Realty Co.* (1915), 168 App. Div. 492, 153 N. Y. Supp. 1025.

Idem; suit to foreclose mechanic's liens.—Issues arising in suits to foreclose mechanics' liens on buildings should not be referred except by consent unless they clearly involve a long account. *Mugler v. Castleton Hotel and Realty Co.* (1915), 168 App. Div. 492, 153 N. Y. Supp. 1025.

Idem; attorney's services under a re-

tainer.—The fact that it will become necessary to consider various items of services of attorneys in determining the value of all the services rendered under a general retainer, does not involve the examination of a long account within the meaning of this section. *Pace v. Amend* (1914), 164 App. Div. 206, 149 N. Y. Supp. 736.

An attorney in an action for professional services who claims in his brief that he performed services pursuant to three separate and distinct retainers in three separate cases; that the services covered a period of two years and consisted of upwards of seventy items; that, in addition, the defendants contend that all the services were not rendered for all the defendants and that it would be necessary to apportion them, is not entitled to a compulsory reference. *Blumberg v. Schwarstein* (1916), 160 N. Y. Supp. 1011.

Idem; when not involved.—When issues presented do not justify a compulsory reference on the ground that the moving papers indicate that the trial will require the examination of a long account. *Western Union Telegraph Co. v. White* (1912), 137 N. Y. Supp. 689.

When examination of long account not involved. *Fisher v. Tuttle* (1914), 164 App. Div. 216, 149 N. Y. Supp. 673.

Account incidental and collateral.—Where an account involved is simply incidental and collateral a compulsory reference will not be ordered. *Smith v. Galanos* (1918), 105 Misc. 19, 172 N. Y. Supp. 334.

Examination of account not necessary.—A compulsory reference will not be directed where under the issues an examination of the account is only collaterally involved and its examination may not be necessary under the defense set up. *Maas v. Swalbach* (1916), 96 Misc. 559, 160 N. Y. Supp. 846.

Suit to restrain the enforcement of L. 1916, ch. 604, which reduced the price of gas supplied to customers of certain wards of the city of New York, it being contended that the statute was confiscatory and thus unconstitutional in depriving the plaintiff of its property without due process of law. Held, that, although an accounting as to the earnings and expenses of the plaintiff may be necessary, the examination of a long account was not involved within the meaning of the statute and that a compulsory reference to hear and determine was unauthorized. *Kings County Lighting Co. v. Woodbury* (1917), 177 App. Div. 451, 164 N. Y. Supp. 380.

Professional services; reference of issues.—Where attorneys move for the reference of issues involving their claims for professional services, they should affirmatively establish their right thereto with reasonable certainty. *Pace v. Amend* (1914), 164 App. Div. 206, 149 N. Y. Supp. 736.

Review of order of reference.—A plain-

tiff who has not consented to the reference of issues upon the ground that it will be necessary to have an accounting, is entitled to review the order. *Fisher v. Tuttle* (1914), 164 App. Div. 216, 149 N. Y. Supp. 673.

Taking of an account to determine the amount of recovery in an action to recover money only, is authorized, see *Clements v. W. S. Cooper Co.* (1912), 136 N. Y. Supp. 93.

§ 1015. Compulsory reference upon question incidentally arising.

Upon a reference to take and state an account the referee has no right to issue written interrogatories and require sworn answers thereto in writing as was the practice before a master in chancery. *Doud v. Hughes' Sons Towing & Transportation Co.* (1918), 183 App. Div. 580, 170 N. Y. Supp. 164.

Referee as receiver.—This section does not confer statutory power upon the court to call its receiver a referee and to send him as its visitor to search the private

papers of a party litigant. *Sanford v. Richardson* (1916), 176 App. Div. 199, 161 N. Y. Supp. 1026.

Accounts of receiver.—A reference to determine and report upon questions of fact arising about conflicting affidavits with respect to certain items of the accounts of a receiver in a foreclosure action comes clearly within this section. *Fine v. Clinton Realty Co.* (1918), 105 Misc. 318, 173 N. Y. Supp. 137.

§ 1018. General powers of a referee upon a trial.

Amendment of complaint by referee.—On a reference to hear and determine, the referee has no power to grant an amendment to the complaint setting up a new cause of action. *Kelly v. St. Michael's Roman Catholic Church* (1912), 148 App. Div. 767, 133 N. Y. Supp. 328.

Stenographers.—A referee has no power to hire a stenographer unless authorized by stipulation of parties, and the fees of a stenographer cannot be taxed as a disbursement in the absence of such stipulation. *Baff v. Elias* (1912), 152 App. Div. 226, 136 N. Y. Supp. 563.

§ 1019. Referee's report; when to be made; consequence of failure.

Fees of referee and stenographer.—Where preliminary to taking of testimony on a reference to hear and determine a motion to set aside a judgment, the parties stipulated that the stenographer's fees should constitute a cost and disbursement and be taxed as such with the referee's fees, and, upon the referee's failure to file his report with the clerk or deliver it to the attorney for one of the parties, plaintiff's attorney elected to end the reference and serve the notice provided by § 1019,

the stenographer is entitled to fees but the referee is not. *Hertzberg v. Elvidge* (1913), 80 Misc. 290, 142 N. Y. Supp. 211.

Referee's report.—Where the referee's report is unconditionally delivered to one of the attorneys within the time limited, the fact that the report is allowed to remain in the referee's office where he has physical control of it, is not ground for terminating the reference. *Winckler v. Winckler* (1912), 149 App. Div. 250, 133 N. Y. Supp. 768.

§ 1021. Decision of court or report of referee, upon trial of demurrer.

Demurrer to separate defense; judgment on complaint.—Where the legal conclusions arising from the allegations of a complaint are met by denials in the answer and a demurrer to a separate defense is sustained, the plaintiff is entitled to judgment on the complaint with leave to defendant to serve an amended answer. *German Savings Bank v. Dunn* (1912), 75 Misc. 251, 135 N. Y. Supp. 56.

No written decision or interlocutory judgment on disposition of demurrer on motion under either § 547 or § 976. *Kramer v. Barth* (1913), 79 Misc. 80, 139 N. Y. Supp. 341.

No findings of fact are necessary, where both the complaint and the counterclaim in an equity action are dismissed for fail-

ure of proof. *Barkenthien v. People* (1912), 77 Misc. 395, 136 N. Y. Supp. 652.

Findings of fact not necessary upon setting aside verdict and dismissal of complaint. *N. Y. Inst. for Deaf and Dumb v. City of New York* (1918), 181 App. Div. 184, 168 N. Y. Supp. 755.

Findings where non-suit is granted.—Where a non-suit is granted, no findings are necessary, but an exception must be taken in order to review the judgment. The objection that no exception was taken, however may be waived. *People v. Journal Co.* (1914), 213 N. Y. 1; where a non-suit is granted, there should be no findings of fact as upon a determination of the merits. *Kling v. Corning News Co.* (1913), 208 N. Y. 334.

§ 1022. Decision of court or report of referee upon trial of the whole issue of fact.

Application. — *Schwartz v. Massachusetts Bonding & Ins. Co.* (1917), 162 N. Y. Supp. 1004; *Troughton v. Digmores Holding Co., Inc.* (1919), 105 Misc. 638, 173 N. Y. Supp. 659.

Failure of trial justice to make findings of fact.—Where in an action tried by the court without a jury, the trial justice made no findings of fact, although the facts were in dispute, but dismissed the complaint, the judgment entered on such decision is a mere nonsuit. The dismissal of the complaint was not on the merits and was improper. *Colon & Co. v. Smith* (1919), 226 N. Y. 101.

Report of referee; defective for failure to distinguish between findings of fact and conclusions of law.—The report of a referee upon the trial of issues of facts which fails to distinguish between findings of fact and conclusions of law, which is indefinite as to the decision arrived at and which contains no direction for the entry of judgment is defective, and a judgment entered thereon will be reversed and the case remitted to the referee for decision. *Anderson v. Knobloch* (1912), 150 App. Div. 834, 135 N. Y. Supp. 251.

Idem; right to include award of costs.—When a referee makes and files his report and interlocutory judgment has been entered thereon, his power ends. And the fact that the same referee is subsequently appointed referee to ascertain the damages due does not give him authority to award those costs which he might have awarded on the first reference. *Barnes v. Midland Railroad Terminal Co.* (1914), 161 App. Div. 621, 146 N. Y. Supp. 1033.

Failure to submit conclusions of law.—Where plaintiff as well as defendants submitted proposed findings of fact but no conclusions of law, such requests will be returned to the clerk in order that amended ones may be presented in their stead. *Shenk v. Oliva* (1916), 94 Misc. 702, 158 N. Y. Supp. 437.

Decision stating facts formed and conclusions of law.—Judgment must be reversed where no decision containing findings of fact and conclusions of law has been filed. *Mattiaccio v. Illinois Surety Co.* (1913), 139 N. Y. Supp. 980.

Where no decision has been made and filed as required by this section the judgment entered thereon will be set aside as

irregular and premature. *Hager v. Arland* (1913), 81 Misc. 421, 143 N. Y. Supp. 388.

Idem; in suit for an accounting.—A judgment in a suit for an accounting is invalid where the judgment roll contains no decision stating separately the facts found and the conclusions of law, and directing judgment authenticated by the official signature of a trial justice at length, as required by this section. The parties' requests to find, marked "found" or "refused" and initialed by the trial judge, are not equivalent to the decision required by the statute. *Watts v. Doull Miller Co.* (1914), 164 App. Div. 259, 149 N. Y. Supp. 744.

Mechanic's lien; findings inconsistent with judgment.—In a suit to establish a mechanic's lien, findings by the court that lienor furnished the materials; that they were used upon the building in question; that they were furnished with the knowledge and consent of the owners for the purpose of carrying out the provisions of a lease, are inconsistent with a judgment of the court dismissing the claim. *McNulty Brothers v. Offerman* (1912), 152 App. Div. 181, 137 N. Y. Supp. 27.

Dismissal of complaint; review of questions of law on appeal.—Where in a suit in equity to compel the delivery of a deed the trial court makes no findings, a judgment dismissing the complaint is not on the merits, but merely one of non-suit and brings up for review questions of law only. *Stephenson v. Southland* (1912), 150 App. Div. 275, 134 N. Y. Supp. 774.

Unwarranted findings.—Admissions in pleadings need not be made part of the findings of a referee, and findings of a referee upon any issue not referred to him are without force and effect. *Brooklyn Heights R. R. Co. v. Brooklyn City R. R. Co.* (1912), 151 App. Div. 465, 135 N. Y. Supp. 990.

Reconsideration of conclusions before formal decision.—A judge after delivering his opinion may reconsider his conclusions and revise his decision, or make an entirely different one, at any time before he has made the formal decision required by §§ 1010 and 1022, and to that end may permit requests to find to be submitted under § 1023. *Dann v. Palmer* (1912), 151 App. Div. 151, 135 N. Y. Supp. 411.

§ 1023. Parties may require court or referee to determine particular questions.

Requests to find; reconsideration of conclusions before formal decision.—A judge after delivering his opinion may reconsider his conclusions and revise his decision, or

make an entirely different one, at any time before he has made the formal decision required by §§ 1010 and 1022, and to that end may permit requests to find to be sub-

mitted under § 1023. *Dann v. Palmer* (1912), 151 App. Div. 151, 135 N. Y. Supp. 411.

Time when requests to find should be submitted.—After a referee to hear and determine has made, signed and delivered his report and judgment has been entered thereon, the defendants are not entitled to submit requests to find, where it does not appear that their rights may not be fully protected by exceptions. *Kinsila v. Shubert* (1913), 160 App. Div. 8, 145 N. Y. Supp. 30.

Time of receiving and marking find-

ings of fact.—It is within the discretion of the trial justice in the interest of justice to receive and mark proposed findings of fact, after decision rendered, at any time before an appeal is taken. *Famous Manufacturing Co. v. Gibson* (1916), 98 Misc. 4, 161 N. Y. Supp. 851.

Surrogate's referee should separately state his findings of fact and conclusions of law and note on the margin of his report his disposition of requests to find. *Matter of Troughton* (1917), 101 Misc. 386, 166 N. Y. Supp. 1077.

§ 1176. Peremptory challenges in a civil action; number of.

Several defendants having common interest.—Where there are several defendants having a common interest and whose answers are substantially identical and their defense conducted in the common in-

terest of all, such defendants are properly treated as only one party within the meaning of § 1176. *Downey v. Finucane* (1912), 205 N. Y. 251.

§ 1180. Challenges; how tried; exception to and review of the determination of the court, in reference thereto.

Casualty company.—Under § 1180 a juror may be questioned as to his interest in a particular casualty company. *Dulberger v. Gimbel Brothers* (1912), 76 Misc. 225, 134 N. Y. Supp. 602.

Waiver.—The constitution does not prescribe the qualifications of jurors, and a failure to interpose a challenge, where the objections is to the property qualifications of a juror, is deemed to be a waiver of that objection. *People v. Cosmo* (1912), 205 N. Y. 91.

The amendment of 1911, providing that a juror who is a stockholder, officer or employee of a company insuring against damage to person or property may be challenged for favor, does not change the rule that it is improper for the plaintiff's attorney in a negligence action to draw the attention of the jury to the fact that the defendant is insured. *O'Brien v. Hencken & Willenbrock Co.* (1916), 172 App. Div. 142, 158 N. Y. Supp. 200.

§ 1181. Discharge of jury failing to agree.

Failure to answer all of specific questions submitted.—Where three specific questions were submitted to the jury, and only two of them answered, but in such a way as to dispose of the issue, an inadvertent discharge of the jury, followed al-

most immediately by a direction of the court to the members of the jury to again retire and bring in a verdict on the questions answered is not a mistrial. *Ripley v. Frazer* (1912), 149 App. Div. 399, 134 N. Y. Supp. 259.

§ 1182. Plaintiff cannot submit to nonsuit after jury retires.

At common law, at least in a case where the defendant would not be unjustly prejudiced by such disposition, a plaintiff was entitled as matter of right to submit to a voluntary nonsuit at any time before the jury rendered its verdict. While this

rule has been modified by this section that section simply limits and does not abolish the right of the plaintiff to submit to such nonsuit. *Schintznis v. Lackawanna Steel Co.* (1918), 224 N. Y. 226.

§ 1183. In action to recover money, jury to assess damages.

Court may not direct judgment where damages are to be assessed.—Where, in an action to recover damages for breach of a contract to exchange lands, the answer admits that the defendant has failed to convey or to pay a consideration named in the contract, but denies all other allegations of the complaint, it is error for the

court to direct judgment on the pleadings for the sum claimed by the plaintiff as damages for the breach of the contracts. This because the amount of damages must be assessed under this section. *Lewis v. City Realty Co.* (1913), 158 App. Div. 733, 143 N. Y. Supp. 1026.

§ 1185. When verdict to be taken, subject to the opinion of the court.

When verdict for defendant, having been directed subject to the opinion of the court, will be set aside and judgment directed for plaintiff, see *Waltz v. Workmen's Sick & Death Benefit Fund* (1912), 78 Misc. 499, 139 N. Y. Supp. 1016.

Right to have case sent to jury without stating question.—Where at the close of the evidence, each party asks that a verdict be directed in his favor and after the decision thereon the unsuccessful party

asks that the case be sent to the jury without stating any question of fact he desires submitted, and he is not required by the court to state the specific question for the jury, a denial of the motion is error. *Brown Paint Co. v. Reinhardt* (1914), 210 N. Y. 162, rev'g 148 App. Div. 920.

Surrogates' courts.—This section applies to trials with juries in the surrogates' courts. *Matter of Dorsey* (1916), 94 Misc. 566, 157 N. Y. Supp. 662.

§ 1186. General and special verdict defined.

Finding of jury on question of adultery. *Anderson v. Anderson* (1918), 103 Misc. 427, 170 N. Y. Supp. 612.

§ 1187. General or specific verdict, when rendered; special finding with general verdict.

General verdict where questions are submitted.—Where in an action of ejectment two questions are submitted to the jury without objection of either party and without request for submission as specific questions, the jury may render a general verdict for the plaintiff and judgment may be entered thereon. *Ramapo Mfg. Co. v. Mapes* (1913), 155 App. Div. 443, 140 N. Y. Supp. 490.

Non-suit after general verdict in favor of plaintiff.—Where the plaintiff in a negligence action fails to prove facts sufficient to constitute a cause of action, the court may reserve decision on a motion for a non-suit and grant the motion after the jury has found a general verdict in favor of the plaintiff; the judgment entered on the order dismissing the complaint, however, should not be "on the merits." *Blyth v. Quinby & Co.* (1912), 148 App. Div. 871, 133 N. Y. Supp. 602.

When defendants' motion for a nonsuit is granted after verdict, and the appellate division unanimously reverses the judgment entered thereon and grants judgment on the special findings of the jury, the reversal of the judgment is reviewed in this court on the evidence and not on the special findings. The special verdict is in suspense until it is instated by the appellate division. The unanimous decision that there is evidence to support the verdict is not reviewed until the order of reversal has been first considered. Then the findings of fact may, if the reversal is upheld, be reviewed for the purpose of determining whether the judgment directed thereon is proper. The practice is different where a general verdict is rendered, set aside by the trial court and reinstated by the appellate division. *Deyo v. Hudson* (1919), 225 N. Y. 602.

Verdict against one joint wrongdoer and in favor of other.—When the liability of wrongdoers is several as well as joint a

verdict against one and in favor of the other is not a special verdict within the meaning of § 1187. *Pangburn v. Buick Motor Co.* (1912), 151 App. Div. 756, 137 N. Y. Supp. 37.

When court may not set judgment of general verdict aside and direct judgment absolute for defendant. *Polo v. D'Achille* (1913), 157 App. Div. 294, 142 N. Y. Supp. 506.

Power of court to direct general verdict where special verdict rendered.—Under this section the court, notwithstanding a special verdict, may, upon a motion for a non-suit or the direction of such general verdict as either party may be entitled to, ordinarily direct a general verdict in conformity with the special verdict unless it is clearly against the weight of evidence or the motion for non-suit ought to be granted as matter of law. *non obstante verdicto.* *Cahill v. Gilman* (1914), 84 Misc. 372, 146 N. Y. Supp. 224.

Direction of verdict.—*Sabatino v. Crimmins Construction Co.* (1918), 102 Misc. 172, 168 N. Y. Supp. 495.

When appellate division cannot reinstate verdict.—Where the court did not submit any specific question of fact to the jury, but directed them to render a general verdict, and declined to pass upon the defendant's motion to set aside the verdict and to grant a new trial on the grounds specified in § 999, the appellate division, although it reverses a judgment dismissing the complaint by the direction of the court, cannot reinstate a verdict for the plaintiff. *Barrington v. Hotel Astor* (1918), 184 App. Div. 317, 171 N. Y. Supp. 840.

A reservation of decision upon a motion for a nonsuit until after the rendition of a general verdict, is unauthorized. *Slater v. United Traction Co.* (1916), 98 Misc. 69, 162 N. Y. Supp. 181.

In trials under the federal employers'

liability act.—It is preferable that juries return special verdicts. *McAuliffe v. New York Central & H. R. R. Co.* (1916), 172 App. Div. 597, 158 N. Y. Supp. 922.

Action for conversion.—Where upon the examination of the record on appeal from a judgment in favor of plaintiff in an action for the conversion of a chattel the court is satisfied that there was no evidence that would justify a jury in finding that the ownership of the chattel was in plaintiff, it was not error, on motion to set aside the verdict, to dismiss the complaint though the trial justice did not reserve decision on the motion to set aside the ver-

dict and for a new trial, and no specific questions of fact were submitted to the jury. *Wright v. Wall* (1916), 94 Misc. 176, 157 N. Y. Supp. 869.

Where two or more propositions are submitted to a jury in one question and the verdict is general, it will be set aside if the evidence is insufficient as to either of the questions, or if error is committed in connection with the submission of either question, as in such case it is impossible to determine on which of the questions submitted the jury base their verdict. *Perham v. Cottle* (1916), 98 Misc. 48, 162 N. Y. Supp. 21.

§ 1189. Entry of verdict; subsequent proceedings.

Correction of verdict to conform to actual finding.—Upon due notice to all parties affected by a verdict which, as recorded does not correctly embody the finding of the jury, the court may correct the record so as to make the verdict conform to the actual findings. *Band v. Bindseil* (1912), 78 Misc. 161, 137 N. Y. Supp. 890.

Striking out superfluous recommenda-

tions.—A verdict for the defendant in an action for an assault upon plaintiff by the captain of a boat owned by defendant with request that the captain be censured will be corrected by merely striking out the superfluous recommendation. *Rettig v. Moore Co.* (1915), 90 Misc. 664, 154 N. Y. Supp. 124.

§ 1207. When judgment for plaintiff not to exceed judgment demanded.

Application.—*Stevens v. Van Wagoner-Linn Construction Co.* (1914), 165 App. Div. 44, 150 N. Y. Supp. 502.

Conformity with allegations and proof.—Judgment should be rendered in conformity with the allegations and proofs of the parties. *O'Hehir v. Central New England Railway Co.* (1912), 152 App. Div. 677, 137 N. Y. Supp. 627.

If a plaintiff fails to prove the cause of action alleged in his complaint and the objection is properly taken and preserved by exception, and the pleadings are not amended, a judgment in favor of the plaintiff on a cause of action entirely separate and distinct from that alleged cannot be

sustained. *Allerton v. Rhineland Machine Works Co.* (1914), 165 App. Div. 557, 150 N. Y. Supp. 265.

A complaint framed in equity which does not state a cause of action may be dismissed where no answer has been served, although the plaintiff is entitled to recover in an action at law. *Low v. Swartwont* (1916), 171 App. Div. 725, 157 N. Y. Supp. 1067.

Plaintiff on demurrer to complaint in equity not demanding legal relief is not entitled to have pleading sustained as stating an action at law. *Spring v. Fidelity Mutual Life Insurance Co.* (1918), 183 App. Div. 134, 170 N. Y. Supp. 253.

§ 1209. Effect of judgment dismissing the complaint.

Judgment of dismissal when no bar to subsequent action.—Where it appears that defendant moved for a non-suit at the close of plaintiff's case and decision was reserved; and that the motion was renewed when the evidence was in and decision again reserved, and the docket reads "Motion for non-suit granted. Action dismissed on the merits," such judgment in the absence of extrinsic evidence, is not a bar to another action between the same parties on the same facts and for the same relief. *McDonald v. Hygienic Ice & Refrigerating Co.* (1911), 148 App. Div. 539, 132 N. Y. Supp. 857.

Dismissal on merits.—Where in a suit in equity to compel the delivery of a deed the trial court makes no findings, a judg-

ment dismissing the complaint is not on the merits, but merely one of non-suit and brings up for review questions of law only. *Stephenson v. Southerland* (1913), 150 App. Div. 275, 134 N. Y. Supp. 774.

Idem; where findings were made on merits.—Where after the trial judge has stated he would grant a non-suit, both parties submit requests to find, upon which findings upon the merits were made and judgment entered dismissing the complaint, such judgment, affirmed by the appellate division and not amended, is not one of non-suit but on the merits. *Oakes Mfg. Co. v. City of New York* (1912), 206 N. Y. 221.

Idem; where judgment does not disclose.—Where a judgment does not state that

the dismissal of the complaint was on the merits, and it does not appear from the judgment roll that it was so, the judgment under this section is not conclusive. *People ex rel. Nolan v. Prendergast* (1914), 88 Misc. 307, 150 N. Y. Supp. 683.

A judgment dismissing the complaint in an action for the foreclosure of a mortgage, which does not state that it is upon the merits is not a bar to a subsequent action to foreclose the same mortgage, where it appears that the case was decided upon a question of practice, upon which no evidence was offered. *Staley v. Murray* (1915), 166 App. Div. 328, 152 N. Y. Supp. 163.

Effect of recital of dismissal on merits.—Where a judgment recites that a jury having been impaneled and the attorney for the plaintiff having stated that he had no witnesses in court and had not subpoenaed any witness on behalf of plaintiff and the attorney for defendant having moved for a dismissal of plaintiff's com-

plaint, defendant is awarded judgment against the plaintiff on the merits, the dismissal is not upon the merits notwithstanding such recital. *Nydelman v. Borden's Condensed Milk Co.* (1912), 77 Misc. 103, 136 N. Y. Supp. 49.

Negligence; dismissal after general verdict.—Where the plaintiff in a negligence action fails to prove facts sufficient to constitute a cause of action, the court may reserve decision on a motion for a nonsuit and grant the motion after the jury has found a general verdict in favor of the plaintiff; the judgment entered on the order dismissing the complaint, however, should not be "on the merits." *Blyth v. Quincy & Co.* (1912), 148 App. Div. 871, 133 N. Y. Supp. 602.

Section cited.—*Utica City National Bank v. Penwarden* (1917), 180 App. Div. 448, 167 N. Y. Supp. 680; *People v. Ladew* (1918), 102 Misc. 595, 170 N. Y. Supp. 196.

§ 1211. Judgment to bear interest.

Interest on a judgment was allowed at common law and the provisions of the code are declaratory thereof. *Crocker-W. Co. v. Genesee Recreation Co.* (1917), 101 Misc. 440, 167 N. Y. Supp. 141.

Condemnation proceedings.—A final order in a special proceeding to condemn lands is an adjudication in the nature of a judgment, and where it directed the pay-

ment of a sum of money interest is payable thereon from the date of entry. *Matter of East River Land Co.* (1912), 206 N. Y. 545.

Award for Palisades Park lands does not draw interest. *Matter of Comrs. of Palisades Interstate Park* (1916), 172 App. Div. 643, 158 N. Y. Supp. 932.

§ 1212. Judgment by default in certain actions on contract; how taken.

Judgment by default conclusive.—A judgment by default is as conclusive as any other judgment, and when rendered on the express stipulation of the parties is of no less effect than one rendered on the failure of a party to appear. *Crouse v. McVickar* (1912), 207 N. Y. 213.

Joint liability.—Where the cause of action set up in the plaintiff's complaint is against the defendants jointly and not

severally, the entry of a default judgment against one of the defendants is unauthorized. *Haas v. Silberman Realty Co.* (1916), 162 N. Y. Supp. 274.

Time of entry.—A judgment by default may be entered at any time except in cases where an order of arrest has been granted. *Purcell v. Lynch* (1915), 92 Misc. 148, 155 N. Y. Supp. 101.

§ 1214. Application to court for judgment by default; when necessary.

A written waiver upon the back of the notice of appearance that "notice of application for reference and judgment of foreclosure and sale is hereby waived" said waiver constituted the consent required to make the application for judgment to a justice of the supreme court out of court. *Bartlett v. Lundin* (1918), 182 App. Div. 117, 169 N. Y. Supp. 391.

Proof of cause of action is not necessary on application for judgment under this section and § 1215. *Charlton v. Ward* (1918), 102 Misc. 238, 168 N. Y. Supp. 876.

Where there is no answer and there are

no absent defendants, in an action to foreclose a mortgage, the court itself under this section and §§ 1215, 1216, may make the computation necessary to render the judgment without ordering a reference to compute the amount due. *De Groot v. Morwick Com. Co.* (1917), 98 Misc. 374, 163 N. Y. Supp. 83.

Upon the refusal of the justice presiding to grant the judgment, the plaintiff should have asked for an order denying his application, from which he could have appealed. *People ex rel. Rosenquest v. Donnelly* (1915), 168 App. Div. 500, 153 N. Y. Supp. 997.

§ 1215. Proceedings on such application.

Section cited.—People ex rel. Rosenquest v. Donnelly (1915), 168 App. Div. 500, 153 N. Y. Supp. 997.

§ 1216. Application for judgment in case of service by publication.

Proof of cause of action is necessary on application under this section. Charlton v. Ward (1918), 102 Misc. 238, 168 N. Y. Supp. 876.

Mortgage foreclosure sale; relief of bidder, when section is not complied with.—Where in an action against several defendants for the foreclosure of a mortgage, one of them is served by substituted service but the court fails to take proof of the cause of action set forth in the complaint, as required by § 1216, a purchaser at the foreclosure sale may be relieved

from his bid. *Lauder v. Meserole* (1912), 148 App. Div. 739, 133 N. Y. Supp. 340.

Where one of the tenants in common was an absentee at the time of the sale of the premises under foreclosure, and the record does not contain a report of the proof of the facts stated in the complaint and of the examination of plaintiff or his agent on oath as to any payments made, the title to the premises acquired on the referee's deed is not marketable. *Brody & Co. v. Hochstadter* (1913), 143 N. Y. Supp. 72.

§ 1218. When judgment cannot be taken against an infant defendant.

Answer of infant submitting rights to court as raising issue of fact.—The answer of an infant defendant, denying none of the allegations of the complaint but simply submitting his rights to the court, requires the court to take proof of the facts and circumstances alleged in the complaint before granting judgment, but such proof may be taken by the court itself or by referee appointed for the purpose. The answer raises no issue which requires the trial of an issue of fact as in an action in

which issues had been raised by the service of an answer denying the allegations of fact contained in the complaint. *Kindgenx v. Craig* (1914), 162 App. Div. 508, 147 N. Y. Supp. 571.

Guardian ad litem for infant.—When plaintiff moves the case for trial without having a guardian *ad litem* appointed for defendant, he may not take judgment by default. *Fishbein v. Fishbein* (1917), 179 App. Div. 883, 165 N. Y. Supp. 936.

§ 1219. When a defendant in default is entitled to notice.

In an action to foreclose a mortgage, defendants who have appeared and demanded service of all papers, but do not answer, are entitled to eight days' notice of application for judgment, and where no such notice was given them, nor any notice of trial served on them, the judgment will not be signed unless plaintiff procures a waiver of such notice from the defendants. *Selinger v. The G. C., Incorporated* (1913), 81 Misc. 343, 142 N. Y. Supp. 194.

Where, in an action to foreclose a mortgage, the defendants, there being no infants, incompetents or absentees, were all

served within the jurisdiction, and three of them appeared, but none of them answered, and the plaintiff served a notice of motion on all the defendants who had appeared for judgment as demanded in the complaint, and none of them appeared, and the application for judgment was not opposed, whereupon the court appointed a referee to compute, the plaintiff, the referee having reported the amount due upon the mortgage, was entitled to judgment without further notice. *Pepole ex rel. Rosenquest v. Donnelly* (1915), 168 App. Div. 500, 153 N. Y. Supp. 997.

§ 1220. When action may be severed, if issues of law and issues of fact presented.

Severance not allowed.—Where causes of action stated in a complaint are such that if stated separately, would have been ordered consolidated, plaintiff will not un-

der § 1220 be allowed to sever them. *Posner v. Rosenberg* (1912), 153 App. Div. 249, 137 N. Y. Supp. 1084.

§ 1221. Judgment, how taken, after trial of issues of law and issues of fact, in the same action.

Application.—This section providing for the taking of judgment after trial of is-

sues of law and fact in the same case applies, not only to § 1220, providing as to

when action may be severed, but also to § 973, providing for the separate trial of one or more issues. *McElroy v. Floral Park Villa Co.* (1916), 176 App. Div. 106, 162 N. Y. Supp. 467.

§ 1223. Proceedings upon application under the last two sections.

Necessity for proof.—An entry of judgment in a suit to foreclose a mechanic's lien is irregular and unauthorized in the absence of proof before the court or a referee upon which to base it. The proper practice is prescribed by this and the preceding section. *Albright v. Trinity Presbyterian Church* (1915), 170 App. Div. 70, 157 N. Y. Supp. 79.

§ 1225. Judgment after trial by jury of specific questions of fact.

Interlocutory judgment in divorce action.—Where, in an action for divorce brought by a husband upon the issues respectively of plaintiff's consent, condonation, connivance, privity and procurement of the adultery charge in the complaint, the jury found in favor of plaintiff, the verdict being only advisory is not conclusive as the court may adopt or reject the jury findings, the only issue conclusively determined being that as to defendant's adultery, and plaintiff's motion for an interlocutory judgment upon the verdict in his favor upon the issues directed to be tried by the jury must be denied. *King v. King* (1915), 91 Misc. 254, 154 N. Y. Supp. 794.

§ 1228. Judgment after trial; upon trial by court or referee of the whole issue of fact.

Application.—*Troughton v. Digmore Holding Co., Inc.* (1919), 105 Misc. 638, 173 N. Y. Supp. 659.

Mechanic's lien.—In a suit to establish a mechanic's lien, findings by the court that lienor furnished the material; that they were used upon the buildings in ques-

tion; that they were furnished with the knowledge and consent of the owners for the purpose of carrying out the provisions of a lease, are inconsistent with a judgment of the court dismissing the claim. *McNulty Brothers v. Offerman* (1912), 152 App. Div. 181, 137 N. Y. Supp. 27.

§ 1229. In matrimonial causes, judgment can be rendered only by the court.

Absolute divorce.—An action for an absolute divorce is a personal one and abates upon the death of the plaintiff. A motion in action for absolute divorce, made after the death of the plaintiff, to vacate the final judgment in his favor and for a new

trial upon the ground of newly-discovered evidence, must be denied for want of power and not in the exercise of discretion. *Hunt v. Hunt* (1912), 75 Misc. 209, 135 N. Y. Supp. 39.

§ 1233. Motion for judgment upon a special verdict, etc.

This section applies to trials with juries in the surrogates courts. *Matter of Dor-*

sey (1916), 94 Misc. 566, 157 N. Y. Supp. 662.

§ 1235. Interest on verdict, etc., to be included in recovery.

Action to foreclose mechanic's lien; Liability of municipal corporation for interest.—This section must be considered subject to the express limitations contained in the consolidation act and subsequent enactments relating to liens against muni-

cipal corporations to the effect that in no case shall judgment be entered against them for more than the amount due to the contractor. *Moran v. New York* (1914), 162 App. Div. 377, 147 N. Y. Supp. 259.

§ 1236. Entry of judgment.

Power of clerk to enter judgment on merits in absence of decision to that effect.—A clerk is without authority to permit the entry of the judgment upon the merits unless the opinion, order or decision of the court so directs, as it is not for the clerk on entering judgment to construe

the orders or decisions of the court, but his function is limited to entering the judgment or order directed by the opinion, order or decision of the court. *Maldonado v. Yglesias* (1914), 162 App. Div. 1, 147 N. Y. Supp. 2.

§ 1237. Judgment-roll to be filed; of what it consists.

The clerk, upon entering final judgment, must immediately file the judgment-roll, which must consist, except where special provision is otherwise made by law, of the following papers: the summons; the pleadings, or copies thereof; the final judgment, and the interlocutory judgment, if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order, which in any way involves the merits, or necessarily affects the judgment. If judgment is taken by default, the judgment-roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor; together with any report, decision or writ of inquiry, and return thereto. If judgment is taken after a trial, the judgment-roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in this act, and the exceptions or case then on file.

Upon an appeal to the court of appeals from a judgment or order of the appellate division of the supreme court, the opinion of the appellate division, if any, shall, for the purposes of the appeal, be deemed to be a part of the judgment-roll or appeal papers.

Amended by L. 1877, ch. 416; L. 1879, ch. 542; L. 1913, ch. 545, in effect Sept. 1, 1913. The amendment of 1913 added the last sentence.

Source.—Code of Proc., § 281, subds. 1, 2.

Application.—People ex rel. Flynn v. Woods (1916), 218 N. Y. 124.

The simple, certain and commendable practice is for this court denying an application which involves the possible consideration of questions of discretion to state in its order, if that be the fact, that the application is denied as a matter of law and not as a matter of discretion. Undoubtedly, however, if this be not done we may now look at the opinion of the appellate division for the purpose of ascertaining, if possible, the grounds upon which the application has been denied. Ellis-Joslyn Pub. Co. v. Common Council (1918), 223 N. Y. 445.

Docket of interlocutory judgment.—A county clerk is not required to docket an

interlocutory judgment for costs. Bleja v. Mager (1913), 80 Misc. 679, 141 N. Y. Supp. 1016.

Opinion of appellate division.—Under the provisions of this section requiring that the opinion of the appellate division "shall, for the purposes of the appeal, be deemed to be a part of the judgment roll or appeal papers" such opinion is properly before this court for consideration. Richard v. Wells-Fargo Express Co. (1915), 215 N. Y. 351.

Opinion of the appellate division must be regarded as part of the papers upon which the appeal is heard in the court of appeals. Matter of Haydorn v. Carroll (1918), 225 N. Y. 84.

§ 1240. When a judgment may be enforced by execution.

Judgment against partnership in process of dissolution.—Where in an action for the dissolution of a partnership brought, not upon the ground of insolvency, but upon allegations showing that it was impossible for the partners to do business together, a receiver of the partnership assets has been appointed *pendente lite*, and nothing has been done in the action for three and one-half years after such appointment, a judgment creditor is entitled to an order permitting the sheriff to levy upon the assets in the hands of the receiver. Abrahams v. Beneke (1913), 155 App. Div. 525, 140 N. Y. Supp. 753.

When order may be enforced by execution.—An order providing as follows: "Ordered, that the plaintiff is entitled to judgment against the defendant, directing her to pay to the plaintiff or his attorneys within five days after service of a copy of this judgment * * * the sum of * * * \$8,491.22" may be enforced by execution. Coffin v. Coffin (1914), 161 App. Div. 215, 146 N. Y. Supp. 565.

Section cited.—Leerburger v. Watson (1915), 169 App. Div. 48, 154 N. Y. Supp. 577.

§ 1241. When a judgment may be enforced by punishment for disobeying it.

Enforcement of injunction.—A decree granting a mandatory injunction requiring the defendants to remove portions of their building which overhang the plaintiff's lands, being one which cannot be enforced by execution, must be enforced as provided in this section, to wit, by service of a certified copy upon the defendants, and if they refuse or neglect to obey by moving to punish them for contempt. *Mills v. Leland* (1913), 156 App. Div. 597, 141 N. Y. Supp. 725.

Enforcement of a judgment by contempt proceedings may be resorted to only under the circumstances specified in this section. Where a judgment provided that, in the event of the failure of defendant within ten days of the entry of said judgment to procure and deliver to plaintiff a bond and mortgage upon certain property to be executed by his wife, the owner of the property, and procure and deliver to plaintiff a reassignment of a certain bond and mortgage and return to her certain corporate bonds, she should be entitled to enter a money judgment against defendant for a certain sum, and it appears that defendant's inability to comply with such directions is based upon lack of ownership of or control over the subject matter of the direction made by the court, a motion to punish defendant as for contempt because of his failure to perform the directions of said judgment will be denied. *Harrison v. De Hart* (1918), 103 Misc. 536, 170 N. Y. Supp. 530.

Punishment for contempt in absence of direction to pay money into court.—Where a defendant is not directed to pay the money into court, or to an officer of the court, he cannot be punished for contempt under this section. *Coffin v. Coffin* (1914), 161 App. Div. 215, 146 N. Y. Supp. 565.

Judgment directing cancellation of stock certificate; transfer to attorney.—Both at common law and under this section the court may punish as a contempt any act which is designed to and does defeat and circumvent its mandate, even when the letter of the decree has been executed. Thus where at the same time that a judgment of the supreme court, directing the cancellation of certain corporate stock issued to two of the defendants, was in form complied with, its effect was completely nullified by the reissuance of a part of the same stock to the attorneys of said defendants, and the defendants and their attorney were guilty of contempt of court. *Archer v. Turbo-Electric Constr. Co.* (1914), 86 Misc. 310, 149 N. Y. Supp. 200.

Not applicable to orders.—This section applies only to judgments and does not require service of a certified copy of an order as a condition precedent to a motion to punish as for contempt a disobedience thereof. *Basch v. Associated Features Booking Co., Inc.* (1915), 92 Misc. 450, 156 N. Y. Supp. 162.

Section cited.—*Leerburger v. Watson* (1915), 169 App. Div. 48, 154 N. Y. Supp. 577.

§ 1245-a. Current docket books.

The county clerk of New York county and the county clerk of Bronx county must keep books to be known as current docket books. Each half page of space in each book shall be consecutively numbered in a series of consecutive numbers for each year and shall be devoted to one action. On a half page so numbered the clerk shall enter the title of the action having the same consecutive number for that year, with the names of the plaintiffs and defendants and attorneys in full, and in chronological order a brief description of each paper as it is filed, together with the date of filing thereof, also the verdict, report or decision, if any, rendered in the action as of the date of the rendering thereof, also all orders and judgments in the action. All interlocutory and provisional proceedings, and proceedings supplementary to execution, shall be entered on the same half page of the docket as the action out of which they arise, except in actions where the entries are so voluminous as to require one or more additional half pages of space; in which case the entries shall be continued under the same number upon other pages of that or a subsequent docket book, reference thereto being entered at the end of the first and all additional half pages, and the clerk upon entering the description of a paper filed in an action shall enter upon its front page and opposite the title caption the

number of the action and the filing date and number of entry of the paper. There shall be kept an alphabetical index of all the actions entered in such current docket books during any year, which index shall consist of two sets of separate volumes, one set to be designated and used for indexing actions wherein the plaintiff or plaintiffs are individuals including all individual members of a copartnership or of a firm doing business under a firm name or style as stated in the title of the action, and the other set to be designated and used for indexing actions wherein the plaintiff or plaintiffs are corporations, joint stock company, a copartnership or a firm name or style under which a person or persons are doing business. Each of such sets of index books shall have a separate volume or volumes for each letter of the alphabet, and the volumes designated and used for indexing actions wherein the plaintiff or plaintiffs are individuals shall have a marginal page index showing each letter of the alphabet in order, and shall have the designation of its set of books, its letter and the year or years of its entries plainly marked on its back and cover and on every page. And all such actions shall be indexed in such index volumes according to all the plaintiffs of each title, in the same manner as it is provided in section twelve hundred and forty-five that judgment debtors shall be docketed in the judgment docket books, and in every case the serial number of the action shall be entered opposite the name indexed. Within three days after a summons, writ or other original process is served in an action in the supreme court, New York county, or in an action in the supreme court, Bronx county, or in an action in the county court, Bronx county, the attorney or party causing the same to be served shall file said process with proof of service in the office of the clerk who has custody of the records of the court in which the action is brought. The said clerk shall, upon receipt thereof, stamp the same upon its front page with a certain number to be one of the series for that year, and enter in the current docket book, on the half page bearing the same number, the names of the parties as they appear on said process, and the name and address of the attorney who issued the same. And the attorney or party causing such summons, writ or original process to be served shall, upon demand, give to the party so served, or to the attorney of such party, the number so stamped by the clerk, stamped or indorsed upon a paper with the title of the action, and the name and address of the attorney or party who made or caused the service to be made. All papers in the action shall bear the same number and year as the summons, writ or other original process, which number shall constitute a part of the title of such action. All original papers in the action, with proof or admission of their service, not later than the day after their service, shall be filed with or mailed to the clerk who stamped the number on the summons, writ or other original process. All papers to be hereafter filed with the clerk of New York county, or with the clerk of Bronx county must be flat and filed flat. The word "action" as used in this section shall mean "action or special proceeding." Whenever a paper pertaining to any action begun prior to the passage of this act is filed in the office of the clerk who has custody of the records of the court in which the action is pending the clerk shall upon receipt of such paper stamp the same upon the front page with a certain number, to be one of a series of consecutive numbers for the year in which said action was brought, and shall enter in a current docket

book prepared for that year the names of the parties to the action and the name and address of the attorney who filed the paper, in the same manner as if such paper were the original summons, writ or other process in such action; and the clerk shall as soon as practicable thereafter stamp or indorse that number upon every paper in that action theretofore filed in his office and shall enter such papers, as they are so numbered, in such docket book in the same manner as if such docketing had been begun with the first paper in such action. And all such entries in such docket books of actions begun prior to the passage of this act shall be indexed in separate volumes for each letter of the alphabet, and for corporations, a joint stock company, a copartnership or a person or persons doing business under a firm name or style, as hereinbefore provided, in the same manner as actions begun after the passage of this act are hereinbefore directed to be indexed. Whenever an action is transferred to another court, or the place of trial changed, the clerk to whom the papers in such action are delivered shall enter in the current docket book in which he makes entries copies of all entries theretofore made in said action, and shall continue to make subsequent entries therein in the same manner as if the process had originally been filed with him. All papers numbered and docketed as herein directed shall be filed together; and on the entry of final judgment in any action all the papers in that action shall be arranged in the order of the dates on which they were filed and shall be fastened or bound together flat with the judgment-roll and so filed. The county clerk of New York county shall appoint, subject to the rules of the state civil service commission, such subordinates as may be necessary for the work required to be done in his office under the provisions of this act, and shall designate the positions and fix the compensation of such subordinates, subject to the approval of the board of estimate and apportionment of the city of New York; and the comptroller of the city of New York shall issue and sell certificates of indebtedness to an amount sufficient to provide for the payment of the salaries of such subordinates during the year nineteen hundred and twelve, which shall be a charge against the county of New York, and an amount sufficient to pay and discharge the certificates so issued shall be included in the budget made by said board of estimate and apportionment for the year nineteen hundred and thirteen.

Added by L. 1911, ch. 290; amended by L. 1912, ch. 344; L. 1915, ch. 567, in effect May 10, 1915. The amendment of 1915 inserted the provisions relative to the new county of Bronx.

§ 1250. Judgment not to be a lien until docketed.

Extent of lien.—A judgment has only such lien as is given by statute for at common law, judgments were not liens upon real estate. No distinction existed, so far as their collection was concerned, between real and personal property. In either case it was necessary to “sue out an execution” and make a levy, and a lien did not attach until the levy was made. *Hulbert v. Hulbert* (1914), 86 Misc. 662, 149 N. Y. Supp. 568.

§ 1251. Real property bound for ten years by a judgment thus docketed; name of debtor to be docketed.

Priority as to after acquired property.—Where several judgments are filed and docketed against a debtor who, at the time, has no real estate, but who later inherits some, the liens of all the judgments attach simultaneously to the interest of the debtor on his acquiring title, and the fact that one of the judgment creditors caused

an execution to issue and the property to be sold thereunder does not give him a preference over the other judgment creditors. *Matter of Thomas* (1915), 216 N. Y. 426.

Necessity for insurance of execution.—A judgment upon being filed and docketed becomes a lien upon the real estate of the debtor and it is no longer necessary for that purpose that an execution should be issued thereon. *Matter of Thomas* (1915), 216 N. Y. 426.

Judgment lien in mortgage foreclosure.—A judgment lien for deficiency arising on foreclosure attaches to defendant's real estate for ten years only after the filing of the referee's report of sale showing the amount of the deficiency. *Koeloch v. Kendall* (1912), 7 Misc. 367, 136 N. Y. Supp. 838.

Liens attach to property owned at time of docket.—The liens specified in this sec-

tion are confined to the real property and chattels real, which the judgment debtor has at the time of docketing the judgment. *Lafayette Trust Co. v. Beggs* (1915), 213 N. Y. 280, 288.

Judgments are a lien upon real property and chattels real from the time of filing the judgment roll. It is the time, not the day, which governs and fractions of a day will be inquired into to determine preferences. *Dwelle-Kaiser Co. v. County of Niagara* (1918), 103 Misc. 460, 171 N. Y. Supp. 361.

Lien of taxes.—The fact that a similar provision in a city charter relative to a lien for taxes upon real property does not include the words "and no longer," is immaterial. If the city authorities are dilatory the lien is lost after the lapse of ten years. *Hall v. City of Lockport* (1915), 153 N. Y. Supp. 298.

§ 1256. Court may order lien of judgment to be suspended upon appeal.

Appeal to appellate term from municipal court.—Where a plaintiff has recovered a judgment in the municipal court and a transcript thereof has been filed with the county clerk, and the defendant has ap-

pealed to the appellate term, the supreme court has no authority to suspend the lien of the judgment pending the appeal. *Danzillo v. Danzillo* (1914), 163 App. Div. 617, 148 N. Y. Supp. 996.

§ 1260. Docket of judgment, how canceled.

The docket of a judgment must be canceled and discharged by the clerk in whose office the judgment-roll is filed, or by the clerk of any county where a transcript of said judgment shall have been docketed, upon filing with him a satisfaction-piece, describing the judgment, and executed as follows:

Amended by L. 1899, ch. 95; L. 1911, ch. 599; L. 1913, ch. 30, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "or by the clerk of any county where a transcript of said judgment shall have been docketed," in lines 2 and 3.

Source.—R. S., pt. 3, ch. 6, tit. 4, §§ 22-24; L. 1834, ch. 262, §§ 1-3.

Origin and purpose of section.—This section was originally incorporated in the revised statute adopted in 1830 (2 R. S., p. 362, sec. 24), and according to the note of the revisers there was then a prevailing impression that under the common law an attorney of record had the right to satisfy his client's judgment within a year of the entry thereof. In order to remove any doubt on the subject the legislature enacted the statute (5 Edmunds Statutes at Large, p. 548), which has ever since been in force without change except that it has been transplanted to the code of civil procedure. *Greenburg v. New York*

Central, etc. R. Co. (1914), 210 N. Y. 505, aff'g 160 App. Div. 888, 144 N. Y. Supp. 1118.

Satisfaction by attorney for infant.—An attorney for an infant has no greater power than the guardian and where the guardian on account of failure to make and file the bond required by § 474 of the code, has no authority to receive payment of a judgment and enter satisfaction, the attorney cannot do so. *Greenburg v. New York Central, etc. R. Co.* (1914), 210 N. Y. 505, aff'g 160 App. Div. 888, 144 N. Y. Supp. 1118.

See notes to section 474.

§ 1261. Satisfaction-piece to be given on payment of judgment.

Payment of judgment by one defendant.—Where one of several defendants, against whom there is a joint judgment, pays the entire amount the judgment is extinguished and they cannot by any mutual arrange-

ment keep the judgment alive for the benefit of the party making the payment. *Gotthelf v. Krulewitch* (1912), 153 App. Div. 746, 138 N. Y. Supp. 691.

§ 1268. Discharge of a judgment against a bankrupt.

Judgment recovered within four months prior to adjudication.—The lien of a judgment, recovered within four months before the adjudication of the debtor as a bankrupt, survives his subsequent discharge, although the debt upon which it was re-

covered was proven in the bankruptcy proceedings, where the trustee elected not to take the property upon which the judgment was a lien. *McCarty v. Light* (1913), 155 App. Div. 36, 139 N. Y. Supp. 853.

§ 1270. Clerk to file and note assignment of judgment.

Record of assignment as constructive notice.—The fact that this section requires the county clerk to make a record of the assignment of a judgment when filed does not charge the judgment debtor with constructive notice of said record. *Boyd v.*

Buffalo Steam Roller Co. (1914), 87 Misc. 20, 149 N. Y. Supp. 1050.

Necessity of filing.—An assignment of a judgment need not necessarily be filed. *Boyd v. Buffalo Steam Roller Co.* (1914), 87 Misc. 20, 149 N. Y. Supp. 1050.

§ 1272. To what judgments and executions this article applies.

Judgment in foreclosure action.—A judgment lien for deficiency arising on foreclosure attaches to defendant's real estate for ten years only after the filing of the

referee's report of sale showing the amount of the deficiency. *Koelsch v. Kendall* (1912), 76 Misc. 367, 136 N. Y. Supp. 838.

§ 1273. Judgment may be confessed; when married woman may confess.

Effect of stipulation not to enter confessed judgment.—Where a stipulation is made that a confessed judgment shall not be entered if the defendant pays in installments a certain sum of money, although full payment has not been made, still if the plaintiff has satisfied all claims due

by selling the defendant's securities, he is not entitled to enter judgment upon the defendant's confession, and a judgment so entered should be vacated. *London, etc. Bank v. White* (1914), 162 App. Div. 739, 147 N. Y. Supp. 1009.

§ 1274. Statement; from thereof.

Statement indefinite and deficient.—A statement in a confession of judgment that it was for a debt justly due plaintiff for "moneys loaned to defendant by plaintiff and for services rendered to defendant by plaintiff at defendant's request" is insufficient. *Hubbell v. Hardy* (1916), 93 Misc. 672, 157 N. Y. Supp. 497.

Signature obtained by fraud.—Where the signature to a confession of judgment was obtained by fraud the judgment entered thereon will be vacated and set aside. *Hubbell v. Hardy* (1916), 93 Misc. 672, 157 N. Y. Supp. 497.

§ 1275. Statement to be filed, and judgment entered.

At any time within three years after the statement is verified, it may be filed with the county clerk of the county of which the defendant was a resident at the time of making such statement, or, where the sum, for which judgment is confessed, does not exceed two thousand dollars, exclusive of interest from the time of making the statement, with the clerk of the city court of the city of New York, provided, however, that the defendant at time of making such statement was a resident of the city of New York. Thereupon the clerk must enter, in like manner as a judgment is entered in an action, a judgment for the sum confessed, with costs, which he must tax, to the amount of fifteen dollars, besides disbursements taxable in an action. If the statement is filed with a county clerk, the judgment must be entered in the supreme court; if it is filed with the clerk of another court, specified in this section, the judgment must be entered in the court

of which he is clerk. But a judgment shall not be entered upon such a statement, after the defendant's death.

Amended by L. 1895, ch. 946; L. 1915, ch. 639, in effect Sept. 1, 1915. The amendment of 1915 inserted the words "of the county of which the defendant was a resident at the time of making such statement," in lines 2 and 3; and the words "provided, however, that the defendant at time of making such statement was a resident of the city of New York," in lines 6 and 7.

Source.—Code of Proc., § 384, first sentence.

§ 1279. Controversy, how submitted without process.

Cause of action must exist.—The submission of a controversy under §§ 1279-1281 contemplate the existence and presentation of a state of facts upon which the person named as plaintiff in the submission could bring an action at law or in equity against the person named therein as defendant. *Hanrahan v. Terminal Station Commission* (1912), 206 N. Y. 494.

Controversy must be one that might have been the subject of an action upon which judgment could be entered, and submission must state kind of judgment to be entered. *Denver Tramway Co. v. Bankers Trust Co.* (1917), 180 App. Div. 433, 167 N. Y. Supp. 750.

Right to submit proceedings in mandamus.—A mandamus proceeding is not an action and is not submissible under this section. *DeLeyer v. Britt* (1914), 212 N. Y. 565, rev'g 157 App. Div. 586, 142 N. Y. Supp. 752.

Question of marketable title is a proper one for submission. *Lynch v. Rogers* (1912), 150 App. Div. 311, 134 N. Y. Supp. 1071. See also *Weinstein v. Kratenstein* (1912), 150 App. Div. 789, 135 N. Y. Supp. 334.

Facts stated to control decision.—On a submission of a controversy upon an agreed statement of facts the court cannot choose between conflicting inference which are permissible, but must confine its decision to the facts stated. *Muller v. Kling* (1912), 149 App. Div. 176, 133 N. Y. Supp. 614.

On an agreed statement of facts, the appellate division can draw no inference, and is bound strictly to the facts set out as conceded. Evidentiary facts in an agreed statement, with no ultimate facts, do not present a case for disposition under this section. *Leopold v. Heymann* (1914), 163 App. Div. 16, 148 N. Y. Supp. 50.

No inferences may be drawn except

those that follow as matter of law from the facts stated. *People v. Hewson* (1918), 224 N. Y. 136.

Where the determination of a question submitted would affect the title to real estate left by a testator, the statement of facts should show what property he left. *Security Trust Co. v. Campbell* (1918), 184 App. Div. 961, 171 N. Y. Supp. 24.

Controverted questions of fact; parties. Upon the submission of a controversy relating to the disposition of the corpus of a trust fund, the court has no authority to determine controverted questions of fact. Such a submission should be dismissed where persons interested in the controversy have not been made parties. *Lee v. Taylor* (1919), 186 App. Div. 199, 174 N. Y. Supp. 203.

No state board or officer may submit a controversy to the courts which might result in a money judgment against the state, where the state may not itself be sued. *Metropolitan Trust Co. v. Tax Comrs.* (1917), 220 N. Y. 344.

Application.—*Van Cott v. Van Cott* (1915), 167 App. Div. 694, 152 N. Y. Supp. 840; *Metropolitan Life Insurance Co. v. Read* (1915), 168 App. Div. 823, 154 N. Y. Supp. 523; *Frank v. Michigan Central R. R. Co.* (1915), 169 App. Div. 69, 154 N. Y. Supp. 701; *Stack v. Leberman* (1915), 169 App. Div. 92, 154 N. Y. Supp. 490; *People v. Interborough Rapid Transit Co.* (1915), 169 App. Div. 32, 154 N. Y. Supp. 627; *Hartwig v. American Insurance Co.* (1915), 169 App. Div. 60, 154 N. Y. Supp. 801; *Wolf v. National City Bank* (1915), 170 App. Div. 560, 156 N. Y. Supp. 575; *Pappas v. Excelsior Brewing Co.* (1915), 170 App. Div. 692, 156 N. Y. Supp. 845; *People v. Ganly* (1915), 170 App. Div. 702, 156 N. Y. Supp. 671; *Levy v. McMahon* (1915), 170 App. Div. 730, 156 N. Y. Supp. 634.

§ 1281. Subsequent proceedings regulated.

Court confined to facts agreed upon.—On a submission of a controversy the court is confined to the facts agreed upon and will not find other facts by inference. *Dreiser v. Lane Co.* (1918), 183 App. Div. 773, 171 N. Y. Supp. 605.

§ 1282. Motion to set aside judgment for irregularity; when it may be heard.

Setting aside void judgment.—Where a complaint unites a cause of action for breach of contract with one in tort arising out of the same transaction, the plaintiff, on the defendant's default in pleading, cannot enter a judgment without application to the court and without notice to the defendant who has appeared. The entry of

such judgment is not a mere irregularity, which, by virtue of this section cannot be cured after the expiration of one year from the filing of the judgment roll, but the judgment is absolutely void, and will be vacated although the year has expired. *Bouker Contracting Co. v. Gale* (1914), 161 App. Div. 617, 146 N. Y. Supp. 894.

§ 1294. When party may appeal.

Application.—*Herpe v. Herpe* (1919), 225 N. Y. 323.

Party aggrieved.—A plaintiff is not entitled to appeal from so much of an order denying his motion for judgment on an answer as frivolous, as denies his motion to strike out a denial as frivolous, as he is not "a party aggrieved." He will be deemed to have appealed from the whole order. *Hagedorn-Merz Co. v. Burns* (1917), 178 App. Div. 483, 165 N. Y. Supp. 99.

Judgment rendered on default.—Where defendants have allowed an order to be entered upon their default, they cannot be allowed to appeal from an order denying their motion to vacate a judgment rendered in accordance with the order first mentioned. *Glens Falls Ins. Co. v. Extension D. Co.* (Nos. 1-4) (1912), 154 App. Div. 305, 138 N. Y. Supp. 939; *Teeter v. Daniel* (1917), 177 App. Div. 903, 163 N. Y. Supp. 821.

Where it has been judicially determined on a former appeal that an order sustain-

ing a demurrer to the answer was entered upon the defendant's default, she cannot afterwards appeal from the order sustaining the demurrer to her answer. *First National Bank v. Fleitmann* (1915), 168 App. Div. 75, 153 N. Y. Supp. 869.

When judgment not entered by default within meaning of this section, see *Sauerbrunn v. Hartford Life Insurance Co.* (1914), 165 App. Div. 506, 150 N. Y. Supp. 1039.

An order sustaining a demurrer and dismissing a complaint on the merits is a judgment from which an appeal may be taken. *Mistrum v. Cranides* (1915), 90 Misc. 610, 153 N. Y. Supp. 677.

Party aggrieved; executrix.—The wife as executrix of her husband is a party aggrieved by an order assessing a transfer tax on bonds which came to her individually as surviving joint tenant and may appeal from such order. *Matter of Dalsimer* (1915), 167 App. Div. 365, 153 N. Y. Supp. 58.

§ 1296. When a person entitled to become a party may appeal.

Receivers of a corporation appointed to protect its property pending the determination of an action in which they have not been made parties defendant, are not entitled to appeal from a judgment for the

plaintiff obtained against the corporation itself, as they are not entitled under this section to be substituted as parties defendant. *Jones v. Woodin* (1914), 164 App. Div. 79, 149 N. Y. Supp. 377.

§ 1297. Appeal when adverse party has died.

No substitution made.—Where the state industrial commission has made an award in favor of a claimant, subsequent to his death, and thereafter the appellate division affirms the award upon findings dis-

closing the death, and no substitution has been made, an appeal to this court will be dismissed as contrary to the provisions of §§ 1297, 1298. *Matter of O'Eau v. Bliss Co.* (1918), 224 N. Y. 701.

§ 1300. Appeal, how taken.

Necessity that judgment be entered before appeal taken.—Where at the time an appeal is taken to the court of appeals no judgment has been entered upon the decision and order of the appellate division, the appeals are without authority or right. *Osborn v. Cardeza* (1913), 209 N. Y. 530.

Appeal only from final judgment.—In actions, except where a new trial is or-

dered, no appeal as of right may be taken to the court of appeals except from a final judgment. Such an appeal may not be taken from the order of the appellate division directing such a judgment; but upon an appeal from a judgment the appellant may in his notice state that he appeals from it or from a specified part thereof. *Morgan v. Sanborn* (1919), 225 N. Y. 454.

Notice not served in time.—An appeal will not be dismissed on the ground that the notice of appeal was not served in time where the copy of the judgment served upon the defendants is so defective in several material respects as to be ineffectual to limit by its service the defendants time in which to appeal. *Benjamin v. Brownstein* (1913), 154 N. Y. Supp. 191.

Notice of appeal.—The appellate division

has no authority to review any questions not raised by the notice of appeal. *Landmesser v. Hayward* (1913), 157 App. Div. 74, 141 N. Y. Supp. 730.

Who may serve notice.—An attorney employed especially to prosecute an appeal from a judgment may serve the notice of appeal. *Slepin v. Beck* (1914), 84 Misc. 254, 145 N. Y. Supp. 530.

§ 1301. When notice of appeal to specify interlocutory judgment, etc.

Application.—*Stemmler v. Alsdorf* (1918), 224 N. Y. 426.

Allowance of costs.—Where the allowance of costs on an interlocutory judgment is affirmed by the appellate division, it cannot on a subsequent appeal from the final judgment strike out the previous allowance. *Osborn v. Cardeza* (1913), 208 N. Y. 131.

Appeal from final order in special proceeding.—A notice of appeal from an order denying a motion to vacate a prior order, denying a motion for a resettlement of an order adjudging the defendants in contempt, which states that the appellant intends to review the prior order served

within thirty days from the earliest order, is sufficient for the purpose stated, although, as a general rule, previous orders may be reviewed under a subsequent notice of appeal, only when such notice is from a final judgment or from a final order in a special proceeding. *Matter of Eckert v. Truman* (1914), 163 App. Div. 17, 148 N. Y. Supp. 48.

Notice to specify intermediate order.—An appeal taken from a final judgment only brings up for review an intermediate order which is specified in the notice of appeal. *Elias v. Coleman & Krause* (1915), 89 Misc. 289, 153 N. Y. Supp. 573.

§ 1303. Defects in proceedings may be supplied.

Amendment of notice of appeal.—Where by inadvertence and mistake of law, an appellant has appealed to the court of appeals instead of to the appellate division, the special term which granted the final judgment from which the appeal is taken has power to amend the notice of appeal so as to make it an appeal to the appellate division. *Vose v. Conkling* (1913), 159 App. Div. 201, 144 N. Y. Supp. 1.

Time within which notice of appeal may be amended.—Such amendment of the notice of appeal may be allowed by the special term, although the time to appeal from the final judgment has expired, for the mistake is a mere irregularity, not jurisdictional. *Vose v. Conkling* (1913), 159 App. Div. 201, 144 N. Y. Supp. 1.

§ 1309. Action upon undertaking; when not to be brought.

In an action upon an undertaking given upon an appeal to the appellate division the lapse of ten days from the service of a notice of the entry of a judgment or order affirming the judgment or order appealed from, is a condition precedent to the maintenance of the action, and in the absence of such an allegation the complaint does not state a cause of action. *First Bank of Notasulga v. Casualty Co.* (1916), 176 App. Div. 109, 162 N. Y. Supp. 349.

A complaint in an action on an undertaking given on appeal from a judgment of the

municipal court of the city of New York, which does not allege compliance with this section, is defective. *North Side Hoisting Co. v. Southern Surety Co.* (1916), 94 Misc. 167, 157 N. Y. Supp. 903.

In an action brought against a surety on an undertaking on appeal from the municipal court to the supreme court judgment on the pleadings should be for the defendant, instead of the plaintiff, where the complaint does not allege compliance with this section. *Monarch Mining Co. v. Laughlin* (1914), 146 N. Y. Supp. 1068.

§ 1310. When appeal stays proceedings; effect thereof.

Where an appeal to the appellate term of any court or to the appellate division of the supreme court or to the court of appeals or otherwise has been heretofore or shall hereafter be perfected, as prescribed in this chapter, and the other acts, if any, required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays

all proceedings to enforce the judgment or order appealed from; except that the court or judge from whose determination the appeal is taken, may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal; or may cause perishable property to be sold, pursuant to the judgment or order appealed from. The proceeds of such a sale must be paid, to abide the result of the appeal, into the court from or in which the appeal is taken, or, if it was taken as prescribed in title fifth of this chapter, into the supreme court. When an appeal from a judgment for rent has been perfected and execution stayed as herein provided, the appeal stays all summary proceedings, pending or otherwise, to recover the possession of real property or dispossess tenants therefrom, based on the failure to pay the rent included in the judgment appealed from. In a case, specified in subdivision four of section one hundred and ninety of this act, a party aggrieved, upon presenting to the court proof by affidavit that he intends to apply to the appellate division, rendering such decision, for leave to appeal to the court of appeals, and in case such appellate division shall refuse such leave, then that such party intends to apply to the court of appeals to be allowed to appeal to said court of appeals, and proof that an undertaking, given as prescribed in this chapter, has been filed with the clerk with whom the judgment appealed from is entered, shall be entitled to an order staying all proceedings to enforce such judgment, until the granting or refusal of such leave to appeal by such appellate division or the court of appeals. The party desiring to make such application must do so at the same term or at the term of said appellate division next succeeding that at which judgment of affirmance was rendered and notice of entry thereof served upon the party aggrieved, and in case said appellate division refuses such application, then such party shall have thirty days, from and after service of a copy of the order of said appellate division denying such application, with notice of entry, in which to apply to the court of appeals, to be allowed to so appeal, and if such application be granted, shall have thirty days from the granting thereof to perfect an appeal to the court of appeals.

Amended by L. 1893, ch. 4; L. 1895, ch. 946; L. 1898, ch. 292; L. 1917, ch. 293, in effect June 1, 1917. The amendment of 1917 added the last two lines, changed the word "general" to "appellate" in the first line, changed reference from section 191 to section 190 in the fourth sentence, and omitted the words "a judge of" in the fourth and fifth sentences.

Source.—Code of Proc., § 339, first sentence, and § 342.

Necessity for order directing stay.—The general language to the effect that proceedings to enforce a judgment or order shall not be stayed by a perfected appeal unless "the other acts, if any, required to be done * * * have been done," should not be construed as confined to acts required by the statute, but should be construed to include those required by the practice of the courts as it has heretofore existed, and one of these acts was to obtain an order expressly directing a stay, when it is desired to stay proceedings upon an appeal from an order granting a new trial. *Matter of Meyer* (1913), 209 N. Y. 59.

Stay as permitting violation of specific injunction.—Even a stay by order of the court does not permit a violation of a specific injunction contained in a judgment on order from which an appeal is taken. *Matter of Meyer* (1913), 209 N. Y. 59.

Necessity for service of notice of entry of judgment.—Service of notice of entry of the judgment of affirmance upon the appellant is necessary to set the time running within which the application for leave to appeal must be made in a case specified in subdivision 2 of § 191. *Galvin v. New York Central, etc. R. Co.* (1915), 216 N. Y. 710.

§ 1312. Court may limit amount of security in certain cases.

Undertaking for costs on appeal may not be dispensed with. *In re Graham's Estate* (1918), 172 N. Y. Supp. 606.

§ 1315. Papers to be transmitted to appellate court.

Power of court to prescribe papers for appeal; dispensing with printing.—This section requires the clerk to cause a certified copy of the notice of appeal, of the order and of the papers upon which the order was founded to be transmitted to the appellate court, and, hence, the court of appeals cannot prescribe the papers upon which an appeal is to be heard. However,

in the case of an impoverished appellant, in exceptional circumstances, the court may consent to dispense with the printing of some papers. Questions as to what papers were considered by the appellate division must be settled by the clerk of that court. *Matter of Hartridge* (1915), 215 N. Y. 633 (mem.).

§ 1316. Interlocutory judgment, or intermediate order, may be reviewed.

An order denying a motion for a bill of particulars does not necessarily affect the final judgment, and, therefore, is not reviewable on appeal from the judgment. *Collins v. McWilliams* (1919), 185 App. Div. 712, 173 N. Y. Supp. 850.

Allowance of costs on interlocutory judgment.—Where the allowance of costs on an interlocutory judgment is affirmed by the appellate division, it cannot on a subsequent appeal from the final judgment strike out the previous allowance. *Osborn v. Cardeza* (1913), 208 N. Y. 131.

Affirmance of interlocutory judgment.—An interlocutory judgment which has been affirmed by the appellate division and the court of appeals cannot be again reviewed. *Seaward v. Davis* (1912), 148 App. Div. 805, 133 N. Y. Supp. 384.

Appeal from an order striking out portions of an answer may be taken, even if it may not be reviewed under this section, by a direct appeal therefrom. Defendant does not waive its right to appeal by proceeding to trial without, so far as the record discloses, any objection to the determination of the issues upon the pleadings as reformed. *Becker v. Colonial Life Insurance Co.* (1912), 153 App. Div. 382, 138 N. Y. 491.

An order of reference is not one which necessarily affects the final judgment and hence cannot be brought up for review on an appeal from the final judgment in the action in which it was granted. *Boiles v. Scheer* (1919), 225 N. Y. 118.

§ 1317. Judgment or order on appeal.

Application.—*Matter of Housmann* (1918), 224 N. Y. 525.

This section applies to appellate courts only. *Bradstreet's Collection Bureau v. Nagler's Brass Works* (1916), 95 Misc. 188, 159 N. Y. Supp. 202; *Conway v. Naylor* (1915), 156 N. Y. Supp. 340; *Butler v. Stellman* (1916), 93 Misc. 151, 157 N. Y. Supp. 22; *Pattison v. Livingston Amusement Co.* (1913), 156 App. Div. 368, 141 N. Y. Supp. 588; *Mahony v. Mahony* (1913), 158 App. Div. 623, 143 N. Y. Supp. 881; *Marion v. Coon Construction Co.* (1913), 157 App. Div. 95, 98, 141 N. Y. Supp. 647; *Schreiber v. Stern* (1913), 156 App. Div. 196, 200, 140 N. Y. Supp. 1094; *Sullivan v. New York Telephone Co.* (1913), 157 App. Div. 642, 647, 142 N. Y. Supp. 735; *Curtiss v. Teller* (1913), 157 App. Div. 804, 143 N. Y. Supp. 188.

Section cited.—*Lamphear v. MacLean* (1916), 162 N. Y. Supp. 432.

Effect of affirmance by appellate division.—An affirmance of an order by the appel-

late division does not necessarily mean that it adopted the reasons stated by the trial court in its decision. *Casey v. Auburn Telephone Co.* (1913), 155 App. Div. 66, 139 N. Y. Supp. 559.

The provisions of this section have to do with appeals in general and are not inconsistent with the provisions of § 2763. Where the facts as determined by the surrogate are undisputed the appellate division may make a final determination. *Matter of Leland* (1916), 219 N. Y. 387.

Amending complaint.—It seems, that the appellate division will not grant an amendment of the complaint to conform to the proof under this section where such proof has been admitted over the objection of the defendant, and no motion to amend was made at the trial. *Blydenburgh v. Ely* (1914), 161 App. Div. 91, 146 N. Y. Supp. 259.

Dismissing complaint.—Where the plaintiff at the time an action to recover damages for breach of contract was com-

menced was in default, he could not rescind the contract without tendering the payment of the money then due. This she did not do and, therefore, as already said, defendant's motion for the direction of a verdict in their favor should have been granted and the complaint dismissed. *Tanzer v. Bankers' Land, etc. Corp.* (1913), 159 App. Div. 351, 144 N. Y. Supp. 613.

A judgment of the appellate division rendered pursuant to this section, which simply dismisses a complaint, is not a judgment on the merits. It is no broader than a judgment of non-suit on the trial. *Peterson v. Ocean Electric Railway Co.* (1915), 214 N. Y. 43.

Complaint dismissed without granting new trial. *Norton v. Erie Railroad Co.* (1914), 163 App. Div. 466, 148 N. Y. Supp. 769.

Where defendants failed to move for the dismissal of the complaint, to which relief they were entitled, the appellate court on reversing a judgment for the plaintiff cannot dismiss the complaint but must grant a new trial. *Ost v. Mindlin* (1915), 170 App. Div. 558, 156 N. Y. Supp. 695.

The failure to serve a copy of the proposed answer upon an application to open a default, when a full statement of the defendant's defense was contained in the moving papers, accompanied by an affidavit of merits, is a mere irregularity, and is not a jurisdictional defect, and may be disregarded by the appellate term. *Holzman, Cohen & Co. v. Motion Picture Apparatus Co.* (1916), 156 N. Y. Supp. 604.

Striking out answer and directing judgment for failure to comply with orders.—Where a defendant fails to serve certain papers under an order granted by the county court, and affirmed by the appellate division, on an order to show cause why it should not be punished for contempt and why its answer should not be stricken out, and why the plaintiff should not have judgment, as upon default, the county court should not refuse to impose a penalty; and if it does so refuse the appellate division, on an appeal from the order of the county court refusing to impose a penalty, will strike out defendant's answer and direct judgment in favor of plaintiff. *Osterhoudt v. Prudential Ins. Co.* (1913), 159 App. Div. 291, 144 N. Y. Supp. 193.

Judgment; modification.—On appeal from a judgment authorizing the discontinuance of an action by the plaintiff and dismissing defendant's counterclaim, the court has power to modify the judgment so as to make a more equitable adjustment between the parties. *Turner v. Bryant* (1912), 152 App. Div. 601, 137 N. Y. Supp. 466.

The appellate division may, upon the defendant's admissions, modify the judgment vacating and setting aside the conveyances

and assignment by declaring the transfers impressed with a trust to apply the rents, income and profits thereof to the mother's maintenance and support, and also that if plaintiff so elect she may have an accounting from defendant of the avails of the mortgage and of the rents and income of the property so transferred. *Lange v. Lange* (1918), 185 App. Div. 259, 172 N. Y. Supp. 846.

Idem; granted without new trial.—Judgment by the appellate division may be granted without awarding a new trial. *Church v. Wilson* (1912), 152 App. Div. 844, 137 N. Y. Supp. 1002.

Since the amendment of § 1317, the appellate division in a suit in equity may make the final judgment as it should be, without ordering a new trial. *Waterproofing Co. v. Hydrolithic Cement Co.* (1912), 153 App. Div. 47, 138 N. Y. Supp. 265.

The appellate division on appeal may grant final judgment without awarding a new trial, although this involves the reversal of some of the findings of the court below, and the final judgment will be predicated on the facts as determined by the appellate court. *Bonnette v. Molloy* (1912), 153 App. Div. 73, 138 N. Y. Supp. 67; *Finney v. National Fire Proofing Co.* (1912), 153 App. Div. 1, 138 N. Y. Supp. 73, *aff'd* 208 N. Y. 625; *Silverstein v. Standard Acc. Ins. Co.* (1917), 221 N. Y. 332.

Idem; technical errors.—After hearing an appeal the court must give judgment without regard to technical errors, or defects, or to exceptions which do not affect the substantial rights of the parties. *Donnelly v. McArdle* (1912), 152 App. Div. 805, 137 N. Y. Supp. 801; *Bloch v. Black & White Cab Co., Inc.* (1918), 102 Misc. 677, 169 N. Y. Supp. 587.

Idem; nominal damages.—A final judgment for nominal damages may be awarded by the appellate division under § 1317 of the Code. *Sandias v. Mustacchi* (1912), 153 App. Div. 810, 138 N. Y. Supp. 875.

Idem; prerequisite to increase.—An appeal by the party aggrieved is a necessary prerequisite to an increase of a judgment in his favor. *Burmester v. O'Brien* (1915), 166 App. Div. 932, 151 N. Y. Supp. 1107.

Award of judgment should be made by the appellate division will result in a judgment for the plaintiff, there is no dispute of fact and both parties at the trial acquiesce in the disposition of the case as a matter of law. *Oliver Refining Co. v. Aspegren* (1912), 152 App. Div. 877, 137 N. Y. Supp. 1057, *aff'd* 214 N. Y. 633.

Final judgment.—Where there is no dispute as to the facts and no question for the jury, and it is apparent that respondents cannot upon a new trial produce relevant evidence which will affect the result, the appellate division will render final judgment for the appellant. *Morrison v.*

Chapman (1913), 155 App. Div. 509, 140 N. Y. Supp. 700.

Final judgment, when proper for appellate division to direct. *Crowe v. Liquid Carbonic Co.* (1912), 154 App. Div. 373, 139 N. Y. Supp. 587, aff'd 208 N. Y. 396; final judgment should not be awarded when facts may be shown upon another trial which will show liability. *Tradesman's National Bank v. Boldt* (1913), 155 App. Div. 72, 139 N. Y. Supp. 531.

Mechanic's lien case.—Reluctant as the appellate division is to direct a new trial in a mechanic's lien case, it finds the making of a judgment unwarranted where the findings are contradictory and the evidence unsatisfactory. *Schreiber v. Stern* (1913), 156 App. Div. 196, 140 N. Y. Supp. 1094.

New trial; when required.—Where the complaint in an action was dismissed at the close of the plaintiff's case, the defendant giving no evidence, the appellate division on reversing the non-suit cannot finally dispose of the case, but must grant a new trial. *Engineer Co. v. Herring-Hall-Martin Safe Co.* (1912), 154 App. Div. 123, 138 N. Y. Supp. 881.

The reversal by the appellate division of findings of fact made at special term in an equity case, and the making of new findings on a question material to the litigation, contrary to those made upon the trial, requires that the judgment should be reversed and a new trial granted, and it is error in such case to affirm the judgment. *Farrell v. Farrell* (1912), 205 N. Y. 450.

Where basic facts cannot be changed upon a new trial, the appellate court may give final judgment, with costs. *Casualty Co. v. U. S. Casualty Co.* (1914), 161 App. Div. 591, 146 N. Y. Supp. 957.

Order overruling demurrer; appeal dismissed on answer.—Where a defendant, after an order has been entered overruling his demurrer and granting him leave to answer, appeals from the order and then serves an answer within the time limited, the answer supersedes the demurrer and the appeal will be dismissed. *Keepers v. Hartley Co.* (1912), 150 App. Div. 252, 134 N. Y. Supp. 896.

Findings in formal decision.—The appellate division in reversing a judgment upon the law and the facts should, since the amendment of § 1338, designate the particular questions of fact which are held to be contrary to the evidence and to the law. It should according to § 1317 also direct final judgment, and, it seems, the findings by the appellate court, which were contrary to those of the trial court, should be embodied in the formal decision. *Union Trust Co. of Rochester v. Oliver* (1913), 155 App. Div. 646, 140 N. Y. Supp. 681.

Findings upon determination of appeal.—The appellate division has no power to make findings, even upon undisputed evidence. *Central Trust Co. v. Manhattan*

Trust Co. (1912), 151 App. Div. 629, 136 N. Y. Supp. 205.

Power of appellate division to substitute new findings.—The appellate division has the power for the purpose of supporting the judgment, to reverse findings made by the trial court and substitute new findings in place thereof. Where a new judgment is entered upon the findings unanimously affirming the judgment of the trial court, it takes the place of the original judgment and defendant cannot appeal therefrom without leave. *Ely v. Barrett* (1918), 224 N. Y. 550.

Court may make its own findings.—The appellate division has the power in all actions and proceedings, whether equitable or legal, except where the trial under review has been before a jury, when it reversed the judgment of the trial court, to make its own findings and proceed to a new and complete adjudication. *Lampport v. Smedley* (1914), 213 N. Y. 82.

Practice under this section, authorizing the appellate division to substitute new findings for those of the trial court to support a judgment, considered. *Rives v. Bartlett* (1915), 215 N. Y. 33.

After hearing an appeal, the appellate division is empowered to do not only what ought to have been done, but what ought to be done in order to effect exact justice. *People ex rel. American and Foreign Marine Ins. Co. v. Sohmer* (1914), 163 App. Div. 778, 149 N. Y. Supp. 247.

Necessity that court make findings of fact.—Where the appellate division desires to exercise the power which it now has under this section it should make findings of fact which would support a final determination. *Aalholm v. People* (1914), 211 N. Y. 406, modifying 157 App. Div. 618, 142 N. Y. Supp. 926.

Necessity for findings of fact to sustain judgment.—The provisions of this section do not dispense with the necessity of findings of fact sufficient to sustain the conclusions of law reached by the appellate division, but in a case where additional findings are requisite to support the judgment which that court orders, such findings must be made in express terms, in the order of reversal. *Bonnette v. Molloy* (1913), 209 N. Y. 167, modifying 153 App. Div. 73, 138 N. Y. Supp. 67.

Conclusiveness of findings of fact.—The appellate division has power to make original findings, overruling those made by the court of first instance, which findings when made, and supported by the evidence, are conclusive on the court of appeals, its power of review on the merits being limited to the inquiry whether the established facts sustain the conclusions of law. *Acme Realty Co. v. Schinasi* (1915), 215 N. Y. 495.

When case remitted to pass on facts.—In an action for malicious prosecution, where the appellate division in dismissing

the complaint as matter of law did not consider the other possible aspect of the case presented by an appeal from an order denying a motion for a new trial upon the minutes, whether the verdict was against the weight of the evidence in case the plaintiff was entitled to go to the jury, in reversing the decision the case will be remitted to the appellate division to enable it to pass upon the weight of the evidence as defendant is entitled to have it do. *Galley v. Brennan* (1915), 216 N. Y. 118.

Where in an action by a workman to recover damages for an injury sustained in the performance of work which he was ordered to do by a foreman, and it appears that the jury might have found that the act of the foreman in removing safeguards from the machine the workman was ordered to operate was an act of superintendence, in which he was negligent, upon reversal of the judgment of the appellate division, entered on the verdict of a jury, the case must be remitted to enable the appellate division to pass upon the questions of fact presented by the appeal from an order denying defendant's motion for a new trial made upon the minutes of the trial court. *Borckmann v. Terry Construction Co.* (1915), 216 N. Y. 139.

Necessity that relief awarded was demanded at trial.—The power of the appellate term to do justice by awarding such a judgment as the trial court should have done is not limited by the question whether or not any formal motion for such relief was made, or any conclusion of law requesting such relief was submitted at the trial. *Seeley v. Osborne* (1913), 83 Misc. 409, 145 N. Y. Supp. 237.

Necessity for going back to trial term for judgment.—This section authorizes the appellate division of the supreme court, in an action at law which has once been tried before a jury, and in which it appears from the conceded or uncontroverted facts that the complaint should have been dismissed or a verdict directed, and a motion to that effect was made and denied, to direct the entry of the judgment which should have been entered at trial term, without imposing upon the parties the futile formality of going back to the trial term for the entry of the proper judgment. *Peterson v. Ocean Electric R. Co.* (1914), 161 App. Div. 720, 146 N. Y. Supp. 604.

Where record is substantially deficient.—Where a judgment contains only general provisions and there is an absence of necessary findings, and the proper parties are not before the court, the appellate division cannot give final judgment. *Coleman & Krause, Incorp. v. Security Bank* (1914), 161 App. Div. 715, 146 N. Y. Supp. 622.

Respondent's expectations are not part of the case when the complaint is dismissed at the close of plaintiff's evidence and the court has power only to grant a new trial.

Follert v. Erikson (1913), 140 N. Y. Supp. 858.

Contract and tort cases.—There is now no distinction between the power of the appellate division in contract cases and tort cases to render final judgment such as the trial court should have given. That court now has the power, with the consent of the party in whose favor the verdict was rendered, to reduce a verdict and grant judgment for a smaller amount. The rule in *Whitehead v. Kennedy*, 69 N. Y. 462 is abrogated by this section, as amended by L. 1912, ch. 380. *Herrman v. United States Trust Co.* (1917), 221 N. Y. 143.

In an action for conversion, where the plaintiff has waived the tort by giving a receipt to defendant, a judgment containing a provision that defendant is liable to arrest will not be reversed, but will be modified by striking out that provision. *Green v. Margolins* (1913), 140 N. Y. Supp. 139.

Tax assessment.—The appellate division, in certiorari proceedings to review a tax assessment, will not make a final determination as to value, where upon a new trial different facts might appear. *People ex rel. N. Y. C. & H. R. R. Co. v. Hanking* (1912), 152 App. Div. 488, 137 N. Y. Supp. 365.

Idem; section not applicable.—Certiorari to review a determination of the state board of tax commissioners heard in the appellate division is neither an appeal from a judgment nor an order, but an original proceeding in that court. Such a hearing is not governed by nor is it within the terms of § 1317. *People ex rel. Town of Hempstead v. Tax Commissioners* (1915), 214 N. Y. 594.

Where the evidence is preponderating in favor of defendant, even though there is some evidence to go to the jury, the appellate division will not disturb the action of the trial court in dismissing the complaint. *Mittleman v. Todd* (1913), 155 App. Div. 924, 140 N. Y. Supp. 650.

Review of facts, order of dismissal; effect of delay.—Where, after a disagreement of the jury, a defendant delayed applying for a dismissal of the complaint and an order of dismissal was made nearly fifty days after trial, the appellate division will review the facts on an appeal by the plaintiff from a judgment entered on an order of dismissal, although there is no exception to the order. *Shafer v. New York Life Insurance Co.* (1912), 149 App. Div. 797, 134 N. Y. Supp. 90.

Erroneous theory; new trial.—Though there be a dearth of exceptions or requests to charge, there is no question as to the power and duty of this court to grant a new trial where a case has been submitted to and decided by a jury upon a wholly erroneous theory although no exception

was taken. *Feneis v. Lewin* (1918), 185 App. Div. 41, 172 N. Y. 821.

Reversal because of erroneous theory.—While the appellate division may reverse a judgment where the case was submitted to the jury on an erroneous theory although no exceptions were taken to the charge, it will only do so where the erroneous theory clearly appears. *Lackawanna Steel Co. v. Pioneer Steamship Co.* (1911), 148 App. Div. 465, 132 N. Y. Supp. 980.

Idem; weight of evidence.—On an appeal from an order denying a motion for a new trial the appellate division may, notwithstanding absence of exceptions, consider the weight of evidence and the question as to whether the case was tried upon a wrong theory. *Spencer v. Hardin* (1912), 149 App. Div. 667, 134 N. Y. Supp. 373.

Judgment which should have been rendered.—It was the intention of the legislature in amending § 1317 to confer upon the court on appeal in causes tried before the court, and particularly in equity causes, power to grant the judgment which should have been granted at the trial. *Wahle Phillips Co. v. 59th St. Madison Ave. Co.* (1912), 153 App. Div. 17, 138 N. Y. Supp. 13.

Judgment; reduction.—Where in an action against a surety on a bond, he is charged with the full penalty thereof rather than the number of installments due, the appellate division may modify the judgment by reducing it to the proper amount. *Severason v. Macomber* (1912), 153 App. Div. 482, 138 N. Y. Supp. 250.

Section 316 which increases the jurisdiction of the city court from \$2,000 to \$3,000 is unconstitutional, but where judgment has been rendered for more than \$2,000 the court may reduce the recovery to the amount limited by the constitution. *Lewkowicz v. Queen Aeroplane Co.* (1912), 154 App. Div. 142, 138 N. Y. Supp. 983.

Idem; modifications.—Where a defendant was entitled to a direction of a verdict in its favor instead of a dismissal of the complaint upon the merits, the appellate division may correct the error by a modification of the judgment where no objection thereto is made. *Manyalis v. Philadelphia & Reading Coal and Iron Co.* (1915), 170 App. Div. 500, 156 N. Y. Supp. 357.

General verdict reinstated on appeal.—Under § 1317, the appellate division may reinstate a general verdict rendered by a jury, although the court had reserved the decision of a motion to dismiss made before the verdict. *Dochtermann V. & E. Co. v. Fiss, Doerr & Carroll Co.* (1913), 155 App. Div. 162, 140 N. Y. Supp. 72.

Inconsistencies appearing in the conclusions of law adopted by the trial court do not require disturbance of the judgment by the appellate division on appeal. *Cornwall v. Nichols* (1913), 155 App. Div. 905, 139 N. Y. Supp. 1051.

Where there are inconsistent findings

the appellate court is no longer required to grant new trials, but may reverse or modify the findings according to the evidence as viewed by the members of the appellate court. *Grubel v. Ritohie* (1916), 173 App. Div. 238, 159 N. Y. Supp. 413.

Disregard of irregularities; mandamus proceedings.—The appellate division may affirm a peremptory writ of mandamus and a judgment for damages, although the proceedings were irregular in that the justice who presided at the trial of the issues of fact himself issued the mandamus instead of certifying the verdict back to the special term, and in that no final order was made directing the issue of the peremptory writ of mandamus. *People ex rel. Solomon v. Brotherhood of Painters* (1915), 169 App. Div. 595, 155 N. Y. Supp. 438.

Mere technical errors may be disregarded where it appears that the substantial rights of the adverse party were not affected thereby. *Troy Automobile Exchange v. Home Ins. Co.* (1917), 221 N. Y. 58.

Variance between proof and complaint disregarded. *Saracena v. Preisler* (1917), 180 App. Div. 348, 167 N. Y. Supp. 871.

What constitutes harmless error in admission of evidence.—When a fact is fully established, and without dispute by other and competent evidence, an error arising from the admission of incompetent evidence relating to it will be considered harmless. This is the rule both by the statute and at common law. *Havoholm v. Whale Creek Iron Works* (1914), 162 App. Div. 354, 147 N. Y. Supp. 856.

An error, which ordinarily would require a reversal of the judgment may be disregarded by the appellate division, where the only question affected is that of the amount of damages and the jury has returned a comparatively small verdict. *Patnode v. Foote* (1912), 153 App. Div. 494, 138 N. Y. Supp. 221.

Errors reviewed on appeal from order.—Upon an appeal to the appellate division from the judgment alone, error cannot be claimed except through an exception taken at the trial, but if the appeal is from an order denying a motion for a new trial, errors may be reviewed and a new trial granted, although no exceptions have been taken. *Miller v. Barnett* (1913), 158 App. Div. 862, 144 N. Y. Supp. 40.

Duty of the appellate term to render a final judgment disposing of a controversy when the complaint should have been dismissed at the trial. *Clark v. New York Railways Co.* (1912), 78 Misc. 646, 138 N. Y. Supp. 824.

The appellate term may on appeal from an order of the municipal court of the city of New York, setting aside a verdict which omits to state a day for the trial of an action, modify said order by inserting therein a direction for a new trial on a

day certain. *Epstein v. Schwartz & Co.* (1913), 81 Misc. 142, 142 N. Y. Supp. 290.

The provisions of § 527 of the code of criminal procedure, by which the court is authorized on appeal to grant a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception should have been taken or not in the court below, are clearly the equivalents of the provisions of §§ 999, 1317 of the code of civil procedure. *People v. Miles* (1916), 173 App. Div. 179, 158 N. Y. Supp. 819.

The amendment of 1912 does not effect the right of the court of appeals to review a question of law raised by the dismissal of a complaint by the appellate division,

for insufficiency of evidence. *Faber v. City of New York* (1915), 213 N. Y. 411.

The amendment of 1912 applies to an appeal pending at the time of its adoption, especially where the case was not settled until after the amendment took effect. *Lamport v. Smedley* (1914), 213 N. Y. 82.

Since the amendment of 1912 to this section, the appellate division is no longer required to grant a new trial in an action tried before the court, where the judgment is right on the material facts. *Levering & Garrigues Co. v. Century Holding Co.* (1914), 165 App. Div. 174, 150 N. Y. Supp. 649; effect of amendment of 1912, see *Archer v. Archer* (1914), 164 App. Div. 81, 88, 149 N. Y. Supp. 426.

§ 1320. Mode of enforcing affirmed or modified order.

Order making judgment of court of appeals judgment of supreme court.—When a judgment of the court of appeals comes before the supreme court on a motion to have it become the judgment of the latter court, the sole and only duty of the special

term is to issue an order making the judgment of the court of appeals the judgment of the supreme court. *O'Brien v. Seybolt* (1914), 163 App. Div. 162, 164, 148 N. Y. Supp. 489.

§ 1323. Restitution; when awarded.

Auxiliary order, not appealable.—An order made in an action on an application incidental and auxiliary to the judgment and for the purpose of regulating, carrying out and enforcing rights already settled and determined is not appealable. *Rudiger v. Coleman* (1912), 206 N. Y. 412.

Cancellation of *lis pendens*; action by receiver.—On an appeal from a judgment in an action by a receiver appointed in supplementary proceedings brought against a purchaser at a foreclosure sale to charge real property with a lien sufficient to pay judgments represented by the plaintiff the defendant is not entitled to an order can-

celling the *lis pendens*. *Faber v. Hanbury* (1913), 159 App. Div. 59, 144 N. Y. Supp. 381.

Judgment of appellate division.—Where the appellate division has reversed a decree whereunder certain property was delivered to the plaintiff, and ordered that it be restored to the defendant, and that the complaint be dismissed on the merits, a judgment entered pursuant thereto is that of the appellate division, and not of the special term. *Lamport v. Smedley* (1913), 157 App. Div. 442, 142 N. Y. Supp. 350, *aff'd* 213 N. Y. 82.

§ 1323-a. Remarks or comments of judge, duly excepted to, shall be subject of review.

Erroneous theory contained in charge.—While the appellate division may reverse a judgment where the case was submitted to the jury on an erroneous theory although no exceptions were taken to the

charge, it will only do so where the erroneous theory clearly appears. *Lackawanna Steel Co. v. Pioneer Steamship Co.* (1911), 148 App. Div. 465, 132 N. Y. Supp. 980.

§ 1326. Security to perfect appeal.

Opportunity to file undertaking.—Where a defendant has deposited an instrument with the county clerk under a misapprehension of the law, he should be given a reasonable opportunity to file the undertaking required by this section. *Walz v.*

Humrich (1913), 168 App. Div. 584, 143 N. Y. Supp. 806.

Action against surety on appeal.—*Fosdick v. Globe Indemnity Co.* (1918), 172 N. Y. Supp. 725.

§ 1327. Security to stay execution on judgment, etc., for money.

Stay of execution by appellate division.—It seems that the appellate division may stay or restrain the execution of its own judgment for restitution. *Lamport v. Smedley* (1913), 157 App. Div. 442, 142 N. Y. Supp. 350, aff'd 213 N. Y. 82.

Right of respondent where security to stay execution not given.—While an appeal regularly taken and perfected is taking its course in the appellate court the respondent may notwithstanding, unless stayed, proceed to enforce his judgment or order, and the appellant's only remedy is to enforce restitution when he becomes entitled

to it. *Matter of Meyer* (1913), 209 N. Y. 59.

In an action upon the undertaking the surety is not liable where after an appeal from the judgment had been dismissed, a new trial was granted upon appeal from an order denying a motion therefor, although the undertaking provided that if the appeal were dismissed the amount would be paid. The reversal of the order necessarily extinguishes the judgment. *Gelder v. National Surety Co.* (1912), 78 Misc. 38, 137 N. Y. Supp. 716.

§ 1330. Security to stay execution on judgment, etc., directing conveyance.

Application of section.—This section relating to a stay by filing with the clerk an instrument executed pursuant to a judgment or order, refers to cases in which an appeal has been perfected as required by §§ 1326 and 1352. *Walz v. Humrich* (1913), 158 App. Div. 584, 143 N. Y. Supp. 806.

Judgment directing delivery of mortgage—A defendant who has been directed by a

final decree to execute and deliver a mortgage on lands, and against whom a judgment for costs has been rendered, does not stay the execution of said decree pending an appeal to the appellate division by filing with the county clerk a mortgage executed in accordance with the judgment to await the result of the appeal. *Walz v. Humrich* (1913), 158 App. Div. 584, 143 N. Y. Supp. 806.

§ 1335. Exceptions to sureties; justification.

Discharge by failure to justify.—Where, before the expiration of the time for the justification of sureties on an undertaking on appeal, exception to them is withdrawn and the undertaking is approved by the court, the failure of one of the sureties to justify does not discharge him *ab initio* from his obligation on the undertaking. *Seidman v. Finklestein* (1912), 76 Misc. 549, 135 N. Y. Supp. 648.

Idem; release from liability to co-surety.—Where the respondent under this section files exceptions to one surety on an undertaking given to stay execution of a judgment pending an appeal therefrom, and such exceptions are not withdrawn, and the surety fails to justify within ten days, he is relieved from liability to his co-surety. *Finkelstein v. Punie* (1914), 162 App. Div. 119, 147 N. Y. Supp. 317.

Justification of sureties may be taken before the county judge of a county other than that in which the action is brought.

Boss v. Hutchinson (1917), 101 Misc. 1, 166 N. Y. Supp. 448.

Where a mortgagor, not liable for a deficiency, appeals to the appellate division from a judgment directing a sale of the lands on the foreclosure of the mortgage, and though not within the terms of this section, gives an undertaking to pay any deficiency, the undertaking is valid as a common-law agreement, though not valid within the statute, and the surety will not be permitted to contest the validity of its undertaking when the latter was accepted as sufficient to stay the proceedings. *Union Bank of Brooklyn v. American Bonding Co.* (1916), 174 App. Div. 542, 161 N. Y. Supp. 655.

Applicability of section to inferior courts.—This section is made applicable to appeals to the supreme court from an inferior court by § 1341 of the Code. *Finkelstein v. Punie* (1914), 162 App. Div. 119, 147 N. Y. Supp. 317.

§ 1336. Appeal from final judgment rendered after affirmance of interlocutory judgment, or denial of motion for new trial.

Application.—*Noble v. Kendall* (1919), 225 N. Y. 673.

Form of appeal.—*Garrison v. Sun Printing & Publishing Assn.* (1918), 222 N. Y. 691.

New trial, where findings of fact are reversed.—The reversal by the appellate division of findings of fact made at special

term in an equity case, and the making of new findings on a question material to the litigation, contrary to those made upon the trial, requires that the judgment should be reversed and a new trial granted, and it is error in such case to affirm the judgment. *Farrell v. Farrell* (1912), 205 N. Y. 450.

Allowance of costs.—Where the allowance of costs on an interlocutory judgment is affirmed by the appellate division, it cannot on a subsequent appeal from the final judgment strike out the previous allowance. *Osborn v. Cardeza* (1913), 208 N. Y. 131.

Where the appellate division reverses an interlocutory judgment overruling a demurrer to a complaint with leave to amend, but the plaintiff does not amend and suffers judgment dismissing the complaint, he cannot appeal to the court of appeals until after a further appeal to the appellate division. But if the final judgment follows an affirmance by the appellate division, an appeal may be taken directly to the court of appeals. *Vose v. Conkling* (1913), 159 App. Div. 201, 144 N. Y. Supp. 1.

Where the appellate division reverses, this section has no application. It is limited to cases of affirmance. *Rose v. Bristol* (1917), 222 N. Y. 11.

A judgment entered by the appellate

division upon its own order dismissing a complaint is the final judgment of said court, and an appeal lies therefrom. *Silverstein v. Standard Acc. Ins. Co.* (1917), 221 N. Y. 332.

Where the appellate division dismissed the complaint and judgment of dismissal was entered and thereupon plaintiff appealed therefrom to the appellate division, which court affirmed its own judgment, an appeal to the court of appeals from the judgment of affirmance brings up nothing for review. *Rose v. Bristol* (1917), 222 N. Y. 11.

Where an interlocutory judgment of the appellate division is one of reversal, the plaintiff cannot appeal directly to this court from the final judgment subsequently entered at special term and on that appeal bring up for review the interlocutory judgment. It is necessary to pursue the ordinary course and appeal again to the appellate division and from its judgment there rendered to this court. *Stemmler v. Alsdorf* (1918), 224 N. Y. 426.

§ 1337. What questions are brought up for review.

Application.—*Morgan v. Sanborn* (1919), 225 N. Y. 454; *Colvin v. Post Mortgage & Land Co.* (1919), 225 N. Y. 510.

Review of decision of court against weight of evidence.—If the judgment entered upon the decision of the court without a jury is against the weight of evidence, it may be reviewed by the appellate division, and if any findings are without evidence to support them, they may be accepted to as a ruling upon a question of law and as such reviewed both in the appellate division and court of appeals. *Dann v. Palmer* (1912), 151 App. Div. 151, 135 N. Y. Supp. 411.

Review of judgment disbaring attorney.—Where the appellate division has found an attorney guilty of gross unprofessional conduct and has decreed his disbarment, the power of review in the court of appeals is limited to the consideration of the single question whether the finding of guilty has any evidence to sustain it. *Matter of Flannery* (1914), 212 N. Y. 610, aff'g 150 App. Div. 369, 135 N. Y. Supp. 612.

Questions relating to the comparative weight of evidence or the fairness of the sentence in a proceeding to discipline an attorney, are beyond the jurisdiction of the court of appeals. *Matter of Hawes* (1916), 217 N. Y. 602.

Error of law.—It is not an error of law to refuse to find an immaterial fact even upon uncontradicted evidence. *Wallace v. Riverside Bank* (1912), 206 N. Y. 434.

Power of court to render judgment as limited by facts found.—The court of appeals may affirm, reverse or modify a judgment brought to it for review, or grant to either party such judgment as such

party may be entitled to, but this means such judgment as a party may be entitled to upon the facts found, since that court can neither review facts nor make findings of facts. *Pray v. New York State National Bank* (1914), 211 N. Y. 231, aff'g 151 App. Div. 906, 135 N. Y. Supp. 502.

New findings on facts; conclusiveness.—Where the appellate division, on examination of the evidence on the question whether plaintiff made a gift of a bond and mortgage, reversed a judgment for the plaintiff and made a new finding, which there was evidence to support, the court of appeals will not disturb the finding. *Hall v. O'Brien* (1916), 218 N. Y. 50.

When new trial should be granted.—While the court of appeals has the power to direct such a judgment as may be demanded by the case presented still the conditions in a particular case may be so unusual and uncertain that a fairer result will be secured by awarding a new trial. *Pangburn v. Buick Motor Co.* (1914), 211 N. Y. 228, rev'g 151 App. Div. 756, 137 N. Y. Supp. 37.

Idem; evidence improperly stricken out; new trial granted.—Where evidence was offered in behalf of the appellant which was at first received by the trial judge and subsequently stricken out on motion, and neither the evidence nor plaintiff's exceptions to the ruling of the court thereon are contained in the record, a new trial should be granted instead of directing judgment absolute for the defendant. *Bonnette v. Molloy* (1913), 209 N. Y. 167, modifying 153 App. Div. 73, 138 N. Y. Supp. 67.

Unanimous decision.—Whether there was evidence to support or tending to sustain

such finding is a question of law, but it is one that cannot be reviewed in the court of appeals, because of the constitutional provisions as to the effect of a unanimous decision of the appellate division. *People ex rel. Stephenson v. Bingham* (1912), 205 N. Y. 168.

Refusal of appellant to obey order of court as ground for dismissal of appeal.—When the statements and acts of an appellant show that he does not intend to

obey the order from which the appeal is taken, or any other order which may be made in favor of the respondent, the appeal from the order of affirmance should be dismissed unless the appellant, on or before a date fixed by the court, complies with the terms that may be imposed on him by the supreme court as a condition of granting a stay of proceedings under the order appealed from. *Matter of Meyer* (1913), 209 N. Y. 59.

§ 1338. When reversal presumed not to be on a question of fact.

The appellate division should now examine the facts in all cases, and if not satisfied therewith so specify in its judgment or order, otherwise this court will on reversal neither grant a new trial nor remit the case to the appellate division to examine the facts. *Larkin v. N. Y. Telephone Co.* (1917), 220 N. Y. 27.

Definite and regular new findings by the appellate division, upon reversal on questions of fact, are more satisfactory, although a provision in an order of modification by the appellate division adjudging a conclusion of fact may be accepted by the court of appeals as equivalent to a reversal of an old and the making of a new finding under this section. This method is liable to be productive of confusion and uncertainty in the consideration of appeals by the court of appeals. *People ex rel. Blackburn v. Hudson Valley Railway Company* (1916), 218 N. Y. 648.

Reversal; questions of fact to be designated.—The appellate division in reversing a judgment upon the law and the facts should, since the amendment to § 1338, designate the particular questions of fact which are held to be contrary to the evidence and to the law. It should according to § 1317 also direct final judgment, and, it seems, the findings by the appellate court, which were contrary to those of the trial court, should be embodied in the formal decision. *Union Trust Company of Rochester v. Oliver* (1913), 155 App. Div. 640, 140 N. Y. Supp. 681.

Reversal presumed on question of law.—When the appellate division reverses a judgment, but does not specify that such reversal is on the facts, and it does not make any new findings of fact, it must be assumed that the reversal was on the law, and that the court of appeals is bound by the findings made by the trial court, if supported by the evidence and unimpeached by any erroneous rulings. *Hearst v. N. Y. C. and H. R. R. Co.* (1915), 215 N. Y. 268.

Rejected findings should be identified either by number or by other designation so unequivocal as to leave no room for construction, otherwise it is presumed that reversal was on the law. *Levy v. Louvre Realty Co.* (1917), 222 N. Y. 14.

Presumption as to ground for reversal.—

Where an order of the appellate division, reversing a final order of the special term, contains no statement specifying the grounds of reversal, the presumption that the reversal was on a question of law is conclusive, notwithstanding that the opinion of the appellate division which is made part of the judgment roll shows that it was reversed upon a question of fact. *Moore v. Vulcanite Portland Cement Co.* (1917), 220 N. Y. 320.

The presumption stated in this section is not applicable where a motion was entertained and granted by the judge who presided at the trial term upon his minutes to set aside the verdict of the jury, and for a new trial "upon the exceptions, and because said verdict was contrary to law, contrary to the evidence, against the weight of evidence, and for excessive damages," and the appellate division has affirmed the order of the trial judge. *Reed v. Belnord Realty Co.* (1918), 222 N. Y. 693.

Power of court where reversal is on questions of law only.—Where a reversal is on questions of law only the court of appeals is limited on review to the consideration of the question of law arising upon the findings of fact which there is any evidence to sustain. *Davenport v. Palmer* (1914), 211 N. Y. 596, rev'g 152 App. Div. 761, 137 N. Y. Supp. 796.

No question of law justifying reversal by appellate division.—Where it appears under the rule declared by the statute, that the appellate division has reversed a judgment solely upon a question of law and there is no question of law justifying such action, the judgment of that court should be reversed and that of the trial term affirmed. *Conway v. Naylor* (1918), 222 N. Y. 437.

Statement that reversal was upon the law and the facts is not a compliance with this section and it will be presumed that the judgment was reversed on errors of law only. *Cannon v. Fargo* (1918), 222 N. Y. 321.

Reversal on fact as well as on law.—Where the orders of reversal specify that the finding of the jury that the defendant was guilty of negligence is disapproved by the appellate division, the judgment—

were reversed on questions of fact as well as on the law. *Queeney v. Willi* (1919), 225 N. Y. 374.

No evidence of negligence.—Where the complaint is dismissed by the appellate

division on the ground that there was no evidence of negligence, the reversal was upon the law. *Scarlett v. D. L. & W. R. Co.* (1917), 222 N. Y. 155.

§ 1339-a. Cancellation of undertaking on appeal from judgment of reversal by appellate division.

If an appeal be taken to the court of appeals from a judgment of reversal of the appellate division, the court of appeals, on motion, may cancel an undertaking given on appeal to the appellate division and release the surety thereon, if satisfied that, on the appeal to the court of appeals, no part of the judgment, so reversed, can be reinstated.

Added by L. 1919, ch. 276, in effect Sept. 1, 1919.

§ 1340. Appeal from inferior courts.

An order sustaining a demurrer and dismissing a complaint on the merits is a judgment from which an appeal may be taken. *Westrum v. Cranides* (1915), 90 Misc. 610, 153 N. Y. Supp. 677.

The city court of New York is an inferior local court. *Bimboni v. McCormick* (1916), 157 N. Y. Supp. 299.

§ 1341. Limitation of time; security.

Only the appellate court or a judge thereof can grant a stay upon an appeal from the city court of New York, an in-

ferior court. *Bimboni v. McCormick* (1916), 157 N. Y. Supp. 299.

§ 1344. Appeal, where and how heard; appellate term of the supreme court for the first and second departments.

1. An appeal taken as prescribed in this title must be heard by the appellate division of the supreme court, except that appeals from judgments or orders of the municipal court of the city of New York, or from judgments or orders of the city court of the city of New York may be heard either by the appellate division of the supreme court or by not less than three justices of the supreme court in each of the first and second judicial departments, who shall be designated for that purpose by the justices of the appellate division sitting in said departments and who shall be known as the appellate term of the supreme court in the first and second departments, respectively.

2. When an appeal shall have been heard and determined by an appellate term constituted as herein provided, the justices thereof or a justice of the appellate division in the same department may allow a further appeal to be taken from that determination to said appellate division.

3. Appeals from inferior courts heretofore heard by the superior court of Buffalo shall be heard by the appellate division of the supreme court in the fourth judicial department or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division of said department.

4. The provisions of title fourth of this chapter, relating to the hearing of appeals taken in the supreme court and to subsequent proceedings thereupon, apply to an appeal taken as prescribed in this title, except as specified in the next following section and except as otherwise provided in a

statute enacted by the legislature in the year nineteen hundred and fifteen, entitled "An act in relation to the municipal court of the city of New York, and repealing certain statutes affecting such court, its justices and officers."

Amended by L. 1895, ch. 946; L. 1902, ch. 515; L. 1904, ch. 502; L. 1914, ch. 349; L. 1915, ch. 623, in effect May 14, 1915. The amendment of 1914 materially changed this section. The amendment of 1915 substituted the word "fifteen" for the word "fourteen" in subdivision 4. The amendment was made so as to conform to the new New York municipal court code (L. 1915, ch. 279).

Source.—Code of Proc., § 346.

A justice of the appellate division should not allow a second appeal from the appellate term unless the case (1) has settled a principle that may affect the decision in numerous other cases, or (2) conflicts directly with one of this court or of the court of appeals, or (3) construes or interprets a public statute, or (4) affects a large public interest or is of public importance, or (5) presents a question that is new so far as the decisions of this state are concerned. Questions of evidence, although novel, will not ordinarily justify the allowance. *Handy v. Butler* (1918), 183 App. Div. 359, 169 N. Y. Supp. 770.

The provision as to allowance of an appeal from the appellate term to the appellate division is permissive only. *Handy v. Butler* (1918), 183 App. Div. 359, 169 N. Y. Supp. 770.

Time within which appeal must be taken.—Where a justice of the appellate division has granted a motion permitting

defendant's appeal to the appellate division from a determination of the appellate term affirming a judgment of the city court, the time to appeal expires thirty days thereafter by virtue of §§ 1344, 1351, and the defendant cannot extend his time to appeal by delaying to enter the order obtained on his own motion. Where his notice of appeal was not filed or served until the expiration of thirty days from the time leave was granted, it was too late and the appeal will be dismissed. *Chase v. Ettinger* (1918), 185 App. Div. 225, 172 N. Y. Supp. 745.

Appeal from municipal court.—By virtue of this section and the rules of the appellate division establishing the appellate term, §§ 1346-1355 are made applicable to an appeal from a judgment of the municipal court to the appellate term. *Mosler Safe Co. v. Brenner* (1917), 100 Misc. 107, 165 N. Y. Supp. 336.

§ 1345. Judgment or order, where entered.

A judgment or order of the appellate division rendered upon an appeal authorized by this title must be entered in the office of the clerk of the appellate division in the department in which the court below is located. A certified copy thereof annexed to the papers transmitted from the court below must be transmitted by the clerk, upon payment of his fees, to the clerk of the county where the court from which the appeal was taken is situated, and shall constitute the judgment-roll and remain in his office. The filing of the judgment-roll or the entry of the order, as prescribed in this section, is a sufficient authority for any proceeding in the court below or before the judge or justice who made the order appealed from which the judgment or order of the appellate court directs or permits. But where the execution of the judgment or order of the appellate court is stayed by an appeal to the court of appeals, the proceedings in the court below or before the judge or justice, who made the order, are stayed in like manner. A judgment or order of the supreme court, rendered upon an appeal from a judgment of any district court or of the city court of New York, or an appeal heretofore heard by the superior court of Buffalo, must be entered in the office of the clerk of the county wherein the court below is located, and with the papers transmitted from the court below, forms the judgment-roll which must be filed in the same office. Where the appeal is from the city court of New York, the judgment or order of the supreme court must be entered in the office of the clerk of the said court.

Where the appeal is from a county court, the judgment must be entered by and filed in the office of the clerk of the county wherein the court below is located.

Amended by L. 1895, ch. 946, and L. 1916, ch. 84, in effect March 30, 1916. The amendment of 1916 added the last sentence

Source.—Code of Proc., § 347.

Entering an order of the county court making the judgment of the appellate division the judgment of the county court, does not comply with this section because there is no judgment of the appellate division of record. *Ruslander v. Fidelity & Deposit Co. of Maryland* (1916), 161 N. Y. Supp. 417.

Section cited.—*Wild v. Erie R. R. Co.* (1916), 171 App. Div. 253, 157 N. Y. Supp. 173.

§ 1346. Appeal from judgment.

An appeal may be taken to the appellate division of the supreme court from a final judgment rendered in the supreme court as follows:

1. Where the judgment was rendered upon a trial by a referee, or by the court without a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both.

2. When the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both.

Amended by L. 1895, ch. 946; L. 1914, ch. 351, in effect Sept. 1, 1914. The amendment of 1914 omitted from between the word "court" and the word "as" in line 2 the words "or in any superior city court prior to the first day of January, one thousand eight hundred and ninety-six, and from a final judgment rendered in the supreme court after said day;" and inserted the words "or upon the facts, or upon both" in line 3 of subdivision 1.

Source.—Code of Proc., § 348, in part.

Construction and application, see *Middleton v. Whiteridge* (1915), 213 N. Y. 499.

Practice in appellate division, under this section, see *Middleton v. Whiteridge* (1915), 213 N. Y. 499.

Order of appellate division dismissing complaint.—An appeal does not lie to the appellate division from a judgment entered upon its own order dismissing a complaint. *Silverstein v. Standard Acc. Ins. Co.* (1917), 221 N. Y. 332.

Appeal from judgment.—The question as to whether a verdict is against the weight of evidence, or whether it should be set aside for inconsistency, cannot be considered by the appellate division on an appeal from the judgment alone. *Pangburn v. Buick Motor Co.* (1912), 151 App. Div. 756, 137 N. Y. Supp. 37, rev'd on other grounds, 211 N. Y. 228.

On appeal from a judgment entered on the dismissal of the complaint at the close of plaintiff's case, he is entitled to the most favorable inferences which may be drawn from the facts proved. *Hirsch v. Lichtenstein* (1913), 79 Misc. 31, 139 N. Y. Supp. 4.

Idem; as against weight of evidence.—If the judgment entered upon the decision of the court without a jury is against

the weight of evidence, it may be reviewed by the appellate division, and if any findings are without evidence to support them, they may be excepted to as a ruling upon a question of law and as such reviewed both in the appellate division and court of appeals. *Dann v. Palmer* (1912), 151 App. Div. 151, 135 N. Y. Supp. 411.

Idem; sufficiency of evidence.—On appeal from a judgment of the city court of New York the sufficiency of the evidence to support the judgment may be reviewed. *Johnson v. Desmond* (1917), 165 N. Y. Supp. 290.

Idem; review of evidence.—Although the appellate division may consider questions of fact as well as of law on an appeal from a judgment entered upon a directed verdict, it will not review the evidence to see if the court was right in directing the verdict in the absence of an exception in the court below. *Wood v. Fiske* (1916), 175 App. Div. 135, 161 N. Y. Supp. 1097.

Idem; from judgment of municipal court.—By virtue of § 1344 and the rules of the appellate division establishing the appellate term, §§ 1346-1355 are made applicable to an appeal from a judgment of the municipal court to the appellate term. *Mosler Safe Co. v. Brenner* (1917), 100 Misc. 107, 165 N. Y. Supp. 336.

Orders supporting judgment may be appealed from. *Metzler v. Fidelity & Deposit Co.* (1918), 183 App. Div. 476, 171 N. Y. Supp. 77.

Discretion as to costs.—Where judgment is rendered against one of two defendants and the complaint dismissed as to the other without costs to such defendants, the discretion of the trial court in refusing to award costs to the successful defendant will not be disturbed where it does not appear that such defendant personally was put to any trouble or expense in the defense of the action. *Kelly v. St. Michael's Roman Catholic Church* (1912), 148 App. Div. 767, 133 N. Y. Supp. 328.

Idem; as to extra allowance.—Where an action of ejectment involved difficult and extraordinary questions of fact, the research and examination of ancient documents, records and histories of the seventeenth century and the production by the plaintiff of more than seventy exhibits, an order granting the plaintiff an extra allowance of costs will not be disturbed on appeal. *Town of North Hempstead v. Oelener* (1912), 148 App. Div. 779, 133 N. Y. Supp. 319.

Credibility of witnesses.—The appellate division, in exercising its right to review questions of fact, need believe a witness only so far as it may deem his testimony credible. *Matter of McMillan* (1916), 218 N. Y. 64.

Judgment directed by court.—On appeal from a judgment directed by the court, the defeated party is entitled to the most favorable view which a jury might properly have taken of the evidence. *Lessler v. De Loynes* (1912), 150 App. Div. 868, 135 N. Y. Supp. 948.

Review on the facts.—Where, in an action at law, the court directed a special verdict upon three issues of fact, but instead of directing a general verdict pursuant to § 1187, made a decision in which the special verdict was recited and the findings of the jury in favor of the plaintiff adopted, the defendant, appealing from the judgment only without a motion for a new trial and without an appeal from an order, is entitled to a review on the facts as well as on the law. *Attman & Co. v. Durland* (1918), 185 App. Div. 114, 173 N. Y. Supp. 62.

Question of fact does not arise, unless

exception taken, etc.—Where on the trial of an action for negligence, defendant did not move to dismiss the complaint and no exception was taken to the charge or to the admission or rejection of evidence and no appeal has been taken from an order denying a motion for a new trial under § 999, no question of fact arises on an appeal to the appellate division. *Fogarty v. Pittsburg Contracting Co.* (1912), 152 App. Div. 409, 137 N. Y. Supp. 589.

Dismissal of complaint; new trial on reversal.—Where the complaint in an action was dismissed at the close of the plaintiff's case, the defendant giving no evidence, the appellate division on reversing the nonsuit cannot finally dispose of the case, but must grant a new trial. *Engineer Co. v. Herring-Hall-Marvin Safe Co.* (1912), 154 App. Div. 123, 138 N. Y. Supp. 881.

Under this section, as amended in 1914, which provides that appeals from judgments after trial by the court, with or without a jury, may be taken upon questions of law, or upon the facts, or upon both, which provision is made applicable to an appeal from a judgment of the municipal court of the city of New York to the appellate term of the supreme court the appellate court has power to reverse upon the evidence, though defendant made no motion to dismiss the complaint. *Mosler Safe Co. v. Brenner* (1917), 100 Misc. 107, 165 N. Y. Supp. 336.

Erroneous assumption that motion for new trial was made and denied.—Previous to the amendment of 1914, where an appeal was taken to the appellate division from a judgment of a county court and an order denying a new trial, although there was no such order set out in the appeal book and no mention of any motion for a new trial was made after the case was fully submitted to the county court, and the appellate division reversed the judgment and order, there being in fact no order denying a new trial in existence, the appellate division was without power upon the record before it to grant a new trial upon the grounds stated in its order, and hence that order must be reversed and the case remitted to the appellate division to pass upon the appeal from the judgment without reference to any supposed order denying a motion for a new trial. *Smith v. Smith* (1916), 216 N. Y. 495.

§ 1347. Appeal from order.

Appeal from ex parte order vacating order for examination of plaintiff before trial will not lie. *Moore v. American Molasses Co.* (1917), 179 App. Div. 505, 166 N. Y. Supp. 4.

Judgment where specific questions were submitted to jury.—In actions triable by the court in which specific questions are submitted to a jury under § 971, the trial of the whole issue by the court is to be

considered as a trial by the court without a jury, and the judgment rendered by the trial court is to be reviewed upon appeal precisely as though the case has been tried without the intervention of a jury. *Carroll v. Bullock* (1913), 207 N. Y. 567.

Order denying motion for new trial.—An appeal may be taken from an order denying a motion for a new trial in an action triable by jury irrespective of

whether a judgment has been entered and irrespective of whether an appeal has been taken from a judgment, if one has been entered. *Gelder v. International Ore Treating Co.* (1912), 148 App. Div. 637, 133 N. Y. Supp. 214.

Idem; remedy by appeal.—A motion for a new trial cannot be heard by the appellate division in the first instance after such motion has been entertained and denied by the trial court; the remedy of the defeated party is to appeal from the order and judgment if one be entered. *Babad v. Colton Dental Asso.* (1912), 150 App. Div. 561, 135 N. Y. Supp. 555.

Idem; review of facts and weight of evidence.—On an appeal from an order denying a new trial the appellant is entitled to have the appellate division pass on the facts and weight of evidence. *Rowe v. Hendricks* (1915), 216 N. Y. 700.

Idem; weight of evidence considered.—On an appeal from an order denying a motion for a new trial, the appellate division may, notwithstanding absence of exceptions, consider the weight of evidence and the question as to whether the case was tried upon a wrong theory. *Spencer v. Hardin* (1912), 149 App. Div. 667, 134 N. Y. Supp. 373.

Order denying judgment on pleadings.—An order denying a defendant's motion for judgment on the pleadings made at the opening of a trial, is not appealable. *Loughlin v. Wocker* (1912), 152 App. Div. 466, 137 N. Y. Supp. 257.

Order opening default; similar motion for same relief.—An order granting a defendant's motion to open his default should be reserved where the record shows that a similar motion for the same relief has been previously denied by another justice. *Heichober v. Poliahook* (1912), 152 App. Div. 193, 136 N. Y. Supp. 567.

Order setting aside verdict for personal injuries.—Where, in an action for personal injuries to an infant, two verdicts each

for fifty dollars in favor of plaintiff have been set aside as against the weight of evidence, an order setting aside a third verdict for a like amount will be reserved and the judgment reinstated. *Perlman v. Brooklyn Heights Railroad Co.* (1912), 78 Misc. 168, 137 N. Y. Supp. 917.

Order requiring plaintiff to obey certain orders.—An order requiring a plaintiff to be brought up to answer for her failure to obey certain orders of the court, and to be further dealt with according to law, is appealable only as to the power of the county judge to make such an order. *Mathoney v. Sutphin* (1914), 164 App. Div. 794, 150 N. Y. Supp. 206.

Order of surrogate's court.—An appeal to the appellate division lies from an order of the surrogate's court, disallowing proposed interrogatories. *Matter of Hernandez* (1913), 158 App. Div. 815, 144 N. Y. Supp. 150.

What amounts to impairment of substantial right.—An order which declares an appeal from judgment abandoned for failure of appellant to make and serve a case according to the terms of an order requiring the appeal to be argued at a particular term, compliance with which was impossible because the case was settled too late to serve notice of argument, impairs a substantial right and is reviewable. *Levine v. Proser* (1913), 83 Misc. 134, 144 N. Y. Supp. 746.

Inconsistent findings.—Where findings are inconsistent the appellant is entitled to have the appeal decided on the basis of those findings which are most favorable to him. *Johnson Service Co. v. Hildebrand* (1912), 149 App. Div. 680, 134 N. Y. Supp. 187.

Error of jury.—An inexcusable error on the part of the jury in the amount awarded is sufficient ground for a new trial. *Fitzpatrick v. Howard* (1912), 148 App. Div. 802, 133 N. Y. Supp. 345.

§ 1348. Idem; when made out of court; powers of appellate division to grant orders.

Motion to vacate order for examination of mayor of city of New York, granted under § 1534 of the charter, may be entertained by the appellate division. *Mitchel v. Cropsey* (1917), 177 App. Div. 663, 164 N. Y. Supp. 336.

The appellate term, there being no ap-

peal pending before it, has no power to vacate an order of the city court of New York, which grants a stay of the enforcement of a judgment without the giving of security. *Bimboni v. McCormick* (1916), 157 N. Y. Supp. 299.

§ 1350. Appeal from final judgment, after affirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.

Costs on interlocutory judgment.—Where the allowance of costs on an interlocutory judgment is affirmed by the appellate division, it cannot on a subsequent appeal from the final judgment strike out the previous allowance. *Osborn v. Cardeza* (1913), 208 N. Y. 131.

An interlocutory judgment which has been affirmed by the appellate division and the court of appeals cannot be again reviewed. *Seward v. Davis* (1912), 148 App. Div. 805, 133 N. Y. Supp. 384.

§ 1351. Limitation of time; order to stay proceedings.

Effect as extending time of motion to resettle order.—Where the thirty days within an appeal to the appellate division must be taken from an order denying alimony has expired, no appeal can be taken, even though a subsequent motion to reopen and resettle the former order has been denied and the time to appeal from the latter order has not expired. *Beach v. Beach* (1914), 160 App. Div. 229, 145 N. Y. Supp. 409.

Failure to enter order.—A party cannot extend his time to appeal by delaying to enter the order obtained for himself on his own motion, and when his notice of

appeal is not filed or served until after the expiration of thirty days from the time leave was granted, it is too late. *Chase v. Ettinger* (1918), 185 App. Div. 225, 172 N. Y. Supp. 745.

An action to restrain the sale of certain securities held as collateral for notes upon which defendant has recovered judgment against plaintiff in another action, is not maintainable pending the determination of an appeal from said judgment upon an allegation that plaintiff is unable to give security to stay execution. *Fleitmann v. Union Bank of Brooklyn* (1916), 93 Misc. 595, 158 N. Y. Supp. 439.

§ 1353. Upon what papers appeal to be heard.

Correction of record.—Where a return on an appeal from a decision of the court of special sessions in bastardy proceedings has been filed in the appellate division, it is for the latter court to correct the record if it be improper, and an order of the court of special sessions assuming to correct the record is ineffective for any purpose. The appeal must be heard on the record as it exists at the time the appeal was taken, and if subsequent to the appeal a fact appears which may be ground for

dismissal, the plaintiff must submit an affidavit to the appellate division setting forth that fact. *Drummond v. Siano* (1913), 159 App. Div. 311, 144 N. Y. Supp. 409.

Filing of printed case in appellate court. *Dyer v. J. G. J. Corporation* (1917), 100 Misc. 115, 165 N. Y. Supp. 221.

Section cited.—*Lederer v. Field and Fancy Publishing Company* (1915), 168 App. Div. 925, 162 N. Y. Supp. 1122.

§ 1355. Hearing, etc., in the supreme court.

Entry of order.—Under the provisions of § 1355, an order made by the appellate division on an appeal must be first entered in the office of the clerk of that court, who transmits a certified copy thereof to the clerk of the county where the judgment was entered, and upon such certified copy of the order and on the papers upon which the appeal was heard, such county clerk enters judgment which is the judgment of

the appellate division and an appeal is properly taken therefrom to the court of appeals. *Dwight v. Gibb* (1913), 208 N. Y. 153.

Clerk of the supreme court must enter judgment on certified copy of the order, filed with the clerk of the appellate division, being transmitted to him. *Jackson v. Smith* (1912), 154 App. Div. 883, 138 N. Y. Supp. 914, aff'd 213 N. Y. 630.

§ 1356. Appeal from order made in the same court.

An appeal may be taken, to the appellate division of the supreme court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the supreme court; or made by a justice thereof in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before him. An appeal may also be taken to the appellate division of the supreme court from an order granting or denying an application for an alternative writ of mandamus or an alternative writ of prohibition.

Amended by L. 1877, ch. 416; L. 1895, ch. 946; L. 1913, ch. 572, in effect Sept. 1, 1913. The amendment of 1913 added the last sentence.

Source.—L. 1854, ch. 270, § 1.

Appeal from order adjudging witness guilty of contempt.—An order adjudging a witness in proceedings supplementary to

execution guilty of contempt of court, in that he refused to answer questions put to him by a justice of the supreme court,

cannot be reviewed by a writ of certiorari, but only by an appeal from the order. *Matter of Hanbury* (1914), 160 App. Div. 882, 146 N. Y. Supp. 44.

Order judging defendant guilty of contempt.—An appeal does not lie from an *ex parte* order adjudging a defendant guilty of criminal contempt. The proper practice is to move to vacate such order and appeal from the order entered upon the decision of such motion. *People ex rel. Bishop v. Bishop* (1918), 184 App. Div. 227, 171 N. Y. Supp. 562.

Writ of mandamus.—An order granting or denying a peremptory writ of mandamus is appealable. *Matter of Haydorn v. Carroll* (1918), 184 App. Div. 151, 171 N. Y. Supp. 601.

Construction.—This section must be construed with § 2433, and as so construed, does not apply to an order made in supplementary proceedings. *Matter of Onetto* (1915), 171 App. Div. 211, 157 N. Y. Supp. 170.

§ 1361. This title qualified. Application of provisions relating to actions.

Section cited.—*Matter of Norton* (1915), 168 App. Div. 385, 153 N. Y. Supp. 798.

§ 1364. The different kinds of execution.

Execution is a process of the court. *Schley v. Andrews* (1919), 225 N. Y. 110.

§ 1366. General requisites of executions.

An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which, the judgment was rendered: and, if it was rendered in the supreme court, the county in which the judgment-roll is filed. It must require the sheriff to return it to the proper clerk, within sixty days after the receipt thereof. Except as otherwise prescribed in the next section, it must be made returnable to the clerk, with whom the judgment-roll is filed. When an execution has been issued against the wages, debts, earnings, salary, income from trust funds or profits due and owing to any judgment debtor, pursuant to the provisions of this chapter, it shall be the duty of the sheriff or other officer or person to whom such execution shall be delivered, from time to time, and at least once every six months from the time a levy shall be made thereunder, to account for and pay over, to the person entitled thereto, all moneys collected thereon, less his lawful fees and expenses for collecting the same. This section shall apply to all such executions now issued and outstanding.

Amended by L. 1914, ch. 347, in effect April 15, 1914. The amendment of 1914 added the last two sentences.

Source.—Code of Proc., § 289, in part, and § 290.

Essential requisites of an execution against property, see *Matter of Kupfer & Co.* (1914), 165 App. Div. 507, 150 N. Y. Supp. 1037.

§ 1377. When execution may be issued after five years.

Right to supplementary proceedings returned wholly unsatisfied. *Press Pub. Co. v. McGill* (1912), 136 N. Y. Supp. 177.

§ 1380. Execution against decedent's property.

After the expiration of one year from the death of a party, against whom a final judgment for a sum of money, or directing the payment of a

sum of money is rendered, the judgment may be enforced by execution against any property upon which it is a lien with like effect as if the judgment debtor was still living. But such an execution shall not be issued, unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and from a surrogate's court of this state, which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor. Where the lien of the judgment was created as prescribed in section twelve hundred and fifty-one of this act, neither order can be made until the expiration of eighteen months after letters testamentary or letters of administration have been duly granted upon the estate of the decedent, and for that purpose such a lien existing at the decedent's death continues for two years thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll. But where letters upon the estate of the decedent have not been granted within eighteen months after his death by the surrogate's court of the county in which the decedent resided at the time of his death, or if the decedent resided out of the state at the time of his death, and letters testamentary or letters of administration have not been granted within the same time by the surrogate's court of the county in which the property on which the judgment is a lien is situated, such court may grant the order where it appears that the decedent did not leave any personal property within the state upon which to administer. In such case the lien of the judgment existing at the decedent's death continues for two years as aforesaid. Provided, however, that such judgment lien, existing at the decedent's death, upon the decedent's real property, or some portion thereof, may be enforced and payment thereof obtained during the said eighteen months after granting of letters testamentary, or letters of administration, in the manner prescribed by title four of chapter eighteen of this act. But this section shall not apply to real estate which shall have been conveyed, or hereafter may be conveyed by the deceased judgment debtor during his lifetime, if such conveyance was made in fraud of his creditors or any of them, and any judgment creditor of said deceased, against whose judgment said conveyance shall have been, or may hereafter be, declared fraudulent by the judgment and decree of any court of competent jurisdiction, may enforce his said judgment against such real property, with like effect as if the judgment debtor was living, and it shall not be necessary to obtain the leave of any court or officer to issue such execution, and the same may be issued at any time to the sheriff of the county where such property is or may be situated. The person issuing such execution, however, shall annex thereto a description of the real estate against which the same is sought to be enforced, as aforesaid, and shall endorse on said execution the words "issued under section thirteen hundred and eighty of the code of civil procedure," whereupon said sheriff shall enforce said execution as therein directed, against the property so described, and not against any other property, either real or personal, and all provisions of law relating to the sale and conveyance of real estate on execution and the redemption thereof shall apply thereto.

Amended by L. 1879, ch. 542; L. 1885, ch. 514; L. 1890, ch. 515; L. 1894, ch. 734, and L. 1916, ch. 625, in effect May 20, 1916. The amendment of 1916 changed the period of lien of judgment.

Source.—L. 1850, ch. 295.

§ 1391. Additional exemptions of personal property; execution against wages and other increment.

In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic or for the purchase money of one or more articles, exempt as prescribed in this or the last section. Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits, due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided, but only one execution against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor shall be satisfied at one time and where more than one execution has been issued or shall be issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the order of priority in which such executions are presented to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing. It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment debtor. If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting

said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution. Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge, to any justice of the city court upon such notice to the other party as such court, judge, or justice shall direct for a modification of said execution, and upon such hearing the said court, judge or justice may make such modification of said execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided. This section, so far as it relates to wages and salary, due and owing or to become due and owing to the judgment debtor shall not apply to judgments recovered more than ten years prior to September first, nineteen hundred and eight, nor to judgments heretofore or hereafter recovered upon such judgments, and any execution heretofore issued upon such judgments pursuant to an order heretofore granted under this section shall, when this act takes effect, cease to be a lien and continuing levy upon wages and salary thereafter to become due and owing to the judgment debtor. No execution under this section shall be hereafter issued upon a judgment against an officer or employee of any city or any county of the state or of the board of education of any such city, unless it shall contain the name of the judgment debtor in full, his title or position, and the bureau, office, department or subdivision thereof in which he is employed; and if a person so employed shall resign or be dismissed while an execution issued pursuant to the provisions of this section is wholly or partly unsatisfied, and he be reinstated or re-employed, such execution shall lapse and no further deduction shall be made thereon unless such reinstatement or re-employment occur within ninety days after such resignation or dismissal. All executions filed in any department against the wages, debts, earnings and salary of officers or employees of any city or of any county of the state, or of the board of education of any such city within five days prior to the date on which payment of wages, debts, earnings and salary are paid shall not become a lien against the wages, debts, earnings and salary that are payable on the said payroll but shall become a lien upon the wages, debts, earnings and salary which shall become due or owing to the judgment debtor thereafter.

Amended by L. 1879, ch. 542; L. 1901, ch. 116; L. 1903, ch. 461; L. 1905, ch. 175; L. 1908, ch. 148; L. 1911, ch. 489, 532; L. 1914, ch. 352; L. 1919, ch. 278, in effect Sept. 1, 1919. The amendment of 1914 inserted the words "nor to judgments heretofore or hereafter recovered upon such judgments," in the last sentence. The amendment of 1919 inserted a new section heading and added the last two sentences.

Source.—L. 1842, ch. 157, § 1. as amended by L. 1858, ch. 107; L. 1859, ch. 134; L. 1866, ch. 782.

Not a special proceeding.—The application for an order for an execution against wages pursuant to the provisions of this section does not constitute the institution of a special proceeding. *Keve v. Columbia Kid Hair Curlers Mfg. Co.* (1914), 161 App. Div. 918, 145 N. Y. Supp. 1072.

Situs of contract of employment.—A New York corporation which has a factory

in another state is for all purposes a resident of this state, and though the wages of a judgment debtor employed in such factory are paid there the situs of his contract of employment is in the state. *Morris Plan Co. v. Miller* (1918), 102 Misc. 470, 169 N. Y. Supp. 37.

Execution as a lien and continuing levy.—The purpose of the provision that

the execution shall become a lien and a continuing levy until the execution and expenses thereof are fully satisfied, is to avoid the necessity of successive levies from time to time whenever an installment of income might become due. It certainly is not intended to create a specific lien upon income or earnings not yet due, and which do not become due until after the discharge and satisfaction of the debt upon which the execution issued. Salary earned after the discharge in bankruptcy stands in a position analogous to that of other property acquired after a discharge, as to which a judgment included in the discharge is specifically declared not to become a lien. The true rule is that as to earnings which become due after the discharge in bankruptcy there remains no indebtedness to be satisfied, and consequently the order permitting the issue of what is sometimes termed a garnishee execution should be modified. It is the evident intention of this section that such an execution should remain in full force until satisfied by the moneys collected thereunder or modified by the court. *Ulner v. Doran* (1915), 167 App. Div. 259, 152 N. Y. Supp. 655.

Idem; effect of discharge in bankruptcy.—A garnishee execution issued under this section, providing that said execution shall become a continuing levy upon the wages of the judgment debtor, and that "said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid, or until modified as hereinafter provided" remains valid and enforceable until modified as contemplated by said section, and moneys collected under it, even after the date of the judgment debtor's discharge in bankruptcy, are payable to the judgment creditor. *Ulner v. Doran* (1915), 167 App. Div. 259, 152 N. Y. Supp. 655; *Brenan v. Dahlstrom Metallic Door Co.* (1917), 167 N. Y. Supp. 860. But see *Taylor v. Buser* (1917), 167 N. Y. Supp. 887.

Voluntary bankruptcy of judgment debtor.—Garnishee order should be vacated thereafter. *Friedman v. Gibbons* (1917), 101 Misc. 356, 167 N. Y. Supp. 685.

Salaries of city employees.—When application to permit access to garnishee orders against salaries of city employees in city comptroller's office, denied. *People ex rel. Scweller v. Prendergast* (1915), 89 Misc. 584, 153 N. Y. Supp. 699.

Idem; failure to pay percentage.—The court has no authority to order a city comptroller summarily to pay over a percentage of the wages of an employee against which an execution has been issued, for where an officer or corporation holding such salary refuses to pay, he is personally liable to an action by the judgment creditor which remedy is exclusive. *Matter of Pratt* (1913), 158 App. Div. 695, 143 N. Y. Supp. 1025.

Idem; limited.—Lien of a judgment upon prospective earnings is limited to 10 per

cent. *Valentine v. Williams, Inc.* (1916), 159 N. Y. Supp. 815.

The surplus income of trust fund, beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those depending on him, is liable in equity to the claims of his judgment creditors. *Demuth v. Kemp* (1913), 79 Misc. 516, 140 N. Y. Supp. 152.

There is a distinction between an execution issued against a trust fund and one issued against salary or wages entitling the trustee to notice of an application for execution on the fund held by them. *Matter of Siegel* (1917), 179 App. Div. 532, 166 N. Y. Supp. 117.

Trust estates; receiver.—In an action at law by a creditor against a trustee to recover a portion of the income from trust funds, a receiver of the creditor is not a proper party defendant. *Demuth v. New York Life Insurance & Trust Co.* (1914), 165 App. Div. 77, 150 N. Y. Supp. 981.

Idem; income due and owing.—Where a trustee under a will was to receive the rents, income and profits and itself apply them to the support of the judgment debtor, and whatever was not needed for his support the trustee was directed to pay over to other persons, there is no income of a trust fund "due and owing" to the judgment debtor or which ever could become "due and owing" to him within the meaning of this section. *Ellis v. Chapman* (1914), 165 App. Div. 79, 150 N. Y. Supp. 673.

Income of trust fund; order to cover debtor's interest only.—Where a trust fund has been created, income payable to the settlor's divorced wife for the support of herself and their three children, a garnishee order issued on the debt of the wife should be directed only against one-quarter of the income from the fund and should not cover the whole thereof. *Pistchal v. Durant* (1915), 168 App. Div. 100, 153 N. Y. Supp. 735.

Income from trust funds.—Motion by trustee in bankruptcy for order directing execution against income from trust funds granted. *Matter of Poskanzer* (1917), 101 Misc. 100, 166 N. Y. Supp. 811.

Execution against income from trust fund.—*Schley v. Andrews* (1919), 225 N. Y. 110.

Wages; notice to debtor.—Where a judgment debtor has not been examined in proceedings supplementary to execution, an application for an order directing the issuance of an execution against his wages, under § 1391 must be on notice to him. *Brodie v. Maher* (1912), 78 Misc. 92, 138 N. Y. Supp. 872.

Idem; liability of employer.—It is a defense to an action by a judgment creditor against an employer that, after having, pursuant to an execution against the wages of an employee, paid over for one week the legal percentage, he thereafter paid the judgment debtor wages of less

than \$12 a week. *Duffy v. Morrissey* (1913), 82 Misc. 149, 143 N. Y. Supp. 780.

Idem; complaint in an action against employer.—Where a complaint in an action brought under this section to recover moneys which defendant was directed to pay pursuant to an order of a justice of the supreme court under an execution returned *nulla bona* requiring defendant to pay to the sheriff ten per cent. of the wages of the judgment debtor, alleges that said order was duly made and entered, it is good under § 532 of the code of civil procedure; and a demurrer because of omission of an allegation that there were no other outstanding executions against such wages prior to that of plaintiff will be overruled. *Lutkins v. Lutkins* (1914), 85 Misc. (N. Y.) 148, 148 N. Y. Supp. 174.

Idem; judgment against employer.—A judgment recovered in 1906, in an action upon a judgment recovered in 1889, does not fall within the exceptions stated in this section, as amended in 1911, which provides that said section "shall not apply to judgments recovered more than ten years prior to September 1, 1908." *Hatch v. Wolff* (1914), 85 Misc. 51, 147 N. Y. Supp. 48.

Idem; power to enforce execution.—The court has no authority to enforce the execution; the sole remedy for the failure to comply with an execution against an employer is the action authorized by the statute to recover the amount which should have been paid to apply on the execution. *Keve v. Columbia Kid Hair Curlers Mfg. Co.* (1914), 161 App. Div. 918, 145 N. Y. Supp. 1072.

Idem; right of debtor to defend collection.—A debtor, although he has failed to seek modification of an order against him directing his payment of a sum weekly, may defend an action against him by the creditor to collect payments due. *Van Valkenburgh v. Bishop* (1917), 164 N. Y. Supp. 86.

The word *earnings* is a more comprehensive term than the word *wages*. Its signification is sufficiently extensive to include not only the monthly wages paid the defendant but also a pecuniary benefit to the defendant resulting from an agreement giving the defendant the right to live in a house free of charge. *Kasting Co. v. Whittle* (1916), 174 App. Div. 224, 159 N. Y. Supp. 909.

Amount of wages to be shown.—In no event can an employer be compelled to pay more than ten per cent. of the wages actually earned by the employee, and in all cases the amount of such wages must be shown before plaintiff can recover in an action brought against the employer under said section. *Hubertus v. Reilly*

(1914), 88 Misc. 143, 151 N. Y. Supp. 775.

Notice to employer of judgment debtor of application for execution against wages, is unnecessary. *Matter of Siegel* (1917), 179 App. Div. 532, 166 N. Y. Supp. 117.

Necessity of notice to the debtor is dispensed with by this section as now amended; but notice to the trustee is not dispensed with. *Pistchal v. Durant* (1915) (App. Div.), 153 N. Y. Supp. 735.

Vacating order on motion of another creditor.—An order for an execution against the salary of a judgment debtor, should not be vacated on the motion of another creditor upon the ground that the order for the execution was granted by the court and not by the justice. *Neu v. Fox* (1912), 151 App. Div. 17, 135 N. Y. Supp. 208.

Voluntary payments to wife.—Execution under this section against voluntary payments by a husband to his wife, after separation, is improper. *Brooks Bros. v. Cassebeer* (1913), 157 App. Div. 683, 142 N. Y. Supp. 781.

A wife who has obtained a judgment against her husband for unpaid alimony which was awarded under a decree for separation and who has had an execution against her husband's property returned unsatisfied cannot maintain sequestration proceedings to reach wages due and owing to her husband, it being conceded that he has no other property real or personal. Her remedy is to apply for an order which applies not only to the prospective earnings of the judgment debtor, but also to accrued earnings which have not yet been paid. *Rolt-Wheeler v. Rolt-Wheeler* (1916), 175 App. Div. 852, 162 N. Y. Supp. 491.

Alimony is not a debt, within the meaning of this section. *Van Valkenburgh v. Bishop* (1917), 164 N. Y. Supp. 86.

Evidence.—Action by creditor against employer of debtor to recover amount of judgment,—evidence establishing *prima facie* case. *Saks & Co. v. McDonald* (1917), 164 N. Y. Supp. 756.

Where the term of office of a justice has expired he may issue a transcript of the judgment which, when filed, becomes a judgment of the county court, and an execution may issue thereon by the county clerk, but said clerk cannot issue an execution. Application therefor should be made to the county judge. *Furanz v. Tramon-tano* (1917), 177 App. Div. 52, 163 N. Y. Supp. 700.

An accruing salary may be reached only by garnishment proceedings under this section. *Hayward v. Hayward* (1917), 178 App. Div. 92, 164 N. Y. Supp. 877.

Section cited.—*Demuth v. Demuth* (1915), 169 App. Div. 920, 154 N. Y. Supp. 1118.

§ 1393. Military pay, rewards, etc., exempt from execution and other legal proceedings.

Judgment against veteran.—A judgment against a veteran of the Civil War is not a lien upon lands purchased by him with pension moneys received from the United States. *Danvers v. Sly* (1912), 152 App. Div. 425, 137 N. Y. Supp. 302.

Idem; mingling pension moneys with other moneys.—The provision exempting from levy and sale by virtue of an execu-

tion the pension granted to a Civil War veteran, also exempts real estate purchased with pension money, where such money has not been so mixed with other moneys as to lose its identity, and should be liberally construed in favor of the veteran. *Benedict v. Higgins* (1915), 165 App. Div. 611, 151 N. Y. Supp. 42.

§ 1405. Personal property bound by execution.

Executions bind personal property from the time of delivery to the sheriff. It is the time, not the day, which governs and fractions of a day will be inquired into to determine preferences. *Dwelle-Kaiser Co. v. County of Niagara* (1918), 103 Misc. 460, 171 N. Y. Supp. 361.

Certificates of stock in a foreign corporation owned by a nonresident are personal

property and are subject to attachment and sale under an execution against the owner where they are within the state in possession of a bank for purposes of sale, together with assignments thereof in blank. *People ex rel. Wynn v. Grifenhogem* (1915) (App. Div.), 152 N. Y. Supp. 679.

Section cited.—*Ellis v. Rickett* (1917), 177 App. Div. 411, 164 N. Y. Supp. 243.

§ 1412. Interest of bailor in goods pledged may be sold.

Pledge by judgment debtor.—Where a judgment debtor has pledged personal property with a third person, his interest therein may be sold on execution, without

disturbing the possession of the pledgee. *Hoffman v. Columbia-Knickerbocker Trust Co.* (1913), 157 App. Div. 434, 142 N. Y. Supp. 445.

§ 1418. Claim of property by a third person, how tried.

Findings of sheriff's jury.—A court of equity will not entertain an action superseding the findings of a sheriff's jury, as to ownership of property, since, if the sheriff was guilty of fraud, an action at law may be maintained against him, and

if the claimants were guilty of fraud, the plaintiff has an ample remedy in proceedings supplementary to execution. *Gilmour Door Co. v. Shea* (1912), 150 App. Div. 239, 134 N. Y. Supp. 919.

§ 1423. Terms may be imposed.

Costs where counsel of sheriff is salaried officer.—Under § 1423, which provides that upon granting the order of substitution the court in its discretion may require the indemnitors to pay the reasonable expenses of the sheriff, necessarily incurred before

the order is granted, no costs will be allowed the sheriff whose counsel is a salaried officer of the county, but the court under § 3236 may award motion costs to the sheriff. *Coddington v. Harburger* (1912), 77 Misc. 211, 137 N. Y. Supp. 536.

§ 1430. To what leasehold property this article applies.

A leasehold with less than one year to run is personal property which the administrator can sell. *Glaser v. Burns* (1915), 154 N. Y. Supp. 21.

A sale on execution of a leasehold of less than five years, which was no longer the judgment debtor's property at the time

of the levy, can only be conducted as a sale of other species of personal property. The judgment lien ceases as soon as the leasehold has less than five years to run. *United States Oxygen Co. v. Bernard A. Buge* (1912), 136 N. Y. Supp. 297.

§ 1435. Property, how described in notice of sale. Part may be sold.

The publication of the description of the real property directed to be sold pursuant to a judgment at foreclosure, is not required. It is only necessary to describe

the property with common certainty. *Wright v. Ackerman* (1916), 97 Misc. 163, 162 N. Y. Supp. 726.

§ 1448. Such redemption avoids the sale.

Lien of judgment after redemption.—The redemption under the first sale renders that sale null and void, and by necessary consequence, there being no sale in law, there is no extinguishment of the judgment lien upon the premises, and the judgment is merely paid and satisfied *pro tanto*, remaining a valid lien for the unpaid bal-

ance. *Thompson v. Thompson* (1917), 98 Misc. 310, 162 N. Y. Supp. 929.

Revival of lien judgment.—The effect of a redemption is to revise or continue the lien of the judgment on which the execution sale was made to the extent it remains unpaid. *Kempf v. Biers* (1916), 176 App. Div. 269, 162 N. Y. Supp. 780.

§ 1487. In what cases execution may be issued against the person.

In an action for separation the judgment for costs cannot be enforced by an execution against the person, for the nature of the action does not in and of itself confer the right of arrest. It is not within any of the causes of action specified in § 549.

Blair v. Blair (1913), 145 N. Y. Supp. 397.

Fraud.—When the complaint shows a cause of action sounding in fraud the plaintiff is entitled to a body execution as a matter of right. *Kaakavas v. Maniotas* (1915), 155 N. Y. Supp. 308.

§ 1488. *Idem*; against a woman.

The act of the widow of a mortgagor, in selling mortgaged property with knowledge of the mortgage, is "willful," within the meaning of § 553, and she is subject

to arrest and imprisonment on execution after judgment for the mortgagee in an action for conversion. *Delbon v. Krautwald* (1917), 165 N. Y. Supp. 534.

§ 1489. When execution against property must be first issued.

Construction.—This section and § 597 should be read and construed together. *Tiffany v. Harvey* (1915), 216 N. Y. 300.

Proof that a judgment debtor is out of the state does not establish that he is not a resident of the state at the time of the issuance of an execution, for he may be without the state and still be a resident. *Buczynski v. Anderson* (1916), 174 App. Div. 790, 156 N. Y. Supp. 697.

Acts justifying arrest.—Where defend-

ant bought a pair of diamond earrings on the installment plan, the title to remain in the vendor until the entire purchase price be paid, upon her refusing to surrender the same after default, an execution may be issued against her person. The refusal of the defendant to surrender the earrings is a wrongful detention and consequently "an injury to property." *People ex rel. Hammond v. Becker* (1913), 143 N. Y. Supp. 277.

§ 1494. New execution when creditor discharges creditor after thirty days.

Immunity from rearrest.—If the judgment creditor consents to the release of his debtor taken upon execution the right to rearrest him is lost. But where the defendant in consideration of a discharge has

in comprehensive terms waived the immunity from rearrest he may be held to his stipulation. *Savage v. Sully* (1915), 168 App. Div. 131, 153 N. Y. Supp. 532.

§ 1496. Plaintiff may recover damages with the land.

Remedies exclusive.—The sections relating to the recovery of real property (§ 1496 *et seq.*) and those relating to the determination of a claim to real property (§ 1638 *et seq.*) provide exclusive remedies for any issues coming within the scope of their provisions, and an action in equity will not lie to accomplish the purposes for which those sections were provided unless special facts are alleged showing that the

remedy at law is not adequate and bringing the case under equitable cognizance. *Pure Strains Farm Co. v. Smith* (1917), 99 Misc. 108, 163 N. Y. Supp. 615.

Jury trial.—Actions of ejectment brought under this section have always been triable by a jury. *Pure Strains Farm Co. v. Smith* (1917), 99 Misc. 108, 163 N. Y. Supp. 615.

§ 1499. Action cannot be maintained for dower; or where land in city consists of strip six inches or less in width.

Where the encroachment is less than six inches, a court of equity will refuse a mandatory injunction. *Carroll v. Bullock* (1913), 207 N. Y. 567, dismissing appeal from 147 App. Div. 926, 131 N. Y. Supp. 1107.

§ 1500. Separate action by joint tenant or tenant in common.

Section cited.—*Commonwealth Water Co. v. Brunner* (1918), 175 App. Div. 153, 161 N. Y. Supp. 794; *People v. Ladew* (1918), 102 Misc. 595, 170 N. Y. Supp. 196.

§ 1501. Grantee of lands held adversely may maintain action.

State may maintain action in the name of its grantor. *People v. Ladew* (1918), 102 Misc. 595, 170 N. Y. Supp. 196.
A complaint in an action for ejectment brought in the name of the grantor for the benefit of the grantee, held adversely to the grantor, is not defective because it fails to allege a withholding of the premises from the plaintiff grantor, but alleges simply a withholding from the plaintiff's grantee subsequent to the delivery of the deed. *Carey v. Lang* (1912), 153 App. Div. 372, 138 N. Y. Supp. 555.

§ 1502. Against whom action to be brought.

Where non-residence of the defendant in an action for ejectment does not operate to prevent the acquisition of title by adverse possession, where under a claim of title she occupied the premises personally during a portion of the year, and at other times through tenants or servants. *French v. Wray* (1915), 166 App. Div. 471, 151 N. Y. Supp. 1015.

§ 1519. Verdict, etc., to state nature of plaintiff's estate.

Failure to describe property or nature of plaintiff's estate renders verdict and judgment defective. *Stage v. Klingler* (1917), 179 App. Div. 820, 167 N. Y. Supp. 41.

§ 1525. New trial may be granted.

A judgment rendered prior to the repeal of this section is final and conclusive, and a motion to vacate it and for a new trial, made after such repeal took effect, must be denied. *Lewis v. Townsend* (1913), 79 Misc. 81, 140 N. Y. Supp. 500.
Stipulation for reference continues in effect for successive trials, even in an ejectment action where a new trial is had pursuant to this section. *Saranac Land & Timber Co. v. Roberts* (1918), 224 N. Y. 377.

§ 1531. Damages recoverable; set-off by defendant.

Effect of a prior judgment in ejectment on a subsequent claim for improvements, see *Ketcham v. Deutsch* (1912), 152 App. Div. 904, 137 N. Y. Supp. 402.
The rental value of buildings in an ejectment action may not be recovered. *Delotti v. Bickhardt* (1916), 101 Misc. 707, 167 N. Y. Supp. 19.

§ 1532. When action for partition may be brought.

Adverse holder.—An action for partition may be maintained even when the premises are held adversely; the right, title and interest of the adverse holder may be determined in the action as an incident to the main relief of partition. *Kellum v. Corr* (1912), 149 App. Div. 200, 133 N. Y. Supp. 784.
Action can be maintained only by joint tenants or tenants in common, having one of the enumerated estates in land, against cotenants having similar estates. *Tracy Development Co. v. Becker* (1914), 212 N. Y. 488, rev'g 160 App. Div. 914, 144 N. Y. Supp. 1148.

Who may maintain.—The language of the section plainly indicates that the ac-
Tenants in common.—Where a testatrix, who left her surviving her husband and several heirs at law, gave more than one-

half of her estate, most of which was personalty, to benevolent and charitable institutions, and her residuary estate, which included real estate, was given to a "home" for aged and destitute men and women, the devise to the "home" is valid to the extent of one-half and invalid as to the other half (decendent estate law, cons. laws, ch. 13, § 17), and immediately upon her death the title of one-half of such real estate devolved to the devisee, and the other half, by the failure of the devise therefor, passed to the heirs at law of testatrix, who own it as tenants in common, and they may maintain an action for the partition of such real estate. *Barber v. Terry* (1918), 224 N. Y. 334.

What is meant by possession is not a strict *pedis possessio*, but a present right to the possession, as distinguished from cases in the next section, where, under certain circumstances, the remainderman may bring the action. This section must be read as part of the article to which it pertains, and cannot be construed so literally as to render nugatory the plain purpose of the provisions with which it is associated. *Brown v. Crossman* (1912), 206 N. Y. 471, rev'g 142 App. Div. 919, 127 N. Y. Supp. 1114.

Necessity that parties be in possession.—This court is committed to the view that a person claiming as joint tenant or tenant in common, even though not in actual possession, may now maintain a suit for partition in which all questions of title

affecting the entire property may be tried and adjudicated with the same effect as was formerly the practice in actions of ejectment. *Kellum v. Corr* (1913), 209 N. Y. 486, aff'g 149 App. Div. 200, 133 N. Y. Supp. 784.

Necessity that subject of partition be land.—In actions for partition under the Code the subject-matter is land capable of being sold in bulk or divided into separate parcels. *Tracy Development Co. v. Becker* (1914), 212 N. Y. 488, rev'g 160 App. Div. 914, 144 N. Y. Supp. 1148.

Partition of right to use water.—The action of partition is not an appropriate remedy where the subject-matter is the right to the use of waters in which the parties have an interest as appurtenant to lands which they hold in severalty. *Tracy Development Co. v. Becker* (1914), 212 N. Y. 488, rev'g 160 App. Div. 914, 144 N. Y. Supp. 1148.

An award made in condemnation proceedings, although for land which it is sought to partition, is personal property and as a partition sale of real property only is authorized by the Code such an award may not be made the subject of an action for partition. *Murphy v. Hirschman* (1915), 168 App. Div. 152, 153 N. Y. Supp. 849.

Land containing burial plot.—Action will not lie for partition sale of land containing a burial plot against the protest of persons entitled to right to burial therein. *Clarke v. Keating* (1918), 102 Misc. 361, 169 N. Y. Supp. 24.

§ 1533. *Idem*; by remainderman.

Dismissal at request of widow of intestate.—Where the only interest of the widow of an intestate, in premises of which he died seized, arises from her right of dower which has neither been admeasured nor assigned, and it appears that, without great prejudice to the owner, there can be no partition of the property, which since the death of the intestate has been occupied by his widow, she is entitled

to have the complaint in an action brought for partition by a tenant in common of a vested remainder in the property dismissed, but without costs. *Green v. Lampman* (1916), 95 Misc. 723, 160 N. Y. Supp. 905.

Failure of life-tenant to consent in writing to sale. *Beebe v. Lockwood* (1918), 103 Misc. 336, 170 N. Y. Supp. 1036.

§ 1538. Who must be parties.

Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency contained in a devise or grant or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof, provided that where a future estate or interest is limited in any contingency to the persons who shall compose a certain class upon the happening of a future event, it shall be sufficient to make parties to the action the persons who would have been entitled to such estate or interest if such event had happened immediately before the commencement of the action; every person having an inchoate right of dower in an undivided share in

the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be made a party to an action for a partition. But no person, other than a joint tenant, or a tenant in common of the property, shall be a plaintiff in the action. Whenever an action for the partition of real property shall be brought before the expiration of eighteen months from the time when letters of administration or letters testamentary, as the case may be, shall have been issued upon the estate of the decedent from whom the plaintiff's title is derived, the executors or administrators, as the case may be, if any, of the estate of said decedent, shall be made parties defendant. In case no executor or administrator of such decedent shall have been appointed at the time said action is begun, that fact shall be alleged in the complaint. The executors or administrators, if any, as the case may be, of a deceased person, who, if living, should be a party to such action, shall be made parties defendant therein, and in case no executor or administrator of such deceased person shall have been appointed, that fact shall be alleged in the complaint. Where the interlocutory judgment directs a sale of the premises sought to be partitioned, or of some part thereof, the judgment may, in the discretion of the court, direct that the premises so sold pursuant to such interlocutory judgment shall be free from the lien of every debt of such decedent or decedents, except debts which were a lien upon the premises before the death of such decedent or decedents. When the action is brought before eighteen months have elapsed from the granting of such letters of administration or letters testamentary, as the case may be, upon the estate of a decedent from whom the plaintiff derived his title, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the proceeds of the sale remaining after the payment of the costs, referee's fees, expenses of sale, taxes, assessments, water rates, and liens established before the death of the decedent, including any sum allowed to a widow in satisfaction of her right of dower, therein directed to be paid, be forthwith paid into court by the referee making such sale by depositing the same with the county treasurer of the county, in which the trial of the action is placed, to the credit of the parties entitled thereto, to await the further order in the premises. Where the action is brought before eighteen months have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of a deceased person, who, if living, should be a party to the action, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the share of the proceeds of such sale, which would have been his, if living, be paid into court by such referee, by depositing the same with such county treasurer, to await the further order in the premises. Upon the certificate of the surrogate of the county of which the decedent was, at the time of his death, a resident, showing that eighteen months have elapsed since the issuing of letters testamentary or letters of administration, as the case may be, upon the estate of said decedent, and that no proceedings for the mortgage, lease or sale of the real property of said decedent for the payment of his debts or funeral expenses, or both, is pending, and upon the certificate of the county clerk of the

county where the real property sold under the interlocutory judgment is located, showing that no notice of pendency of action in respect to such real property has been filed in his office, the court, wherein the final judgment was made shall, upon the application of any party to said action, make an order directing the county treasurer to pay to said party from said deposit, the amount to which he is entitled under the said final judgment, with the accumulation thereon, if any, less the fees of said county treasurer. Any party to such action may, at any time after final judgment, upon notice to the executors or administrators of the decedent from whom the party applying derived his share or interest, apply to the court in which said action is pending for leave to withdraw the deposit or the share of the deposit, adjudged in the final judgment to belong to him; and, upon said application, the court may, in its discretion, make an order directing the county treasurer to pay over to said party the deposit, or the share of the deposit, adjudged in the final judgment to belong to him, but said order shall not be made until said party so applying shall have furnished a bond to the people of the state of New York in the penalty of twice the amount of the deposit sought to be withdrawn, with two or more good and sufficient sureties, approved by the judge or justice of the court making such order, and filed with such approval, in the office of the clerk of the county in which such action is pending, to the effect that the said party so withdrawing said deposit will pay any and all claims, not exceeding the amount of said deposit, when thereunto required by order of the court or by order of the surrogate or of the surrogate's court in a proceeding to mortgage, lease or sell the real property of such decedent. Where a final accounting has been had in the estate of said decedent in a surrogate's court, and certified copies of the account and decree of final settlement, showing that all of the debts of the decedent have been paid in full, is filed with the court having jurisdiction of the fund, the court may dispense with the giving of a bond and direct the immediate payment of the fund to the parties entitled thereto, subject to the provisions of article second, title three, chapter fifteen of the code of civil procedure. But where final judgment shall be rendered in any action for partition after eighteen months have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived title, and the premises shall have been sold, free from the lien of debts, as above provided, then, upon producing to the court the certificate of the surrogate of the county in which the decedent was at the time of his death a resident, showing that eighteen months have elapsed since the issuing of letters of administration or letters testamentary, as the case may be, upon the estate of said decedent and that no proceeding for the mortgage, lease or sale of the real property of the decedent for the payment of his debts or funeral expenses, or both, is pending, and upon the certificate of the clerk of the county where the real property sold under the interlocutory judgment is located showing that no notice of pendency of action in respect to such real property has been filed in his office, the court rendering the final judgment shall direct the payment of the different shares to the several parties entitled thereto; except that the share of a deceased person, who, if living, should be a party to the action shall be paid into court as above pro-

vided, unless eighteen months have also elapsed since the granting of letters of administration or letters testamentary, as the case may be, upon the estate of said last mentioned deceased person, and like certificates of the surrogate and county clerk are produced to the court.

Amended by L. 1918, ch. 305, in effect Sept. 1, 1918. The amendment of 1918 substituted the words "eighteen months" in lines 18, 35, 48, 57-58, 96, 102, 113, for the words "three years"; and substituted the words "pendency of action in respect to such real property" in lines 64-65, 108-109, for the words "provided for in section twenty-seven hundred and fifty-one of the code of civil procedure."

No appointment of executor or administrator.—Where a partition action is brought within three years after the death of a decedent from whom plaintiff derived title and no executor or administrator has been appointed, a complaint which fails to allege that fact is demurrable. *Dueringer v. Kloeck* (1912), 78 Misc. 417, 139 N. Y. Supp. 676.

Decedent's widow and administrator, parties.—An action for the partition of real estate of which an intestate died seized will not lie at the suit of all the tenants in common against decedent's widow and administrators. *Barton v. Reynolds* (1913), 81 Misc. 15, 142 N. Y. Supp. 895.

Assignee of renewal lease.—A person who has a contract for the assignment of the renewal term of a ground lease and building upon the demised premises is a necessary party to a partition action which involves the lease. *Glaser v. Burns* (1915), 154 N. Y. Supp. 21.

Designation of unknown owner.—In a partition action, where the owner of an interest in the property has disappeared and has not been heard of for several years, the joinder of his name with that of thirteen others recited as "being fictitious, and being intended to designate his wife, if any, and if he be dead, his widow, heirs at law, devisees, and their legal representatives, and their wives, widows, or husbands, if any, and the heirs at law, devisees and legal representatives of any who may be dead," is sufficient to designate the unknown owner or owners of such interest. *Snyder v. Parezo* (1912), 151 App. Div. 110, 135 N. Y. Supp. 960.

Distribution of proceeds here administrators have accounted.—Where, in an action for partition, administrators of an estate are made defendants, and the interlocutory judgment does not provide that the sale shall "be free from the lien of

every debt of such decedent," and the final accounting of the estate has been had before the surrogate, the court may distribute the proceeds of the sale without depositing the same in court, although the sale was made within three years after the granting of letters. *Johnston v. Johnston* (1914), 165 App. Div. 24, 151 N. Y. Supp. 66.

The provision as to the distribution of the proceeds of land sold on partition, relates exclusively to the payment to heirs, devisees or other parties to whom amounts are awarded by the judgment and not to payment to creditors. Methods by which payment may be made stated. *Lichtenberg v. Lichtenberg* (1913), 156 App. Div. 532, 141 N. Y. Supp. 356.

Distribution among creditors.—Where the amounts due several creditors have been judicially determined, the moneys deposited with the city chamberlain under this section being proceeds of the partition sale, may be ordered to be distributed to the creditors, although three years have not elapsed since the issuance of letters testamentary. *Lichtenberg v. Lichtenberg* (1913), 156 App. Div. 532, 141 N. Y. Supp. 356.

Idem; proceedings to apply proceeds of sale.—Where lands in which a testator owned an undivided interest have been sold on partition and his share of the proceeds has, pursuant to this section been deposited with the chamberlain of the city of New York, a proceeding may be maintained by creditors in the surrogate's court for the application of the decedent's realty to the payment of debts. *Lichtenberg v. Lichtenberg* (1913), 156 App. Div. 532, 141 N. Y. Supp. 356.

Future event.—When grandchildren of testator not necessary parties. *Bamberger v. Stern* (1918), 105 Misc. 394, 174 N. Y. Supp. 264.

§ 1539. Who may be made parties.

Adverse holder.—An action for partition may be maintained even when the premises are held adversely; the right, title and interest of the adverse holder may be determined in the action as an incident to the main relief of partition. *Kellum v. Corr* (1912), 149 App. Div. 200, 133 N. Y. Supp. 784.

Municipal corporation as proper party defendant.—A municipal corporation having a lien or interest which attaches to the entire property sought to be partitioned may, at the election of the plaintiff, be made defendant although the propriety of making a municipal corporation having an alleged lien for taxes or assessments, or

based upon a sale for taxes or assessments, a party defendant, unless there in a real controversy to be determined affecting the validity of such lien, may be seriously questioned. *Delcambre v. Delcambre* (1914), 210 N. Y. 460, rev'g 149 App. Div. 962, 133 N. Y. Supp. 1118.

Person having lien as necessary party defendant.—It is not necessary to make a person having a lien or interest which attaches to the entire property a party defendant, but he may be made a defendant at the election of the plaintiff. *Delcambre v. Delcambre* (1914), 210 N. Y. 460, rev'g 149 App. Div. 962, 133 N. Y. Supp. 1118.

Idem; intervention to enforce sale.—A person having a lien on land sought to be partitioned who is made a party defendant, may assert his lien and ask that it be paid out of the proceeds of the sale, if one be directed, but he has no right to intervene in the action for the purpose of enforcing a sale, and the court itself has no power to direct a sale unless it appear that the property cannot be partitioned. *Harlem Savings Bank v. Larkin* (1913), 156 App. Div. 666, 142 N. Y. Supp. 122.

Idem; foreclosure of mortgage.—A mortgagee made a party defendant in an action of partition is not estopped from subsequently bringing a suit of foreclosure, merely because his answer in the partition action demanded a decree that the sum secured by a mortgage is due, and that the lien thereof is superior to any other inter-

est in the land, and that it be sold to satisfy the mortgage. *Harlem Savings Bank v. Larkin* (1913), 156 App. Div. 666, 142 N. Y. Supp. 122.

A mortgagee, having a lien upon the entire property, is not bound by a judgment of partition, to which he was not a party and even though his mortgage is past due, cannot, unless a party, be compelled without his consent to transfer his lien from the land to the fund, and to relinquish the costs of his pending action. These defects in title under the sale may, however, be cured if the costs are paid and the mortgagee stipulates to be bound by the judgment. *Harrison v. Higgins* (1916), 218 N. Y. 556.

A holder of a deed of a cemetery lot, however strong may be the wording of the grant and even if it uses terms of inheritance, acquires only a privilege or license exclusive of others to make interments in the lot purchased only so long as the lot remains a cemetery. Hence, after the abandonment of the private cemetery under the circumstances aforesaid, the lands are left subject to sale or partition and the court in a partition action can pass upon the issues involved. In such action of partition the plaintiff may join former holders of burial rights so as to extinguish any cloud upon the title. *Clarke v. Keating* (1918), 183 App. Div. 212, 170 N. Y. Supp. 187.

§ 1541. Provision where a party is unknown.

Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, pursuant to an order for that purpose, as prescribed in article second of title first of chapter fifth of this act, the notice subjoined to the copy of the summons as published must, in addition to the matters required in that article, state briefly the object of the action, and contain a brief description of the property.

Amended by L. 1914, ch. 346, in effect Sept. 1, 1914. The amendment of 1914 omitted from between the word "publication" and the word "pursuant" in line 3, the words "or without the state;" and from between the word "published" and the word "must" in line 5, the words "or served therewith."

Source.—R. S., pt. 3, ch. 5, tit. 3, § 12.

§ 1542. Complaint to state interests of parties.

Sufficiency of allegations as to interests of parties.—A complaint which sets forth the chain of title from a person named and alleges that he was seized and possessed of the premises upon a certain date, and that he died twenty-one years later, but fails to allege that he was seized or possessed of the premises at any time subsequent to

the date named, or at the time of his death, or that any of the alleged heir at law or devisees of the persons named have since been seized or possessed of the premises, and also fails to state any reason why certain defendants are made parties, is insufficient. *Martin v. Palmer* (1913), 156 App. Div. 327, 141 N. Y. Supp. 396.

§ 1543. Title of parties may be tried.

Application.—*Allen v. Litchard* (1916), 93 Misc. 197, 157 N. Y. Supp. 19.

The validity of a deed of conveyance may be attacked in an action of partition. *Curran v. Hosey* (1912) 153 App. Div. 557, 138 N. Y. Supp. 910.

An issue as to the validity of certain deeds made by an ancestor of the plaintiff in an action for partition may be determined in that action. *Barker v. Barker* (1915), 166 App. Div. 863, 152 N. Y. Supp. 356.

§ 1544. Issues of fact, triable by jury.

Notice of trial; effect of failure to give.—A plaintiff in an action for partition who did not notice the case for trial at special term, does not waive his statutory right to a jury trial, merely because he asked

for several adjournments after the defendant had noticed the case for special term. *Barker v. Barker* (1915), 166 App. Div. 863, 152 N. Y. Supp. 356.

§ 1546. Interlocutory judgment.

Sale of ferry and appurtenant land.—Property consisting of a ferry boat, a license from the state to operate the same, docks upon both sides of the river and appurtenant land, which have all been transferred to the heirs and devisees or legatees of the original owners who have allowed the business to continue from year

to year, thereby constituting a partnership, should be offered for sale separately and jointly in an action for partition. The real property should not be sold separately where the value of other property would thereby be impaired. *Bogardus v. Reed* (1914), 160 App. Div. 294, 145 N. Y. Supp. 597.

§ 1549. Appointment of commissioners.

In a proceeding by a city to acquire title to streets, the partition made by the

commissioners has the same effect as a sale under §§ 1549-1557.

§ 1561. Reference to inquire as to creditors.

Failure to direct reference to ascertain creditors not parties having liens.—Where the provisions which require that before an interlocutory judgment for the sale of real property is entered in such an action, the court must either with or without application by a party, direct a reference to ascertain whether there is any creditor not a party who has a lien on the undivided share or interest of any party, were not followed, and after final judgment was rendered and a sale had, it was discovered that there was an unsatisfied mortgage upon the premises, there was no adjudication upon the rights of the

parties with reference to said bond and mortgage. *Lowe v. Leary* (1918), 184 App. Div. 421, 171 N. Y. Supp. 637.

Determination of priority of liens.—This and the following sections contemplate that where the existence of liens shall be ascertained and reported to the court, with their date, the final determination as to priority of one over the other shall be made upon an application for a distribution of the proceeds of the sale. *Hulbert v. Hulbert* (1914), 86 Misc. 662, 149 N. Y. Supp. 568.

Section cited.—*Adams v. Stewart* (1915), 170 App. Div. 445, 156 N. Y. Supp. 135.

§ 1565. Payment of incumbrances.

Payment of judgments.—A lien arising out of a judgment under which an execution purchaser claimed having been diverted from the real estate of defendant to its proceeds, and the same being insufficient for the payment in full of the three judgments which attached to the land simultaneously, the execution purchaser was entitled to have his lien satisfied in full and the balance of the proceeds directed to be paid to the owner of the other

judgments. *Hulbert v. Hulbert* (1914), 86 Misc. 662, 149 N. Y. Supp. 568.

Right of purchaser at execution sale.—A purchaser at an execution sale becomes a substantial lienor in place of the judgment creditor and is entitled to whatever rights the judgment creditor had in the land by virtue of the judgment. *Hulbert v. Hulbert* (1914), 86 Misc. 662, 149 N. Y. Supp. 568.

§ 1569. Gross sum to be paid to or invested for tenant in dower, etc.

A party to an action for partition, who has a right of dower, or is a tenant for life or for years, in or of an undivided share of the property sold, is entitled to receive, from the proceeds of the sale, a gross sum, to be fixed

according to the principles of law applicable to annuities, in satisfaction of his or her estate or interest. The written consent of the party to receive such a gross sum, acknowledged or proved, and certified, in like manner as a deed to be recorded, must be filed, at the time of, or before, the filing of the report of sale; otherwise the court must direct that, out of the proceeds of the sale, which belong to the undivided share to which the estate or interest attaches, one-third, in case of dower, and in any other case arising under this section, the entire proceeds, or such a proportion thereof as fairly represents the interest of the holder of the particular estate, be paid into court, for the purpose of being invested for his or her benefit. If it shall appear to the court that the tenant for life or for years, or the widow, is an infant, lunatic or otherwise incompetent, and that a general guardian or committee has been duly appointed, upon proof that it will be for the best interest and advantage of the estate of such infant, or lunatic or incompetent person, the court may authorize and direct such guardian or committee, in the name of such infant, lunatic or incompetent person, having such estate for life or years or dower right, to execute an instrument under seal, acknowledged or proved, and certified in like manner as a deed to be recorded, whereby such guardian or committee shall consent to accept in lieu of such estate or dower, a sum, to be ascertained by the court as above provided, according to the principles applicable to life annuities; and upon presentation of such an instrument to the court, the value of the estate for life or for years or dower so ascertained by it shall be paid to such guardian or committee. Such instrument shall have the same force and effect as a deed or instrument executed and acknowledged by a competent person or a person of full age.

Amended by L. 113, ch. 450, in effect Sept. 1, 1913. The amendment of 1913 added the last two sentences.

Source.—R. S., pt. 3, ch. 5, tit. 3, §§ 52-54.

Application.—*Sperduto v. New York City Interborough R. Co.* (1919), 186 App. Div. 145, 173 N. Y. Supp. 834.

Dower right.—Where a widow who was a defendant in an action of partition claimed her dower interest and filed a consent to accept a gross sum in satisfaction thereof, she is entitled to receive one-third of the rents of the premises collected after the death of her husband, although she did not set up a claim to damages for withholding dower, and it is error to refuse to

make such allowance to her in the partition action. *Ryder v. Kennedy* (1918), 224 N. Y. 407.

Admeasurement of dower in action of partition.—Where a widow brings no action to admeasure her dower but the heirs seek a partition of the lands and by pleading admit the widow's right of dower, it should be admeasured in the action of partition. *Ryder v. Kennedy* (1915), 166 App. Div. 146, 151 N. Y. Supp. 1036.

§ 1570. Interests of owners of future estates to be protected.

Inchoate right of dower, how protected. 278 (151 App. Div. 945), *aff'd* 211 N. Y. —*Bell v. Golding* (1912), 136 N. Y. Supp. 507.

§ 1578. Final judgment; effect thereof upon incumbrancers.

Effect of sale on purchase at prior execution sale.—A partition sale places the property beyond the reach of a purchaser at an execution sale and his right then becomes simply one to share in the proceeds to the extent of his bid, which right is

not lost to him because of the expiration before the partition sale of ten years from the docketing of the judgment under which he claims. *Hulbert v. Hulbert* (1914), 83 Misc. 662, 149 N. Y. Supp. 568.

§ 1594. When the state is interested.

The people of the state may be made a party defendant to an action for the partition of real property, in the same manner as a private person. In such a case the summons must be served upon the attorney-general who must appear in behalf of the people, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure detailed facts showing the nature and extent of the interest in or lien on the said real property of the people of the state of New York and the reason for making the people a party. Upon failure to state such facts, the complaint shall be dismissed, as to the people of the state of New York. The commissioners of the land office, whenever they deem it for the best interests of the state, may order the treasurer on the warrant of the comptroller to pay off and cancel any mortgage, tax, or other encumbrance, or any amount due thereon, or to acquire any undivided interest, adverse to the state, existing on any lands belonging to the state, or in which the state has an interest other than the lien of a tax under article ten of the tax law, to perfect in the state a title to any such lands or to protect the state's interest therein. In all such actions wherein the commissioners of the land office are so empowered the plaintiff shall not be entitled to costs if the people of the state are made a party defendant, unless the commissioners of the land office, after a full presentation of the facts to them shall have determined before the action of partition is brought against the state that the interests of the state did not warrant their making an order for the payment or cancellation of said mortgage, lien or encumbrance, or any amount due thereon, or for the acquisition of any outstanding undivided interest adverse to the state, or unless the commissioners of the land office shall have failed to make such determination within three months after such full presentation of facts shall have been made to them by a verified statement in writing, and filed with the secretary of said commissioners at his office in the city of Albany, nor unless a certified copy of the commissioners' report of partition, and of the referee's or sheriff's report of sale, in case of a sale, filed in the action shall have first been duly served upon the attorney-general; and in no such case wherein the people are made a party defendant because of an interest other than the lien of a tax under article ten of the tax law, shall any additional allowance under sections thirty-two hundred and fifty-two or thirty-two hundred and fifty-three of this act be made to the plaintiff.

Amended by L. 1911, ch. 26; L. 1916, ch. 330, and L. 1917, ch. 774, in effect Sept. 1, 1917. The amendment of 1916 added the last sentence. The amendment of 1917 inserted reference to article ten of Tax Law in last two sentences and changed provision as to costs where the people are defendant.

Source.—R. S., pt. 3, ch. 5, tit. 3, §§ 92, 93.

§ 1598. Who may be joined as defendants.

1. In either of the cases specified in the last section, any other person, claiming title to, or the right to the possession of, the real property in which dower is claimed, may be joined as defendant in the action.
2. The people of the state of New York may be made a party defendant

in an action for dower where the people of the state of New York have an interest in or a lien upon the lands affected thereby, in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear in behalf of the people. But where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure, detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York and the reason for making the people a party defendant. Upon failure to state such facts the complaint shall be dismissed as to the people of the state of New York.

Amended by L. 1913, ch. 773, in effect Sept. 1, 1913. The amendment of 1913 added subdivision 2.

Source.—New.

§ 1600. Damages may be recovered; how estimated.

In an action to admeasure dower, defendants not sued as heirs but as devisees, are "other persons" within the meaning of this section, and the plaintiff may only recover mesne damages from the time of her demand of dower. *Roessle v. Roessle* (1914), 163 App. Div. 344, 148 N. Y. Supp. 659.

§ 1617. Liens to be ascertained.

Application.—*Sperduto v. New York City Interborough R. Co.* (1919), 186 App. Div. 145, 173 N. Y. Supp. 834.

Gross sum in lieu of dower.—In an action of partition, a widow may elect to take a gross sum in lieu of dower, which should be computed according to the tables of mortality from the date of her husband's death. *Ryder v. Kennedy* (1915), 166 App. Div. 146, 151 N. Y. Supp. 1036.

§ 1621. Liens to be ascertained.

Before an interlocutory judgment is rendered for the sale of the property, the court must direct a reference to ascertain whether any person, not a party, has a lien upon the property, or any part thereof. But the court may direct or dispense with such reference, in its discretion, where a party produces a search, certified by the clerk, or by the clerk and register as the case requires, of the county where the property is situated; and it appears therefrom, and by the affidavits, if any, produced therewith, that there is no such outstanding lien. Except as otherwise expressly prescribed in this article, the proceedings upon and subsequent to the reference must be the same, as prescribed in article second of this title, where a reference is made as prescribed in section fifteen hundred and sixty-one of this act.

Amended by L. 1914, ch. 348, in effect Sept. 1, 1914. The amendment of 1914 added the last two sentences.

Source.—L. 1879, ch 717, § 2. in part, as amended by L. 1874, ch. 258.

§ 1625. Certain provisions of article second made applicable.

Actions for partition and dower.—This section seems to contemplate that actions for partition and actions for dower shall be conducted on the same principle, and that the procedure shall be the same so far as possible. *Ryder v. Kennedy* (1918), 224 N. Y. 407.

§ 1627. Person liable for mortgage debt may be made defendant, etc.; when people of state may be made a party.

2. The people of the state of New York may be made a party defendant to an action for the foreclosure of a mortgage on real property, where the people of the state of New York have an interest in or a lien on the said real property subsequent to the lien of the mortgage sought to be foreclosed in said action, in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear in behalf of the people, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York, and the reason for making the people a party defendant. Upon failure to state such facts, the complaint shall be dismissed as to the people of the state of New York. The commissioners of the land office, whenever they deem it for the best interests of the state may order the treasurer, on the warrant of the comptroller, to pay off and cancel any mortgage, or encumbrance or any amount due thereon existing on any lands belonging to the state, or in which the state has an interest other than the lien of a tax under article ten of the tax law, to perfect in the state a title to any such lands or to protect the state's interests therein. In all such actions wherein the commissioners of the land office are so empowered, the plaintiff shall not be entitled to costs if the people of the state are made a party defendant, unless the commissioners of the land office, after a full presentation of the facts to them, shall have determined before the action of foreclosure is brought against the state that the interests of the state did not warrant their making an order for the payment or cancellation of said mortgage, or encumbrance or any amount due thereon, or unless the commissioners of the land office shall have failed to make such determination within three months after such full presentation of facts shall have been made to them by verified statement in writing, and duly filed with the secretary of said commissioners at his office in the city of Albany, nor unless a certified copy of the referee's or sheriff's report of sale filed in the action shall have first been duly served upon the attorney-general; and in no case wherein the people are made a party defendant because of an interest other than a lien under article ten of the tax law, shall any additional allowance under sections three thousand two hundred fifty-two or three thousand two hundred fifty-three of this act be made to the plaintiff.

Amended by L. 1916, ch. 331, and L. 1917, chaps. 685 and 773, in effect Sept. 1, 1917. The additional changes made by L. 1917, ch. 685, are not inserted. The amendment of 1916 added the last two sentences. The amendment of 1917 inserted references to article ten of the tax law in the last two sentences.

Person made party on motion of defendant.—One may not be made a party to a foreclosure action on motion of a defendant, unless he has some pecuniary interest in the subject of the action and the moving party will be prejudiced by a denial of the motion. *Gano v. Potter* (1918). 105 Misc. 482, 173 N. Y. Supp. 528.

Maker of bond.—In a foreclosure action, the maker of a bond, given as collateral security, should be made a party defendant in order to avoid multiplicity of suits. *Hochstein v. Schlanger* (1912), 150 App. Div. 124, 134 N. Y. Supp. 704.

Commencement of action.—The filing of a *lis pendens* and the service of a sum-

mons and complaint in an action of foreclosure upon a tenant of the property constitutes a commencement of the action, and a subsequent tender of payment by the mortgagor, even if made before service was made upon her, is insufficient to relieve her from liability for costs. *Harvey v. Mooney* (1915), 168 App. Div. 169, 153 N. Y. Supp. 268.

The interest of an heir at law of a deceased mortgagor in the mortgaged property is subject to be wiped out by a judgment in foreclosure and, in case of a deficiency, judgment may be entered against the administratrix of the deceased mortgagor, she having been made a party to the foreclosure action, and collected out of

property coming into her hands in due course of administration. *Buckley v. Beaver* (1917), 99 Misc. 643, 166 N. Y. Supp. 131.

Failure to provide for deficiency judgment; amendment.—Where the plaintiffs in a suit to foreclose a mortgage entered a decree containing no provision for a deficiency judgment and bought the property on the foreclosure sale, they are not entitled after the defendant's time to file exceptions to the decision and to appeal from the judgment has expired, to amend said judgment *nunc pro tunc* by inserting a provision making the defendant liable for any deficiency. *Baehr v. Smith* (1915), 169 App. Div. 574, 155 N. Y. Supp. 453.

§ 1628. Other actions for mortgage debt, when prohibited.

Action on bond.—After a sale on the foreclosure of a mortgage, an application for leave to bring an action upon the bond against a defendant who is not served with a summons and who did not appear must be made upon notice. *Cooper Co. v. Naumburg* (1912), 154 App. Div. 225, 138 N. Y. Supp. 1005.

When leave will be granted.—The propriety of granting leave to bring an action to recover a portion of a mortgage debt while a prior suit of foreclosure is pending, or after final judgment therein, is to be determined upon equitable principles. *Matter of Steiner* (1914), 161 App. Div. 742, 147 N. Y. Supp. 200.

When leave to sue should be granted.—The plaintiff in a suit for the foreclosure of a mortgage who fails to ask for a de-

ficiency judgment against one of the defendants who has guaranteed the payment of the debt, pursuant to an agreement that no recovery would be sought against such defendant on his guaranty until a judgment for deficiency had been entered against the mortgagor, is entitled, after entry of judgment against the mortgagor for a deficiency, to an order granting leave to sue the guarantor on the contract. *Matter of Rothschild* (1914), 160 App. Div. 530, 145 N. Y. Supp. 955.

Good reasons must be shown why defendants in foreclosure should be called on to answer again in an action at law. *Carlin v. Lindtveit* (1916), 175 App. Div. 940, 161 N. Y. Supp. 1120.

Section cited.—*Baehr v. Smith* (1915), 169 App. Div. 574, 155 N. Y. Supp. 453.

§ 1629. Complaint to state whether such action brought.

Failure to state whether action to recover has been brought.—A complaint in an action to foreclose a mechanic's lien, which fails to state whether any other action has been brought to recover any part of the debt for which the lien was filed, is insufficient. *Bachmann v. Spinghel* (1914), 164 App. Div. 725, 149 N. Y. Supp. 610.

A criticism that the complaint did not state whether any other action had been brought, not having been raised in the trial court, where an amendment might have been permitted, is unavailing on appeal. *Szemko v. Weiner* (1917), 176 App. Div. 620, 163 N. Y. Supp. 382.

Complaint insufficient; recovery of personal judgment.—Where a complaint in an action to foreclose mechanic's liens is in-

sufficient in that it does not state whether any other action has been brought to recover any part of the lien debt, the plaintiff may nevertheless recover a personal judgment for the sums due him under § 54 of the lien law where the allegations of the complaint and proof are sufficient. *Prime v. Hughes* (1916), 174 App. Div. 406, 159 N. Y. Supp. 1041.

This section applies to an action to foreclose a mechanic's lien, and unless complied with the complaint will be dismissed for insufficiency. *Weaver Hardware Co. v. Solomovitz* (1917), 98 Misc. 413, 163 N. Y. Supp. 121.

Section cited.—*Gate, & Co., Inc., v. Nat. Fair & Exposition Assn.* (1916), 172 App. Div. 581, 158 N. Y. Supp. 1070.

§ 1632. Effect of conveyance upon sale.

All partners must be served with a summons in a suit of foreclosure of a mortgage in order that the purchaser may

obtain a marketable title. *Liebert v. Reiss* (1916), 174 App. Div. 308, 160 N. Y. Supp. 535.

§ 1633. Disposition of surplus; duties of officer making sale.

If there is any surplus of the proceeds of the sale, after paying the expenses of the sale, and satisfying the mortgage debt and the costs of the action, it must be paid into court, for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may if an application therefor is pending, direct it to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court. Within thirty days after completing the sale, and executing the proper conveyance to the purchaser, unless such time be extended by an order of the court entered in the office of the clerk within said thirty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.

Where real property, or an interest in real property, liable to be disposed of as prescribed in article third of title four of chapter eighteen of this act, is sold in an action or special proceeding, or otherwise, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's lifetime, the surplus money must be paid into the surrogate's court having jurisdiction to issue letters testamentary or of administration upon the estate of the decedent, in the following cases:

1. Where eighteen months have not elapsed since the date when letters testamentary or of administration were first issued.
2. Where a proceeding for a judicial settlement of the accounts of such executor or administrator has been commenced within eighteen months from the date of the issue of such letters and is still pending.
3. Where no such letters have been issued and two years have not elapsed since the death of the decedent.

Money paid into the surrogate's court, as herein provided, may be paid out to the executor or administrator of the decedent, as directed by an order of the surrogate's court, to be accounted for by him upon the judicial settlement of his accounts; or, in a special proceeding brought for that purpose in the surrogate's court, an order may be entered directing distribution to the persons entitled thereto, in case eighteen months have elapsed since letters testamentary or of administration were first issued upon the estate of the decedent, or, in case no such letters have been issued, and two years have elapsed since the death of the decedent.

Amended by L. 1908, ch. 294; L. 1915, ch. 643, in effect May 14, 1915. The amendment of 1915 added all after the first paragraph.

Source.—R. S., pt. 3, ch. 1, tit. 2, §§ 159, 160.

§ 1634. When complaint to be dismissed on payment of sums due.

Stipulation to discontinue on payment of accrued interest and costs.—A plaintiff, in a suit for the foreclosure of a mortgage, who stipulates before answer to discontinue if the defendant pay all accrued interest and taxable costs before a certain date, but reserves the right to proceed without notice upon failure of the defendant to pay said interests and costs, may proceed with the suit where the defendant has merely paid the interest. It seems that such a stipulation is without consideration and invalid; but whether valid or invalid, its force and effect can only be determined by answer and a trial of the issues. *Burkard v. Stephan Bldg., etc., Co.* (1913), 160 App. Div. 50, 144 N. Y. Supn. 775.

§ 1638. Who may maintain an action to compel determination of claim

Application.—Hall v. City of Lockport, 90 Misc. 429; Somerville v. City of New York (1915), 89 Misc. 188, 153 N. Y. Supp. 253; Porter v. Denny (1915), 170 App. Div. 546, 156 N. Y. Supp. 1016; Hooper v. City of New York (1916), 96 Misc. 47, 160 N. Y. Supp. 14; Dime Savings Bank v. Butler (1916), 96 Misc. 82, 160 N. Y. Supp. 954; Burns Bros. v. City of New York (1917), 178 App. Div. 615, 166 N. Y. Supp. 615.

Remedies exclusive.—The provision relating to the recovery of real property (§ 1496 et seq.) and the determination of a claim to real property (§ 1638 et seq.) are exclusive remedies for any issue coming within the scope of their provisions and an action in equity will not lie to accomplish the purposes for which those sections were provided unless special facts are alleged showing that the remedy at law provided by them is not adequate and that resort must be had to a court of equity to secure proper relief. *Pure Strain Farm Co. v. Smith* (1917), 99 Misc. 108, 163 N. Y. Supp. 615.

Ejectment.—When action by owner of distinct parcels of land to enjoin maintenance of various actions of ejectment, cannot be maintained. *Prospect Park & Coney Island R. R. Co. v. Morey* (1913), 155 App. Div. 347, 140 N. Y. Supp. 380.

Tenant.—A tenant, in asserting ownership and a right to remove fixtures which have become a part of the real estate, may be considered as claiming an interest in the property under § 1638. *Robinson v. Pratt* (1912), 151 App. Div. 738, 136 N. Y. Supp. 98.

Between lessee and subsequent purchaser.—Where a lease of agricultural lands for twenty-five years is executed in consideration of an agreement that the lessee shall maintain the lessor for life, and later the lessor deeds the same land to his son which deed is not recorded until after the lessor's death, an action is maintainable under the statute as one brought to determine plaintiff's rights in the property in question and to quiet their title to the same. *Parmely v. Showdy* (1914), 86 Misc. 634, 148 N. Y. 1086.

Cancellation of lien.—In order to maintain an action under this section to cancel a lien for taxes when the lien has expired by reason of the lapse of ten years it must be shown that the taxes are an apparent lien, that the municipality unjustly claims that such lien is valid or that it appears from the public records that such a claim might unjustly be made. In such a case there can be no presumption that the proceedings to enforce the lien have been stay or that the city can make such a claim, and where the necessary element of an apparent lien is absent and the city makes no claim of a lien, the court is without jurisdiction to grant re-

lief. *Hall v. City of Lockport* (1915), 153 N. Y. Supp. 298.

In an action brought to cancel an assessment on plaintiff's property on the ground that it was illegal and void because made in excess of the jurisdiction of the common council in creating the district of assessment, it will be presumed that the common council did establish a district of assessment containing all the property likely to be benefited by the improvement and, in the absence of fraud or bad faith, its action is conclusive. *Govers v. City of New Rochelle* (1916), 95 Misc. 352, 159 N. Y. Supp. 221.

Determination of claim under tax deed.—Tenants in common who have been in possession of certain real property for one year may maintain an action to compel the determination of defendant's claim to the property under a tax deed which, following the assessment roll, neither describes the property nor states the size of the lot whereby the particular property could be located or identified. *Stearns v. Albany Syndicate* (1916), 93 Misc. 597, 158 N. Y. Supp. 553.

Cancellation of deed.—A suit in equity for the cancellation of a deed will be regarded as one brought to determine a hostile claim to real estate under art. 5, where grantor is in possession of lands so as to be unable to bring an action of ejectment on the failure of the grantee to fulfill the conditions subsequent. *Norton v. Valentine* (1912), 151 App. Div. 392, 135 N. Y. Supp. 1084.

An action to cancel a mortgage on real property brought by one who claims to be the legal owner under a recorded deed is an action to determine a claim to the property, and where the defendants set up a conveyance to them by foreclosure under the mortgage and ask for a dismissal of the complaint and such other and further relief to which they may be entitled, the case is triable by a jury. *Pure Strains Farm Co. v. Smith* (1917), 99 Misc. 108, 163 N. Y. Supp. 615.

Claim in the nature of an easement.—The right claimed need not necessarily be technically an easement so long as the claim is "in the nature of an easement" and includes the elements of a claim to domination over plaintiff's property for the benefit and advantage of the defendants. Such a claim, although created by covenant, and not by grant, is frequently spoken of judicially as an easement, and is held to be such an incumbrance upon land as to justify the refusal of a vendee to accept the title. *Dime Savings Bank v. Butler* (1915), 167 App. Div. 257, 152 N. Y. Supp. 633, *aff'd* 215 N. Y. 706.

Under this section an owner of a plot of land may sue to determine the validity of a claim asserted by owners of property in the same block, to a right to exercise

dominion over plaintiff's plot, to the extent that it may not, without their consent, build upon or use its land unless it complies to certain restrictions. *Dime Savings Bank v. Butler* (1915), 167 App. Div. 257, 152 N. Y. Supp. 633, aff'd 215 N. Y. 708.

Removal of cloud on title.—In a suit in equity to remove a cloud on a title the relief is not merged in the statutory action here provided, and the complaint need not comply with the requirements prescribed by the Code. Action in equity and under § 1638 distinguished. *Meyer v. Wilcox* (1912), 136 N. Y. Supp. 337.

Equitable rules may be applied to reach a proper determination, for the purpose of the statute is to enlarge and supplement pre-existing equitable remedies. *Holden v. Crolly* (1912), 153 App. Div. 254, 138 N. Y. Supp. 23.

Where all parties have invoked the equitable jurisdiction of the court, it has power to determine every question involved in accordance with equitable practices. *Eidlitz v. French* (1918), 105 Misc. 163, 173 N. Y. Supp. 646.

Possession of the real property for at least a year before the commencement of the action must be established. *Ludlow v. Rector, etc., St. John's Church* (1913), 207 N. Y. 689, rev'g 144 App. Div. 207, 136 N. Y. Supp. 79.

Constructive possession is sufficient since

the amendment of 1891. Constructive possession is "the possession in law which follows in the wake of title." *Magnetite Mining Co. v. Wilmore Realty Co.* (1913), 142 N. Y. Supp. 1094.

Constructive possession, evidenced by clear paper title is sufficient. *Kiowa Realty Co. v. Molenaar* (1917), 98 Misc. 694, 165 N. Y. Supp. 131.

Who may intervene.—In an action to determine a claim to real property, one who claims no interest in the property may not be allowed to intervene for the purpose of establishing the right of one of the parties thereto, even though he asserts an interest in the question to be decided in the action. *People v. Fisher* (1913), 209 N. Y. 392, rev'g 157 App. Div. 899, 141 N. Y. Supp. 1136.

Effect of judgment in foreclosure upon defendant having estate in land and defendant having only a judgment lien thereon, see *Johnson v. Putnam Foundry & Machine Co.* (1915), 167 App. Div. 99, 152 N. Y. Supp. 792.

Jury trial.—Actions under this section are made triable by a jury where the defendant raises issue of title. *Pure Strains Farm Co. v. Smith* (1917), 99 Misc. 108, 163 N. Y. Supp. 615.

Forest preserve.—Proceeding to determine title to lands appropriated for the Adirondack Park. *People v. Fisher* (1916), 98 Misc. 131, 164 N. Y. Supp. 125.

§ 1639. Complaint.

Tenants in common.—Where deeds of conveyance between tenants in common of certain land leave the record title to a part thereof unconveyed, the heirs and devisees of one of the tenants in common may bring an action against the heirs, devisees and executors of the other tenant in common, to compel the determination of plaintiff's claim which was not conveyed. *Hamilton v. Hamilton* (1912), 78 Misc. 557, 139 N. Y. Supp. 1095.

Purpose and sufficiency of allegation as to possession.—The purpose of the provision that plaintiff must have been in possession for at least a year is to prevent suits by transient occupants who might go into possession for that purpose only, and allegations from which the fact of possession appears as a necessary inference is sufficient. *Hulbert v. Hulbert* (1914), 86 Misc. 662, 149 N. Y. Supp. 568.

It is sufficient that the defendant makes a claim; its source and validity is for him to assert if he stands upon his claim. And it is sufficient for him to allege in the words of the code that defendants unjustly make a claim. It is unnecessary for him to state facts showing wherein the injustice consists. *Dime Savings Bank v. Butler* (1915), 167 App. Div. 257, 152 N. Y. Supp. 633, aff'd 215 N. Y. 708.

Complaint in an action to determine claims to real property. *O'Brien v. Gill*

(1915), 166 App. Div. 92, 151 N. Y. Supp. 682.

Complaint in an action to determine claim of defendant to a negative easement or interest in the nature of an easement, see *Dime Savings Bank v. Butler* (1915), 88 Misc. 698, 152 N. Y. Supp. 448, aff'd 167 App. Div. 257, 152 N. Y. Supp. 633, aff'd 215 N. Y. 708.

It is evidently intended that the source of the party's title should be given specifically. It would serve no useful purpose otherwise. If a statement that title came from the state or by act of the legislature, without giving any particulars, was a compliance with the provision, the latter would seem to be an unnecessary requirement. The object is to require the particulars of the title to be given. *Hooper v. City of New York* (1916), 96 Misc. 47, 160 N. Y. Supp. 14.

A complaint alleging that the plaintiff is the owner of a certain piece of real property and that defendants unjustly make claim to an easement as interest therein in the nature of a restriction upon the kind of building that may be erected thereon, states facts sufficient to constitute a cause of action under § 1638. *Dime Savings Bank v. Butler* (1915), 215 N. Y. 708, aff'g 167 App. Div. 257, 152 N. Y. Supp. 633.

§ 1642. Proceedings the same as in ejectment.

Application.—*N. Y. Inst. for Deaf and Dumb v. City of New York* (1918), 181 App. Div. 184, 168 N. Y. Supp. 755.

As a suit for the reparation of a referee's deed is not one to determine a claim to real property under the provisions of the code, but has its sanction in the general jurisdiction of the court of equity, this section, making the procedure the same as in an action of ejectment where the defendant claims an estate, has no application. *Garth Estates v. Bronx Parkway Commission* (1917), 177 App. Div. 6, 163 N. Y. Supp. 950.

§ 1644. Judgment awarding defendant possession, etc.

Section cited.—*Eidlitz v. French* (1918), 105 Misc. 163, 173 N. Y. Supp. 646.

§ 1645. Judgment for plaintiff.

Section cited.—*Eidlitz v. French* (1918), 105 Misc. 163, 173 N. Y. Supp. 646.

§ 1651. Who liable to action for waste.

An action by the assignee of a contract for the purchase of a dwelling house against the owners and vendors thereof, to recover damages for injuries alleged to have been willfully, maliciously and wantonly inflicted thereon by the owners pending the contract and conveyance, is not strictly one for waste, but is in the nature of the old action upon the case. *Potter v. Bierwirth* (1916), 171 App. Div. 175, 157 N. Y. Supp. 25.

§ 1664. Certain persons holding over deemed trespassers. Action against them.

Application.—*Ryder v. Kennedy* (1918), 224 N. Y. 407.

An occupant in lawful possession under a lease from a life tenant for a term of years becomes a trespasser upon refusal to yield possession of said premises after the death of the life tenant, and the remedy of the owners is by action in ejectment and not by summary proceedings under §§ 2231, 2232, since the conventional relation of landlord and tenant does not exist and the occupant is not such a trespasser as may be removed through such proceedings. *Williams v. Alt* (1919), 186 App. Div. 235, 174 N. Y. Supp. 460.

The lessee of a life tenant upon the death of the life tenant is no longer a tenant by sufferance, but becomes a trespasser. *Williams v. Alt* (1918), 170 N. Y. Supp. 506.

§ 1666. Joint tenant, etc., may maintain action against his co-tenant.

A plaintiff, ignorant of what rents have been received, cannot bring himself under the provisions of this section. *Minion v. Warner* (1918), 185 App. Div. 246, 173 N. Y. Supp. 69.

§ 1667. Action for cutting, etc., trees.

Owner of trees.—In order to recover treble damages under this section, the plaintiff must be the owner of the trees cut. *Pfohl v. Rupp* (1915), 166 App. Div. 630, 152 N. Y. Supp. 47.

Idem; trees in highway.—In an action for trespass in cutting shade trees without plaintiff's consent, in which treble damages are claimed, actual damages sustained may be recovered where it appears that the plaintiff was not the owner of the trees, but that they were within the limits of a public highway upon which his premises abutted, and that their destruction was not necessary for purposes of public improvement. *Pfohl v. Rupp* (1915), 166 App. Div. 630, 152 N. Y. Supp. 47.

§ 1668. Idem; when treble damages may be recovered.

Title to lands.—Where, in an action by an owner of land to recover treble damages for the wrongful and unlawful cutting and removal of timber by the defendant, both parties claim title to the land, the burden of establishing ownership

is upon the plaintiff, and he must prevail upon the strength of his own title and not upon the weakness of the defendant's.

Judd v. Chilson (1917), 177 App. Div. 121, 163 N. Y. Supp. 695.

§ 1669. Treble damages for forcible entry or detainer.

An injunction is not authorized in action at law to recover for injury to prop-

erty, claiming treble damages. Reynolds v. Webber (1916), 160 N. Y. Supp. 177.

§ 1670. Notice of pendency of action by plaintiff.

In action to recover money paid under contract for purchase of land.—Where a vendee assigns a claim for moneys paid under a contract to purchase certain real property, but does not assign his interest in the contract for the purchase of such property, an action by the assignee to recover upon such claim does not in any manner affect the title to the real property in question, within the meaning of § 1670, and hence a notice of *lis pendens* filed in the action is properly canceled. Murphy v. Hurley (1913), 155 App. Div. 465, 140 N. Y. Supp. 514.

In an action to impress real property held in trust with a lien for work and material furnished for the protection of the trust estate, at the request of the executors and trustees of the testator, on the ground that the executors and trustees are insolvent, the plaintiff may file notice of pendency of action the action being one affecting the trust real property. Miller v. Herzog (1914), 148 N. Y. Supp. 945.

A suit to enforce the specific performance of a contract to erect a building on lands sold by the plaintiff to the defendant, which holds them for the benefit of other defendants, and to impress a lien thereon for the unpaid purchase price and to compel the execution of a mortgage, is one brought to recover a judgment affecting the title to or the possession, use or enjoyment of real property, within the meaning of this section. Small Realty Co.

v. Strauss (1914), 162 App. Div. 658, 147 N. Y. Supp. 478.

Foreclosure action.—The filing of a *lis pendens* and the service of a summons and complaint in an action of foreclosure upon a tenant of the property constitutes a commencement of the action, and a subsequent tender of payment by the mortgagor, even if made before service was made upon her, is insufficient to relieve her from liability for costs. Harvey v. Mooney (1915), 168 App. Div. 169, 153 N. Y. Supp. 268.

Sufficiency of complaint.—In order that a *lis pendens* may be filed, the complaint must state a cause of action affecting the title of real property, or the use, possession or enjoyment thereof. Kauffman v. Simis (1913), 156 App. Div. 208, 141 N. Y. Supp. 110.

Where the complaint in an action to ascertain and foreclose an attorney's lien shows that the plaintiff never had any lien upon the real property and fails to set forth any cause of action by which such lien can be established, and the action is solely to recover a money judgment, a *lis pendens* is improper. Kauffman v. Simis (1913), 156 App. Div. 208, 141 N. Y. Supp. 110.

Right to file as depending on sufficiency of complaint.—In determining the right to file a *lis pendens* the court will not seek to see whether the action is well brought. Small Realty Co. v. Strauss (1914), 162 App. Div. 658, 147 N. Y. Supp. 478.

§ 1671. Effect of notice; cancellation of notice upon making deposit or giving undertaking.

Lateral support.—A landowner deprived of lateral support is entitled to a mandatory injunction requiring the adjacent owner to give such support although the land was conveyed subsequent to the excavation if a *lis pendens* was filed in the suit for an injunction. Leerburger v. Hennessy Realty Co. (1912), 154 App. Div. 158, 138 N. Y. Supp. 921.

Effect of filing notice pendency of an action. Hubbard v. Lydecker (1912), 78 Misc. 80, 137 N. Y. Supp. 714.

A party by filing a *lis pendens* does not acquire an interest in property described superior to the rights of one having an interest under an unrecorded deed and who has not been made a party to the action. Nugent v. Foley (1912), 137 N. Y. Supp. 705.

§ 1671-a. Persons bound by judgment in certain actions.

In an action or proceeding specified in articles second, third or fourth of this title, all the proceedings and the judgment shall bind, in addition

to the persons who are bound pursuant to the provisions of section sixteen hundred and seventy, all persons who acquire inchoate dower in the real property described in the notice of pendency of the action after the filing of such notice and also all persons born between the filing of such notice of pendency of action and the entry of judgments in such action who would have been bound by such proceedings if borne* after such judgment; provided the court may in its discretion at any time before final judgment allow any such person to intervene or may require that he be brought in as party, or may make such other order or provision for the protection or recognition of his rights as justice may require and the circumstances of the case permit. In admitting such new party or requiring such new party to be brought in the court may give or refuse leave to answer; may permit or direct that the answer of any other defendant or defendants stand as his answer; may direct that the action retain its place on the calendar; may require or dispense with the appointment of guardian ad litem; may allow a new trial or any re-hearing; or direct that all or any part of the proceedings stand and bind such new party or make or impose any other provision, term or condition that to the court may seem proper.

Added by L. 1916, ch. 518, in effect Sept. 1, 1916.

§ 1672. Notice to be recorded and indexed.

Each county clerk with whom such a notice is filed, must immediately record it in a book kept in his office for that purpose, and index it to the name of each defendant, specified in a direction appended at the foot of the notice, and subscribed by the attorney for the plaintiff. The notice filed in partition suits must be indexed against the name of each plaintiff and of each defendant having any interest or estate in the premises. The expense of procuring a new book, when necessary, must be paid out of the county treasury, as other county charges.

Amended by L. 1913, ch. 69, in effect Sept. 1, 1913. The amendment of 1913 added the second sentence.

Source.—L. 1864, ch. 53, parts of §§ 1, 2.

§ 1674. When and how notice may be cancelled.

Laches.—Where it appears that a *lis pendens* filed against defendants' property is still open and that the situation of the case is due solely to the neglect and laches of defendants in failing to have a proper decision and judgment entered while the trial justice was a member of the court, their motion to dismiss the action for failure to prosecute and to cancel the *lis pendens* will be denied and a

retrial ordered. *Rosenblum v. Tolkow* (1918), 105 Misc. 96, 173 N. Y. Supp. 549.

In a judgment creditor's action a notice of pendency can only be cancelled by order of the court, upon payment into court, or upon giving the security required by this section. *Wittmann Brothers v. Forman Bottling Co.* (1917), 178 App. Div. 674, 165 N. Y. Supp. 811.

§ 1675. When and how court may compel delivery of possession of real property to purchaser.

An order of the court requiring the sheriff to put a person into possession of real property supersedes the ancient writ of assistance as to actions brought under

tit. 1 of ch. 14 of the code and may be granted *ex parte* in the discretion of the court. *Smith v. Brotsch* (1917), 99 Misc. 371, 163 N. Y. Supp. 986.

* So in original.

§ 1594. When the state is interested.

The people of the state may be made a party defendant to an action for the partition of real property, in the same manner as a private person. In such a case the summons must be served upon the attorney-general who must appear in behalf of the people, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure detailed facts showing the nature and extent of the interest in or lien on the said real property of the people of the state of New York and the reason for making the people a party. Upon failure to state such facts, the complaint shall be dismissed, as to the people of the state of New York. The commissioners of the land office, whenever they deem it for the best interests of the state, may order the treasurer on the warrant of the comptroller to pay off and cancel any mortgage, tax, or other encumbrance, or any amount due thereon, or to acquire any undivided interest, adverse to the state, existing on any lands belonging to the state, or in which the state has an interest other than the lien of a tax under article ten of the tax law, to perfect in the state a title to any such lands or to protect the state's interest therein. In all such actions wherein the commissioners of the land office are so empowered the plaintiff shall not be entitled to costs if the people of the state are made a party defendant, unless the commissioners of the land office, after a full presentation of the facts to them shall have determined before the action of partition is brought against the state that the interests of the state did not warrant their making an order for the payment or cancellation of said mortgage, lien or encumbrance, or any amount due thereon, or for the acquisition of any outstanding undivided interest adverse to the state, or unless the commissioners of the land office shall have failed to make such determination within three months after such full presentation of facts shall have been made to them by a verified statement in writing, and filed with the secretary of said commissioners at his office in the city of Albany, nor unless a certified copy of the commissioners' report of partition, and of the referee's or sheriff's report of sale, in case of a sale, filed in the action shall have first been duly served upon the attorney-general; and in no such case wherein the people are made a party defendant because of an interest other than the lien of a tax under article ten of the tax law, shall any additional allowance under sections thirty-two hundred and fifty-two or thirty-two hundred and fifty-three of this act be made to the plaintiff.

Amended by L. 1911, ch. 26; L. 1916, ch. 330, and L. 1917, ch. 774, in effect Sept. 1, 1917. The amendment of 1916 added the last sentence. The amendment of 1917 inserted reference to article ten of Tax Law in last two sentences and changed provision as to costs where the people are defendant.

Source.—R. S., pt. 3, ch. 5, tit. 3, §§ 92, 93.

§ 1598. Who may be joined as defendants.

1. In either of the cases specified in the last section, any other person, claiming title to, or the right to the possession of, the real property in which dower is claimed, may be joined as defendant in the action.
2. The people of the state of New York may be made a party defendant

§ 1679. Purchases by certain officers prohibited; penalty.

A commissioner or other officer making a sale, as prescribed in this title, or a guardian of an infant party to the action, shall not, nor shall any person, for his benefit, directly or indirectly, purchase, or be interested in the purchase of any of the property sold; except that a guardian may, where he is lawfully authorized to do so, purchase for the benefit or in behalf of his ward. The violation of this section, is a misdemeanor; and a purchase made contrary to this section, is void. But no action shall be brought for or in respect to real property by a person claiming that the property has been heretofore sold under a judgment in an action directing the sale wherein there were infant defendants for whom a guardian *ad litem* had been appointed, and the premises were sold at public auction and purchased by or on behalf of such guardian *ad litem*, commissioner or other officer and where the deed to the premises so purchased has been recorded in the proper office for thirty years, unless such action shall be commenced within six months after this act takes effect.

Amended by L. 1916, ch. 585, in effect Sept. 1, 1916. The amendment of 1916 added the last sentence.

Source.—R. S., pt. 3, ch. 5, tit. 3, § 58.

Attorney acting as guardian *ad litem*.—Where an attorney acting as guardian *ad litem* for infant defendants in an action for partition, bid in the lands at a judicial sale, assigned his bid to another person who purchased the land partly for the benefit of the attorney, contrary to this section, the legality of a title derived through such purchase is so open to question that a vendee will not be compelled specifically to complete a contract to purchase. *McKean v. Hill* (1915), 166 App. Div. 18, 151 N. Y. Supp. 689.

§ 1681. Defendant, how prevented from committing waste, etc.

Timber.—As to cutting and removing timber. *Wagner v. Garin* (1913), 155 App. Div. 727, 140 N. Y. Supp. 936.

§ 1688-f. Appointment of referee; notice to appear.

Upon the presentation of the petition, the judge shall make an order containing directions as to the persons to whom, and the manner in which, notice shall be given of the time and place at which such application will be heard; and at the time fixed in said notice for that purpose, if it shall be shown to the satisfaction of the court that the case comes within the provisions of this article, the court shall make an order appointing a referee to take such testimony and prescribing the manner in which and the persons to whom notice shall be given of the time and place at which the testimony will be taken before said referee.

If it shall appear from the petition that the person or persons to be examined reside without the state, the judge to whom the petition may be presented may direct that a commission be issued to one or more competent persons named therein to examine the person or persons named therein under oath upon the interrogatories annexed to the commission; to take and certify the deposition of each witness, and to return the same and the commission according to the directions given in or with the commission; and for this purpose the judge shall make an order directing that interrogatories be settled on notice to persons who, from the petition it may

appear, may be adversely affected by the testimony sought to be taken. All the provisions of chapter nine, title three, article two of the code of civil procedure shall apply to depositions taken without the state as herein provided; and a deposition taken and filed in accordance with the provisions thereof and of this article, shall have the same force and effect as the depositions of a witness before a referee as herein provided, if, before it may be read in evidence, the petition and order under which it was taken and proof of service of all the notices required by this article, shall be filed in the office of the clerk of the county in which the real estate is situated, and the deposition or a certified copy thereof shall be recorded in the office of the register, or, if there be none, of the county clerk, of the county in which the real estate is situated.

Added by L. 1901, ch. 303; amended by L. 1913, ch. 140, in effect March 27, 1913. The amendment of 1913 added the second paragraph.

§ 1688-g. Referee to take deposition.

Before proceeding with the testimony, the referee shall require proof that due notice of the hearing has been given in accordance with the directions in said order contained, and thereupon the referee must proceed to take the depositions of the persons proposed to be examined, as stated in the petition, at the time and place mentioned in the notice, and may from time to time adjourn the examination to another day and another place within the same county. All the provisions of sections eight hundred and fifty-four, eight hundred and fifty-five, eight hundred and fifty-six, eight hundred and fifty-seven and eight hundred and fifty-eight of the code of civil procedure apply to the examination of a person taken before a referee as prescribed in this article.

Added by L. 1901, ch. 303; amended by L. 1913, ch. 140, in effect March 27, 1913. The amendment of 1913 inserted the words "before a referee" in the last sentence.

§ 1688-i. Depositions as evidence.

Subject to the provisions of this article, the depositions taken before a referee or pursuant to a commission or a certified copy thereof may be read in evidence by any party to an action or proceeding, which shall involve the title to such real property, as against the person on whose petition said depositions were taken, each person to whom notice of the taking of such depositions was given as directed in the order appointing the referee, and all persons claiming from, through or under them or any of them.

Added by L. 1901, ch. 303; amended by L. 1913, ch. 140, in effect March 27, 1913. The amendment of 1913 inserted the words "taken before a referee or pursuant to a commission," in lines 1 and 2.

Source.—R. S., pt. 3, ch. 8, tit. 12, § 63, and tit. 17, § 15.

§ 1689. Actions relating to chattels; joinder of action to others.

History of remedy in replevin. *Kurzweil v. Story & Clark Piano Co.* (1916), 95 Misc. 484, 159 N. . Supp. 231.

§ 1690. Action to recover chattel; when it cannot be maintained.

Common law action.—The action of replevin is an old common law action, and the provisions of the code are merely regulations of and restrictions upon the common law authority of the courts. *Crocker-W. Co. v. Genesee Recreation Co.* (1917), 101 Misc. 440, 187 N. Y. Supp. 141.

Action by chattel mortgagee against sheriff.—When at the time chattels are

seized under a writ of attachment they were mortgaged to a third person and the mortgagor has abandoned possession thereof, the mortgagee under the insecurity clause in his mortgage has the right to reduce the chattels to possession and he may maintain replevin to recover their possession. *Crutts v. Daly* (1914), 84 Misc. 192, 145 N. Y. Supp. 850.

§ 1694. Plaintiff may require sheriff to replevy.

Failure to deny demand as obviating necessity for proof.—The complaint in an action of replevin should not be dismissed upon the ground that there is no proof of a demand by the plaintiff for the return

of the chattel, where such demand is alleged in the complaint and is not denied in the answer. *Scaglione v. Brooks* (1913), 159 App. Div. 573, 144 N. Y. Supp. 542.

§ 1695. Affidavit therefor, before commencement of action.

Replevin; evidence of ownership.—In an action for replevin, where plaintiff shipped goods over defendant's road and delivery was refused, plaintiff's possession, of goods prior to their delivery to defendant was *prima facie* evidence of his ownership and sufficient to maintain the action. *Perkins*

v. Chautauqua Traction Co. (1912), 76 Misc. 307, 137 N. Y. Supp. 80.

Wrongful transfer.—An action of replevin will lie against one who had voluntarily wrongfully transferred to another property which he is bound to deliver upon demand. *O'Connor v. Lock* (1912), 148 App. Div. 765, 133 N. Y. Supp. 320.

§ 1699. Plaintiff's undertaking for replevin.

Liability of sureties.—Sureties upon an undertaking in an action of replevin are only liable to the defendants before the court when their undertaking was given; they are not liable to a defendant subsequently brought in and the provisions of § 815 relating to new parties have no application. *First Commercial Bank v. Valentine* (1913), 155 App. Div. 91, 139 N. Y. Supp. 1037.

To whom obligation of undertaking runs.—As it is only the possession of the defendant in the action that is invaded by the writ, the obligation of the undertaking given by plaintiff is to him alone, unless there is privity of title or possession between such defendant and a party seeking to recover on the undertaking. *First Commercial Bank v. Valentine* (1913), 209 N. Y. 145, *aff'd* 155 App. Div. 91, 139 N. Y. Supp. 1037.

§ 1700. How chattel to be replevied.

Power of officer to take chattels from third person.—The code of civil procedure restricts the authority of an officer to taking the chattels mentioned in a writ of replevin only from the possession of the

defendant in action. *First Commercial Bank v. Valentine* (1913), 209 N. Y. 145, *aff'd* 155 App. Div. 91, 139 N. Y. Supp. 1037.

§ 1703. When defendant may except to sureties; proceedings thereupon.

Effect of failure to comply.—Where defendants in an action of replevin gave a bond not shown to comply with §§ 1703-1705 to the plaintiff in order to obtain possession of chattels, which had been seized by the sheriff, neither they nor

the surety on the bond can question the authority of the court to make the order for the return of the property to the defendants. *Thompson v. Illinois Surety Co.* (1916), 175 App. Div. 379, 161 N. Y. Supp. 1009.

§ 1633. Disposition of surplus; duties of officer making sale.

If there is any surplus of the proceeds of the sale, after paying the expenses of the sale, and satisfying the mortgage debt and the costs of the action, it must be paid into court, for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may if an application therefor is pending, direct it to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court. Within thirty days after completing the sale, and executing the proper conveyance to the purchaser, unless such time be extended by an order of the court entered in the office of the clerk within said thirty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.

Where real property, or an interest in real property, liable to be disposed of as prescribed in article third of title four of chapter eighteen of this act, is sold in an action or special proceeding, or otherwise, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's lifetime, the surplus money must be paid into the surrogate's court having jurisdiction to issue letters testamentary or of administration upon the estate of the decedent, in the following cases:

1. Where eighteen months have not elapsed since the date when letters testamentary or of administration were first issued.
2. Where a proceeding for a judicial settlement of the accounts of such executor or administrator has been commenced within eighteen months from the date of the issue of such letters and is still pending.
3. Where no such letters have been issued and two years have not elapsed since the death of the decedent.

Money paid into the surrogate's court, as herein provided, may be paid out to the executor or administrator of the decedent, as directed by an order of the surrogate's court, to be accounted for by him upon the judicial settlement of his accounts; or, in a special proceeding brought for that purpose in the surrogate's court, an order may be entered directing distribution to the persons entitled thereto, in case eighteen months have elapsed since letters testamentary or of administration were first issued upon the estate of the decedent, or, in case no such letters have been issued, and two years have elapsed since the death of the decedent.

Amended by L. 1908, ch. 294; L. 1915, ch. 643, in effect May 14, 1915. The amendment of 1915 added all after the first paragraph.
Source.—R. S., pt. 3, ch. 1, tit. 2, §§ 159, 160.

§ 1634. When complaint to be dismissed on payment of sums due.

Stipulation to discontinue on payment of accrued interest and costs.—A plaintiff, in a suit for the foreclosure of a mortgage, who stipulates before answer to discontinue if the defendant pay all accrued interest and taxable costs before a certain date, but reserves the right to proceed without notice upon failure of the defendant to pay said interests and costs, may proceed with the suit where the defendant has merely paid the interest. It seems that such a stipulation is without consideration and invalid; but whether valid or invalid, its force and effect can only be determined by answer and a trial of the issues. *Burkard v. Stephan Bldg., etc., Co.* (1913), 160 App. Div. 50, 144 N. Y. Supn. 775.

§ 1638. Who may maintain an action to compel determination of claim

Application.—Hall v. City of Lockport, 90 Misc. 429; Sommerville v. City of New York (1915), 89 Misc. 188, 153 N. Y. Supp. 253; Porter v. Denny (1915), 170 App. Div. 546, 156 N. Y. Supp. 1016; Hooper v. City of New York (1916), 96 Misc. 47, 160 N. Y. Supp. 14; Dime Savings Bank v. Butler (1916), 96 Misc. 82, 160 N. Y. Supp. 954; Burns Bros. v. City of New York (1917), 178 App. Div. 615, 165 N. Y. Supp. 615.

Remedies exclusive.—The provision relating to the recovery of real property (§ 1496 et seq.) and the determination of a claim to real property (§ 1638 et seq.) are exclusive remedies for any issue coming within the scope of their provisions and an action in equity will not lie to accomplish the purposes for which those sections were provided unless special facts are alleged showing that the remedy at law provided by them is not adequate and that resort must be had to a court of equity to secure proper relief. Pure Strain Farm Co. v. Smith (1917), 99 Misc. 108, 163 N. Y. Supp. 615.

Ejectment.—When action by owner of distinct parcels of land to enjoin maintenance of various actions of ejectment, cannot be maintained. Prospect Park & Coney Island R. R. Co. v. Morey (1913), 155 App. Div. 347, 140 N. Y. Supp. 380.

Tenant.—A tenant, in asserting ownership and a right to remove fixtures which have become a part of the real estate, may be considered as claiming an interest in the property under § 1638. Robinson v. Pratt (1912), 151 App. Div. 738, 136 N. Y. Supp. 98.

Between lessee and subsequent purchaser.—Where a lease of agricultural lands for twenty-five years is executed in consideration of an agreement that the lessee shall maintain the lessor for life, and later the lessor deeds the same land to his son which deed is not recorded until after the lessor's death, an action is maintainable under the statute as one brought to determine plaintiff's rights in the property in question and to quiet their title to the same. Parmely v. Showdy (1914), 86 Misc. 634, 148 N. Y. 1086.

Cancellation of lien.—In order to maintain an action under this section to cancel a lien for taxes when the lien has expired by reason of the lapse of ten years it must be shown that the taxes are an apparent lien, that the municipality unjustly claims that such lien is valid or that it appears from the public records that such a claim might unjustly be made. In such a case there can be no presumption that the proceedings to enforce the lien have been stay or that the city can make such a claim, and where the necessary element of an apparent lien is absent and the city makes no claim of a lien, the court is without jurisdiction to grant re-

lief. Hall v. City of Lockport (1915), 153 N. Y. Supp. 298.

In an action brought to cancel an assessment on plaintiff's property on the ground that it was illegal and void because made in excess of the jurisdiction of the common council in creating the district of assessment, it will be presumed that the common council did establish a district of assessment containing all the property likely to be benefited by the improvement and, in the absence of fraud or bad faith, its action is conclusive. Govers v. City of New Rochelle (1916), 95 Misc. 352, 159 N. Y. Supp. 221.

Determination of claim under tax deed.—Tenants in common who have been in possession of certain real property for one year may maintain an action to compel the determination of defendant's claim to the property under a tax deed which, following the assessment roll, neither describes the property nor states the size of the lot whereby the particular property could be located or identified. Stearns v. Albany Syndicate (1916), 93 Misc. 597, 158 N. Y. Supp. 553.

Cancellation of deed.—A suit in equity for the cancellation of a deed will be regarded as one brought to determine a hostile claim to real estate under art. 5, where grantor is in possession of lands so as to be unable to bring an action of ejectment on the failure of the grantee to fulfill the conditions subsequent. Norton v. Valentine (1912), 151 App. Div. 392, 135 N. Y. Supp. 1084.

An action to cancel a mortgage on real property brought by one who claims to be the legal owner under a recorded deed is an action to determine a claim to the property, and where the defendants set up a conveyance to them by foreclosure under the mortgage and ask for a dismissal of the complaint and such other and further relief to which they may be entitled, the case is triable by a jury. Pure Strains Farm Co. v. Smith (1917), 99 Misc. 108, 163 N. Y. Supp. 615.

Claim in the nature of an easement.—The right claimed need not necessarily be technically an easement so long as the claim is "in the nature of an easement" and includes the elements of a claim to domination over plaintiff's property for the benefit and advantage of the defendants. Such a claim, although created by covenant, and not by grant, is frequently spoken of judicially as an easement, and is held to be such an incumbrance upon land as to justify the refusal of a vendee to accept the title. Dime Savings Bank v. Butler (1915), 167 App. Div. 257, 152 N. Y. Supp. 633, aff'd 215 N. Y. 708.

Under this section an owner of a plot of land may sue to determine the validity of a claim asserted by owners of property in the same block, to a right to exercise

§ 1704. When defendant may reclaim chattel; proceedings thereupon.

Protection of defendant's rights against third party. *United Shoe R. M. Co. v. Dochtermann S. W. Co.* (1919), 186 App. Div. 359, 174 N. Y. Supp. 284.

Liability of sureties on undertaking given pursuant to the code is conditioned upon the rendering of a judgment in the

alternative and the issue and return of an execution which would require, first, the taking possession of the chattel replevied if such be possible. *Levine v. Dohl* (1917), 179 App. Div. 777, 167 N. Y. Supp. 329.

§ 1709. Claim of title by third person; proceedings thereupon.

Action in replevin.—*United Shoe R. M. Co. v. Dochtermann S. W. Co.* (1919), 186 App. Div. 359, 174 N. Y. Supp. 284.

§ 1711. Indemnity to sheriff against such action.

Costs.—In an action to recover a chattel, upon granting a motion to substitute as a party defendant, in place of the sheriff, the obligor in an undertaking under § 1711,

the court is without power to award costs to the sheriff. *Coddington v. Harburger* (1912), 77 Misc. 211, 137 N. Y. Supp. 536.

§ 1721. Taking chattel, how stated in complaint.

Facts alleged showing wrongful taking; demand.—Under the provision that "where the taking of the chattel is not complained of, but the action is founded upon its wrongful detention, the complaint must set forth the facts, showing that the detention was wrongful," the plaintiff must show that he has, as the owner, demanded the possession of the chattel or that there is some other fact which puts the defendant in the wrong. This provision has nothing to do with the facts relating to the title, but refers to the facts which show "that the detention was wrongful." *Wagman v. Raynor* (1914), 163 App. Div. 68, 148 N. Y. Supp. 471.

Wrongful taking.—A complaint in the action against the sheriff to recover a chattel which alleges plaintiff's title and that

defendant wrongfully took them is sufficient under this section, though there was no allegation that plaintiff, whose mortgage was not yet due, "deemed himself unsafe" and so entitled to possession under the insecurity clause. *Crutts v. Daly* (1914), 84 Misc. 192, 145 N. Y. Supp. 850.

Demand and refusal to deliver.—Where the plaintiff in an action to recover a chattel, alleges ownership and right to possession, and to show that the defendant's detention was wrongful, alleges that he, the owner, with right to immediate possession, demanded the same and that the defendant refused to deliver, the complaint states a cause of action. *Wagman v. Raynor* (1914), 163 App. Div. 68, 148 N. Y. Supp. 471.

§ 1722. Damages when chattel injured, etc., by defendant.

Section cited.—*Harding v. Gaillard* (1917), 176 App. Div. 833, 839, 163 N. Y. Supp. 617; *Greenberger v. North Side*

Storage Warehouse Company (1915), 170 App. Div. 887, 154 N. Y. Supp. 450.

§ 1723. Answer of title in third person.

Action for recovery of chattels brought before a justice of the peace; application of section does not extend to. *Bills v. Baker* (1917), 178 App. Div. 480, 165 N. Y. Supp. 171.

Justifying under title of stranger.—The rule that in an action of trespass, trover or replevin, a defendant cannot justify under the title of a stranger without connecting himself with the right of said person, is not changed by the provisions of this section that a defendant may by answer,

defend on the ground that a third person was entitled to the chattel without connecting himself with the latter's title. *Bills v. Baker* (1917), 178 App. Div. 480, 165 N. Y. Supp. 171.

Recovery of possession of films from one not the purchaser.—An agreement for manufacture and lease of films by plaintiff provided that the ownership of each film should remain in manufacturer. Plaintiff may maintain action for replevin to recover possession of such films from one

with whom it had had no business relations and who could show no legal purchase. *Biograph Co. v. International Film Traders* (1912), 76 Misc. 436, 134 N. Y. Supp. 1069.

§ 1725. Defendant may demand judgment for return.

Effect of failure to demand return.—Where the record on appeal from a final judgment in an action to recover a chattel does not show that defendant demanded a return thereof, and no such demand is made in the answer, only a "judgment for defendant" which entitles him to statutory costs can be rendered. Such judgment, however, does not preclude defendant from thereafter bringing an action to regain possession of the chattel. *Beck v. Schneider* (1914), 84 Misc. 23, 145 N. Y. Supp. 1046.

§ 1730. Final judgment; docketing the same.

Judgment in the alternative.—Even if the chattel has been delivered to a third party claiming title thereto under § 1709, nevertheless the judgment must be in the alternative for the recovery of the chattel, or, if the chattel cannot be recovered, for its value. *Levine v. Dohl* (1917), 179 App. Div. 777, 167 N. Y. Supp. 329.

§ 1731. Execution; contents thereof.

Execution to sheriff to deliver property.—*Rafferty v. World Film Corporation* (1917), 180 App. Div. 475, 167 N. Y. Supp. 1027.

§ 1742. Action by woman, married under sixteen, to annul marriage.

Repealed by L. 1919, ch. 144, in effect Sept. 1, 1919.

Where defendant, in an action to annul a marriage, contracted a void marriage, for the reason that prior to the marriage he had been divorced in this state and by the terms of the divorce was forbidden to remarry during the lifetime of his former wife, and his former spouse was alive at the time of the second marriage, the court has inherent jurisdiction to declare the second marriage a nullity, although it is probable that it has no statutory jurisdiction. *Gardner v. Gardner* (1917), 98 Misc. 411, 162 N. Y. Supp. 365.

Under age; valid marriage not intended.—Where, in an action to have a marriage adjudged null and void *ab initio* upon the ground that plaintiff was under age at the time of her marriage and that the necessary legal consent, etc., had not been obtained, it not only appears that there was no intention on the part of either plaintiff or defendant that the formal ceremony should be considered as a valid and legal marriage, but it is affirmatively established that the ceremony was entered into as a mere subterfuge for the purpose of obtaining a certificate of marriage which could be used by plaintiff in her endeavor to obtain a theatrical engagement thereby overcoming the objection that being under the legal age she could not be provided with an engagement without first having the consent of her mother or guardian to such employment, and it further appears that the marriage was never consummated and that defendant joined in the prayer for relief for the annulment of the marriage and that both plaintiff and defendant subsequently contracted other marital relations, the evidence is sufficient to justify a court of equity in granting the relief prayed for. *Dorgeloh v. Murtha* (1915), 92 Misc. 279, 156 N. Y. Supp. 181.

§ 1743. Action for judgment declaring nullity of void marriage or annulling voidable marriage.

An action may be maintained to procure a judgment declaring the nullity of a void marriage or annulling a voidable marriage heretofore or hereafter entered into or contracted.

Amended by L. 1916, ch. 605; L. 1917, ch. 244; L. 1918, ch. 311; L. 1919, ch. 144, in effect Sept. 1, 1919. The amendment of 1916 inserted the words "heretofore or hereafter entered into" in the second line, and inserted the last two lines of subdivision 1. The amendment of 1917 added subdivision 6. The amendment of 1918 materially changed subdivision 2. The amendment of 1919 materially changed the entire section.

Source.—R. S., pt. 2, ch. 8, tit. 1, § 20.

The jurisdiction of the court to annul marriage depends wholly upon the statute, except in those cases in which annulment is sought for some case for which chancery has power to cancel or avoid all contracts, such as lunacy or fraud. Where a marriage is absolutely void because of the existence of a former spouse, the court has inherent power so to declare it. *Roth v. Roth* (1916), 97 Misc. 136, 161 N. Y. Supp. 99.

There is no general equitable jurisdiction to set aside marriages; the power to deal with matrimonial actions must be found in the statute. There is no provision of the statute permitting an action to annul a marriage between two persons of full age, sound mind, without living husband or wife, and free from incapacitating physical defects. *Davidson v. Ream* (1917), 178 App. Div. 362, 164 N. Y. Supp. 1037.

Fraud; pregnant at time of marriage.—Where defendant before her marriage was pregnant by another than her husband, the plaintiff, who neither before nor after the marriage had sexual intercourse with her and did not know of such pregnancy at the time of the marriage, is entitled to have it annulled for fraud. *Fontana v. Fontana* (1912), 77 Misc. 28, 135 N. Y. Supp. 220.

Idem; facts required.—A marriage will not be annulled for fraud unless the facts misrepresented or concealed go to the very essence of the marriage contract. *Roth v. Roth* (1916), 97 Misc. 136, 161 N. Y. Supp. 99.

Idem; misrepresentation.—Where defendant procured plaintiff's consent to the marriage by false representations as to his past life, though frankly stating that it was not spotless and that he knew plaintiff regarded these matters as material, and neither the interests of the community nor the interest of the child require other action, the court will be convinced that the plaintiff's consent was obtained by fraud and free the plaintiff from her contract. *Libman v. Libman* (1918), 102 Misc. 443, 169 N. Y. Supp. 900.

Duress.—Where, after the birth of a child of which plaintiff was the father, the mother coerced him by threats of bodily violence, to be inflicted by her brother, to go through the form of a marriage ceremony and he complied upon the express understanding, embodied in a writing, that they should never live together as husband and wife nor have any claim upon each other because of, or arising from, the marriage ceremony, and it is established that they had not cohabited or lived together as husband and wife, plaintiff is entitled to a decree of annulment on the ground that his consent to the marriage was procured under duress. *Houle v. Houle* (1917), 100 Misc. 28, 166 N. Y. Supp. 67.

Incapacity.—If a slight operation will remove the incapacity without endanger-

ing life and health, the fact that one refuses to submit to such an operation does not justify annulment; but if the incapacity can be cured only by a dangerous operation it is incurable within the law. *Anonymous* (1916), 158 N. Y. Supp. 51.

Age of legal consent; written consent of mother.—An infant who marries under the age of eighteen years, with the written consent of her mother, but leaves her husband before she arrives at that age is entitled to maintain an action to annul the marriage under § 1743 (1). *Mundell v. Coster* (1913), 80 Misc. 337, 142 N. Y. Supp. 142.

Idem; action for annulment, effect of prior judgment for separation.—Where the judgment in an action for a separation, begun before plaintiff became eighteen years of age, was not entered until after that time and since the entry of the judgment defendant has been paying the alimony for which provision was made therein, the judgment is a bar to an action brought by plaintiff after she became twenty-one years of age to annul the marriage on the ground of her non-age. *Terry v. Terry* (1916), 96 Misc. 594, 160 N. Y. Supp. 1016.

Idem; laches.—A girl married under the age of fifteen years, whose cohabitation with her husband ended before reaching the age of eighteen years, is entitled to an annulment of the marriage, and this right is not barred by her laches of over five years, where it appears that she was an ignorant girl and had been told that after five years she would have a right to a divorce without any court proceedings. *Macri v. Macri* (1917), 177 App. Div. 292, 164 N. Y. Supp. 112.

An action by the father for the annulment of a marriage will not lie where the husband who was 19 years of age obtained a marriage license upon his statement that he was 22 years old, and contracted a valid marriage without his father's consent. *Greenberg v. Greenberg* (1916), 97 Misc. 153, 160 N. Y. Supp. 1026.

Former marriage; effect of knowledge.—Although a woman married a man with the knowledge that he was already bound by a valid and subsisting marriage, she is entitled nevertheless to a decree annulling the marriage, for it is absolutely void. *Brown v. Brown* (1912), 153 App. Div. 645, 138 N. Y. Supp. 602.

Where in an action to annul a marriage it appears that the parties acted in good faith and in the belief, after full and careful inquiry, that defendant's first husband, from whom she had not heard for over seven years and did not know him to be alive, was dead, plaintiff is entitled to judgment though he knew all the defendant knew about the facts before he married. *Tiedemann v. Tiedemann* (1916), 94 Misc. 449, 157 N. Y. Supp. 1101.

Idem; former spouse.—A decree of annulment will be granted, even though the marriage be absolutely void by reason of

the evidence of a former spouse, on the ground of fraud. *Roth v. Roth* (1916), 97 Misc. 136, 161 N. Y. Supp. 99.

Lunacy; proof required.—To annul a marriage on the ground of lunacy, it must be satisfactorily shown that the party in whose behalf the action is brought was mentally incapable of understanding the nature, effect and consequences of the marriage; proof of insane delusions or hallucinations on other subjects is not sufficient. *Meekins v. Kinsella* (1912), 152 App. Div. 32, 136 N. Y. Supp. 806.

Jurisdiction over marriage in another state.—Where two persons, residents of this state, the woman being under the age of legal consent as fixed by the laws of this state and also that of New Jersey, go to the latter state, are married without the knowledge of the woman's parents, and the marriage is not followed by cohabitation, our courts have the power to annul the marriage. *Cunningham v. Cunningham* (1912), 206 N. Y. 341.

Where plaintiff, in an action to annul a marriage on the claim of his non-age, was eighteen years and four months old when, without his parents' consent, he married defendant in the state of New Jersey

which has no statute fixing the age of legal consent, his complaint must be dismissed upon the merits. *Padula v. Padula* (1916), 96 Misc. 597, 160 N. Y. Supp. 833.

Defense; foreign decree of divorce.—A decree of divorce granted by a Missouri court to the husband against the wife who was a resident of this state, will not be recognized as valid by our courts, where the first and only matrimonial domicile was in this state where the parties both resided at the time of their marriage, and the defendant did not subject herself to the jurisdiction of the Missouri court by appearing or answering in the action. Hence, such a decree of divorce is no defense in an action to secure the annulment of a second marriage contracted by the defendant therein upon the ground that she had a former husband still living. *Gilson v. Airy* (1918), 181 App. Div. 761, 169 N. Y. Supp. 242.

This section, as amended by the laws of 1916, applies to foreign states where the age of consent is not provided for, but requires the consent of parents or guardians. *Greenberg v. Greenberg* (1916), 97 Misc. 153, 160 N. Y. Supp. 1026.

§ 1744. Action when party was under the age of consent.

An action to annul a marriage on the ground that one or both of the parties had not attained the age of legal consent may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person, as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age of legal consent when it was contracted, or by a party who for any time after he or she attained that age, freely cohabited with the other party as husband or wife.

Amended by L. 1916, ch. 605; L. 1919, ch. 144, in effect Sept. 1, 1919. The amendment of 1916 inserted the words "under which the consent of parents or guardians was required by the laws of the state where the marriage was contracted." The amendment of 1919 materially changed the entire section.

Source.—R. S., pt. 2, ch. 8, tit. 1, § 21.

The intent of the legislature in making the amendment of 1916, was to provide a remedy in this state for parties who had become residents of this state but who were residents of another state at the time the marriage was contracted and the marriage was consummated, so that relief might be obtained in our courts in a proper case. The legislature has by the domestic relations law (art. 2) determined what conditions shall govern citizens of this state in the making of a valid contract of marriage. We must assume that the amendment of 1916 to the code was not made by the legislature to encourage an evasion of the statutory regulations concerning marriage. *Bays v. Bays* (1918), 105 Misc. 492, 174 N. Y. Supp. 212.

Action by mother.—The right of a mother to maintain an action to annul the marriage of her son as under the age of legal consent, is neither stayed nor abrogated because the defendant wife had theretofore brought a similar action. *Long v. Baxter* (1912), 77 Misc. 630, 138 N. Y. Supp. 505.

Where at the time of their marriage the parties represented to the clergyman that they were of the age of legal consent, though the husband was not eighteen years of age and the wife was over twenty years of age, an action brought by the mother of the husband under §§ 1744, 1745, to annul the marriage cannot be maintained where both the husband and wife object. *Marone v. Marone* (1918), 105 Misc. 371, 174 N. Y. Supp. 151.

Application to marriage in this state; action by father.—§§ 1743, 1744, so far as they provide for the annulment of a marriage where one of the parties has not reached the age under which the consent of parents or guardians is necessary, do not apply to a marriage in this state. Where a boy under eighteen years of age marries a girl under the same age and cohabits with her after he is eighteen years old, the marriage will not be an-

nulled upon the complaint of the boy's father where the boy objects. In such case the marriage, as a matter of public policy, will be upheld if necessary as a common-law marriage. *Allerton v. Allerton* (1918), 104 Misc. 627, 172 N. Y. Supp. 152.

"Cohabited."—The term cohabited is used in its popular rather than derivative meaning. *Herrman v. Herrman* (1915), 93 Misc. 315, 156 N. Y. Supp. 688.

§ 1745. Action; when former husband or wife was living.

An action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties during the lifetime of the other, or by the former husband or wife.

Amended by L. 1882, ch. 401; L. 1913, ch. 444; L. 1919, ch. 202, in effect Sept. 1, 1919. The amendment of 1913 inserted the words "or that the former marriage had been annulled or dissolved," in lines 7 and 8. The amendment of 1919 materially changed the entire section.

Source.—R. S., pt. 2, ch. 8, tit. 1, §§ 22, 23.

Application.—*Barker v. Barker* (1915), 92 Misc. 390, 156 N. Y. Supp. 194.

Presumption of legitimacy.—Where the legitimacy of a child born of a *de facto* marriage is assailed upon the allegation that one of the child's conceded parents was a party to an earlier marriage, the presumption is in favor of legitimacy. The presumption in favor of legitimacy is one of the strongest known to the law and will prevail as the all-sufficient basis for an adjudication, unless those who attack the legitimacy make clear and irrefragable proof of every element of fact necessary to defeat or escape the presumption. Illegitimacy cannot be found unless the parties holding the burden of establishing it complete a chain of evidence which will not only demonstrate the fact and validity of an earlier marriage and its subsistence at the time of a later marriage, but will aggressively exclude every indication or suggestion which might conceivably rescue the second marriage from invalidity. The presumption of legitimacy is called into action so soon as it is determined that the second marriage was such that it would be valid if no impediment thereto existed. *Matter of Biersack* (1916), 96 Misc. 161, 159 N. Y. Supp. 519.

Alimony and counsel fees pendente lite.—Where a husband sues for the annulment of a second marriage upon the ground that a former wife is still living the marriage to whom has not been annulled or dissolved, the defendant is entitled to alimony and counsel fees *pendente lite*, because she is entitled to have the status of the plaintiff as to his competency to contract the second marriage established, and because even if he were incompetent she is entitled to have the legitimacy of her children established. *Erlanger v.*

Erlanger (1916), 173 App. Div. 767, 159 N. Y. Supp. 353.

Proof of prior marriage.—In an action to annul a marriage on the ground that at the time of its celebration defendant had a former husband living, the burden is on the plaintiff to prove not only a former ceremonial marriage but that it was valid and still subsisting at the time of the second marriage. While ordinarily in such an action the fact of the prior marriage, if controverted, may be proved by the testimony of one of the parties thereto, yet, when the effect of a judgment in plaintiff's favor will necessarily brand the defendant with the crime of bigamy, the court is justified in requiring strict proof that the alleged prior marriage was in fact valid under the laws of the country where it is alleged to have been celebrated. *Lazarowiz v. Lazarowiz* (1915), 91 Misc. 116, 154 N. Y. Supp. 107.

Custody of children.—Where a marriage is annulled on the ground that the woman had a husband living, the innocent party to the annulled marriage is not entitled to the custody of the children unless he entered upon the marriage in good faith: belief that the former marriage had been dissolved by a valid decree of divorce is not sufficient. *Baylis v. Baylis* (1913), 207 N. Y. 446.

The courts of the state of the last matrimonial domicile can grant a decree of divorce without personal service of process upon or the appearance of the defendant therein, where the constructive service of process is made in accordance with the laws of that state, and such a decree is entitled to full faith and credit in the courts of all the states of the union. *Schenker v. Schenker* (1918), 181 App. Div. 621, 169 N. Y. Supp. 35.

Section cited.—*Bell v. Terry & Tench* | Supp. 733; *Gilson v. Airy* (1918), 181
Co. (1917), 177 App. Div. 123, 163 N. Y. | App. Div. 761, 169 N. Y. Supp. 242.

§ 1747. *Idem*; where party was a lunatic

Incompetent as necessary party.—When an incompetent has not been declared insane, such incompetent is a necessary party to an action to annul a marriage contracted by him during incompetency, although it is brought by a relative appointed to bring the action as next friend. *Anderson v. Hicks* (1912), 150 App. Div. 289, 134 N. Y. Supp. 1018.

The committee of the person and property of an incompetent cannot, under § 2340, maintain an action to annul the marriage of the incompetent on the ground that he is a lunatic and was such at the time of his marriage. Since the action to annul a marriage is purely statutory, such an action can be maintained only by a relative, or next friend, of the incompetent, or the incompetent himself, after his restoration to sanity. *Walter v. Walter* (1916), 217 N. Y. 439.

Proof of insanity.—To annul a marriage on the ground of lunacy, it must be satisfactorily shown that the party in whose behalf the action is brought was mentally incapable of understanding the nature, ef-

fect and consequences of the marriage; proof of insane delusions or hallucinations on other subjects is not sufficient. *Meekins v. Kinsella* (1912), 152 App. Div. 32, 136 N. Y. Supp. 806.

Action can be maintained only by lunatic or in her behalf.—An action to annul a marriage on the ground that the defendant, at the time of the marriage, was a lunatic and has ever since continued so to be, may only be brought in her behalf or by herself after restoration to sound mind, and a motion for judgment on the pleadings on the ground that the complaint does not state facts sufficient to constitute a cause of action will be granted. *Reed v. Reed* (1919), 106 Misc. 85, 175 N. Y. Supp. 264.

Right to appoint testamentary guardian.—Where a marriage is annulled because of the lunacy of the wife existing at the time of the marriage, the husband may not appoint a testamentary guardian for a child, the issue of such marriage, if its mother is still living. *Matter of Tombo* (1914), 86 Misc. 361, 149 N. Y. Supp. 219.

§ 1749. *Legitimacy of children.*

The following provisions govern the effect of declaring a marriage void or annulling a voidable marriage upon the legitimacy of children of the marriage:

1. If a marriage be annulled on the ground that one or both of the parties had not attained the age of legal consent, a child of the marriage is deemed the legitimate child of both parents.

2. If a marriage be annulled on the ground of the idiocy or lunacy of one of the persons entering into the marriage, a child of the marriage is deemed the legitimate child of the parent of sound mind, and the court by the judgment may decide that a child of the marriage is the legitimate child of the parent of unsound mind.

3. If a marriage be annulled on the ground of the idiocy or lunacy of both of the persons entering into the marriage, the court by the judgment may decide that a child of the marriage is the legitimate child of either or both parents.

4. If a marriage be annulled on the ground of force, duress or fraud, a child of the marriage is deemed the legitimate child of both parents unless the court by the judgment decides otherwise as to either or both parents.

5. If a marriage be declared a nullity as incestuous, a child of the marriage is deemed the legitimate child of both parents.

6. If a marriage be declared a nullity or annulled upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, if it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or

wife was dead or that the former marriage had been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, a child of such subsequent marriage is deemed the legitimate child of the parent who at the time of the marriage was competent to contract. If either or both parties to such subsequent marriage were incompetent to contract, the court by the judgment may decide that a child of the marriage is the legitimate child of such an incompetent.

7. If a marriage be declared a nullity or annulled for any cause or under any conditions other than those specified in the foregoing subdivisions, the court by the judgment may decide that a child of the marriage is the legitimate child of either or both of its parents.

8. If the court be authorized by this section to decide that a child of a marriage is the legitimate child of either or both of its parents, the judgment may limit the effect of legitimatization to rights other than succession to real and personal property of a deceased parent.

Amended by L. 1919, ch. 202, in effect Sept. 1, 1919. The amendment of 1919 materially changed the entire section.

§ 1750. Action on ground of force, fraud, etc.

Fraud in concealing prior marriage.—If a man's previous marriage and annulment thereof is a fact material to a marriage contract with another, it is his duty to make a full and free disclosure of his previous status. Where a wife upon her discovery, only a few hours after her marriage, that her husband had been previously married, without having cohabited with him returns to her own home and has since resided there, her marriage will be annulled upon the ground of fraud. *Weill v. Weill* (1918), 104 Misc. 561, 172 N. Y. Supp. 589.

Cohabitation.—Plaintiff, upon discovery

of his wife's epilepay, though under no legal necessity or duty to abandon her, was legally bound to care for her until a court of equity annulled the marriage, and that he cared for and continued to live with her in the same apartment, but without cohabiting with her, did not preclude his right to bring the action. *McGill v. McGill* (1917), 99 Misc. 86, 163 N. Y. Supp. 462.

Waiver of allegations of force and duress by voluntary cohabitation. *McGill v. McGill* (1917), 179 App. Div. 343, 166 N. Y. Supp. 397.

§ 1751. Custody and maintenance of children.

If a marriage be declared a nullity or annulled, the court, by the judgment or by subsequent order, may award the custody of a child of the marriage to either party as the interests of the child require, and may make provision for his education and maintenance out of the property of either or both of its parents if the marriage shall have been declared a nullity, and out of the property of the guilty parent, if the marriage shall have been annulled.

Amended by L. 1919, ch. 202, in effect Sept. 1, 1919. The amendment of 1919 materially changed the entire section.

§ 1752. Action on the ground of physical incapacity.

An action to annul a marriage, on the ground that one of the parties was physically incapable of entering into the marriage state, may be maintained by the injured party against the party whose incapacity is alleged: or such an action may be maintained by the party who was incapable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did

not know it was incurable. Such an action can be maintained only where the incapacity continues and is incurable; and must be commenced before five years have expired since the marriage.

Amended by L. 1919, ch. 144, in effect Sept. 1, 1919. The amendment of 1919 inserted the words "can be maintained only where the incapacity continues and is incurable; and" in the last sentence.

The statute of limitations upon an action to annul a marriage upon the ground that the defendant was impotent, having merely rudimentary signs of the genital organs, is governed solely by this section. *Deitch v. Deitch* (1914), 162 N. Y. App. Div. 25, 146 N. Y. Supp. 1019.

Basis of limitation.—This statutory limitation is part of our public policy. It declares a rule of the ecclesiastical courts,

that the injured party cannot unreasonably delay proceedings for relief without being open to the charge of want of sincerity and promptitude. Divorces for alleged impotency early led to abuse and fraud. Hence the limit on the time to avoid a marriage rests upon a basis quite different from the periods to begin other civil suits. *Deitch v. Deitch* (1914), 161 App. Div. 492, 146 N. Y. Supp. 782.

§ 1754. Judgment annulling a marriage; how far conclusive.

As determining date when marriage deemed invalid.—The provision that a final judgment annulling a marriage rendered during the lifetime of both parties is conclusive evidence of the invalidity of the marriage, is merely a rule of evidence with respect to the effect of the decree as evidence; but was not intended thereby to de-

clare a rule of law with respect to whether the marriage should be deemed invalid from the date of its celebration or from the date of the decree, and those matters were left to be regulated by the provisions of the domestic relations law. *McCullen v. McCullen* (1914), 162 App. Div. 599, 147 N. Y. Supp. 1069.

§ 1756. Action for divorce; in what cases maintained.

Residence; marriage within state not sufficient.—The mere fact that parties have been married in this state is not sufficient to confer jurisdiction on the court in an action for divorce irrespective of their residence. *Barber v. Barber* (1915), 89 Misc. 519, 151 N. Y. Supp. 1004.

A foreign divorce is no defense where it appears that defendant left plaintiff without justification and went to another state where he obtained a divorce on the ground of cruelty; and though she was served with process in this state she never entered an appearance in the action and at no time lived in the state where the decree was granted. She is entitled to a decree of absolute action on the ground

of misconduct with one whom, after the divorce was granted to him, he married in another state. *Rontey v. Rontey* (1917), 101 Misc. 166, 166 N. Y. Supp. 818.

Action abates upon death of plaintiff.—An action for an absolute divorce is a personal one and abates upon the death of the plaintiff. A motion in action for absolute divorce, made after the death of the plaintiff, to vacate the final judgment in his favor and for a new trial upon the ground of newly-discovered evidence, must be denied for want of power and not in the exercise of discretion. *Hunt v. Hunt* (1912), 75 Misc. 209, 135 N. Y. Supp. 39.

§ 1757. Answer; mode of trial, judgment by default.

Interlocutory judgment prior to appearance by corespondent.—Where a party named as corespondent in a divorce action within a few days after learning of the pendency of such action serves a notice of appearance, pursuant to subd. 2 of § 1757, upon the attorney for the plaintiff and demands a copy of the complaint, and thereafter a copy thereof is served upon his attorney in accordance with such demand, his motion to vacate an interlocutory judgment entered prior to his appearance and for permission to come in and defend in so far as the issues affect him should be granted. *Dicks v. Dicks* (1913), 155 App. Div. 418, 139 N. Y. Supp. 1068.

Opening interlocutory judgment to permit corespondent to intervene.—A corespondent in an action for an absolute divorce has all the rights which a party would have. So after an interlocutory decree has been granted the court has power to open the judgment and permit an infant corespondent not represented at the trial by her guardian *ad litem* to intervene and to give her an opportunity to be heard on the merits in defense of her chastity. *Shaw v. Shaw* (1913), 140 N. Y. Supp. 388.

The corespondent in a divorce suit may intervene and defend as to her individual guilt before final decree even though an

interlocutory decree has been entered. *Shaw v. Shaw* (1913), 156 App. Div. 379, 141 N. Y. Supp. 425.

It seems that a corespondent has no right to come in after the entry of an interlocutory judgment and have the issues reopened and retired, in order that she may assert her defense. *Howatt v. Howatt* (1913), 158 App. Div. 28, 142 N. Y. Supp. 908.

Motion by corespondent for stay of judgment.—In an action for divorce, a motion by the corespondent, upon whom no copy of the summons and complaint had been served, made after a verdict in favor of the plaintiff on the issue of adultery, but before the entry of the interlocutory judgment, to stay the entry thereof until after the issues raised by answer to be afterwards interposed shall be disposed of, based upon the affidavit of her attorney only, should be denied, unless also supported by her own affidavit denying the truth of the charges of adultery. *Stafford v. Stafford* (1915), 170 App. Div. 172, 156 N. Y. Supp. 25.

Idem; when granted.—A motion by a corespondent to set aside an interlocutory decree of divorce and to settle issues is properly granted, where the moving papers tend to establish her virginity. *Shaw v. Shaw* (1913), 156 App. Div. 379, 141 N. Y. Supp. 425.

Effect of judgment where corespondent is not party to action.—Where the judgment roll, in an action brought by a wife against her husband for absolute divorce, does not show that the corespondent was a party to the action, such judgment is not binding upon her as to the issues of adultery tried therein, and it is reversible error to admit the judgment roll in evidence in an action thereafter brought by the wife against such corespondent to recover damages for the alienation of the affections of her husband. *Hendrick v. Biggar* (1913), 209 N. Y. 440, 151 App. Div. 522, 136 N. Y. Supp. 306.

Idem; where corespondent voluntarily appears.—Where a corespondent was not originally served with a copy of the summons and complaint, but voluntarily appears and demands service of the latter, a judgment rendered in such action is binding on him. *Hendrick v. Biggar* (1913), 209 N. Y. 440, rev'g 151 App. Div. 522, 136 N. Y. Supp. 306.

When corespondent waives right to appear and defend.—Where the corespondent sat throughout the trial with defendant and his attorneys, consulted with them in the court room, heard testimony to the effect that she was the proprietor of an assignation house and all the testimony of plaintiff and her witnesses besides the testimony of members of her own family, a motion by her made after a verdict in favor of plaintiff for an order compelling plaintiff to accept service of her answer

denying the allegations of the complaint and for a stay of entry of plaintiff's interlocutory judgment must be denied on the ground that the corespondent had waived her statutory rights to appear and defend in the action. *Stafford v. Stafford* (1915), 92 Misc. 563, 156 N. Y. Supp. 459.

Idem; where corespondent is party to action.—A corespondent may so become a party to a divorce action wherein allegations of adultery are made against him that he will be bound by the adjudication therein. *Hendrick v. Biggar* (1913), 209 N. Y. 440, rev'g 151 App. Div. 522, 136 N. Y. Supp. 306.

Effect of evidence against corespondent.—Where in an action for divorce the corespondent appeared but did not answer, the judgment roll may be introduced in evidence against him in a subsequent action to recover damages for alienation of affections. *Hendrick v. Biggar* (1912), 151 App. Div. 522, 136 N. Y. Supp. 306, rev'd on other grounds, 209 N. Y. 440.

Separate judgment for costs.—Where, in an action for absolute divorce, the corespondent, upon whom the summons and complaint were duly served, did not answer, but her attorney took part in the trial which resulted in a judgment dismissing the complaint on the merits, a motion to vacate a separate judgment for costs entered by the corespondent, will be granted. *Mehlenbacher v. Mehlenbacher* (1912), 77 Misc. 343, 136 N. Y. Supp. 210.

Right to trial by jury.—Either party to an action for divorce has an absolute right to a trial by jury of the issue of adultery. *Cohen v. Cohen* (1914), 160 App. Div. 240, 145 N. Y. Supp. 652.

The right to a trial by jury of the issue of adultery is a constitutional right. *Moot v. Moot* (1914), 86 Misc. 495, 149 N. Y. Supp. 302.

Idem; on counter-charge of adultery.—Where the defendant denies charges of adultery made against him he is entitled as matter of right to a trial of the issues by a jury, likewise the same privilege extends to the plaintiff upon the counter-charges of adultery made by the defendant. *Yates v. Yates* (1914), 211 N. Y. 163, rev'g 147 App. Div. 915, 131 N. Y. Supp. 1086.

Idem; of charge of adultery as defense in action for reparation.—Where a husband, sued for a separation on the ground of cruel and inhuman treatment, alleges the adultery of the plaintiff, not as a counterclaim for absolute divorce as affirmative relief, but merely as a defense to the action for separation, he is not entitled to a jury trial on the issue of adultery. *Wise v. Wise* (1913), 159 App. Div. 575, 144 N. Y. Supp. 649.

Idem; effect of rule requiring issues to be settled.—The right of parties in an action for divorce, to the trial of issues by jury, is not affected by a rule of the

supreme court requiring the issues to be settled for trial within twenty days after issue joined. *Moot v. Moot* (1915), 214 N. Y. 204.

Necessity for motion to have issue settled.—To enforce the right to a jury trial, however, a party to such an action must make the motion that the issues be settled, and if he fails to make that motion within the time at which such a motion may be made by law, or by the general rules of practice, the action may be tried by the court without a jury. *Cohen v. Cohen* (1914), 160 App. Div. 240, 145 N. Y. Supp. 652.

Time within which motion must be made.—A motion under § 970 of the code of civil procedure to frame issues of adultery for trial by jury must be made within twenty days after the case is at issue, as provided by rule 31 of the general

rules of practice. *Cohen v. Cohen* (1914), 160 App. Div. 240, 145 N. Y. Supp. 652.

Idem; effect of failure to apply.—Rule 31 of the general rules of practice, as amended in 1910, is unauthorized in so far as it is an attempt to limit the constitutional rights to a trial by jury of the issue of adultery in an action for divorce by prescribing a mode of waiver not included in a statutory provision (Code Civ. Proc. 1009), relating to the same subject-matter. Hence, a defendant in an action for divorce does not waive her right to a trial by jury by failing to apply within twenty days after issue joined for an order directing that the issue of adultery be stated for trial by a jury. *Halgren v. Halgren* (1914), 160 App. Div. 477, 145 N. Y. Supp. 987; *Moot v. Moot* (1914), 86 Misc. 495, 149 N. Y. Supp. 302; s. c. 214 N. Y. 204.

§ 1758. When divorce denied, although adultery proved.

Proof of mere opportunity to commit adultery is not proof of the offense. There must be not only opportunity but evidence of a desire and purpose. Something in the conduct of the parties from which it may properly be inferred that, given the opportunity, they will indulge their passions. *Graham v. Graham* (1913), 157 App. Div. 52, 141 N. Y. Supp. 766.

Failure to pay alimony and counsel fees as depriving plaintiff of right to affirmative relief.—Until a plaintiff has paid counsel fees and accrued alimony he can

take no affirmative action in his own behalf, although he is entitled to be heard in his own defense on any motion which may be taken against him. Therefore, he will not be permitted to enter judgment dismissing his complaint and the defendant's counterclaim for a divorce, although the jury has found that neither party was guilty of the offense charged, and this, even though he has not yet been formally adjudged guilty of contempt. *Gray v. Gray* (1914), 162 App. Div. 586, 148 N. Y. Supp. 24.

§ 1759. Regulations when action brought by wife.

Annulment or modification of decree for alimony.—Although the provision of § 1759, empowering the court to annul, vary or modify a decree for alimony, was held to be unconstitutional, as applied to decrees entered before it took effect, said section has no relation to a case where no provision for alimony was made, as in such case there was nothing to annul, vary or modify. *White v. White* (1912), 154 App. Div. 250, 138 N. Y. Supp. 1082.

Where no provision for alimony is contained in the final judgment granted in an action for separation the court is without power to subsequently insert such a provision. *Koehl v. Koehl* (1915), 92 Misc. 579, 156 N. Y. Supp. 234.

Obligation to pay alimony is personal.—The obligation of a husband to pay ali-

mony for the support and maintenance of his wife is personal and ceases upon her death, and it makes no difference whether alimony has accrued at the time of death or not, for the right to receive being unassignable it is unsurvivable, hence, the executor of a wife is not entitled to be substituted as plaintiff for the purpose of entering judgment for unpaid alimony. *Faversham v. Faversham* (1914), 161 App. Div. 521, 146 N. Y. Supp. 569.

Property affected.—Section 1759 applies to foreign decrees of divorce granted for causes not recognized in this state, except as to property acquired by the husband subsequent to the granting of the decree. *Van Blaricum v. Larson* (1912), 205 N. Y. 355.

§ 1761. Regulation when action brought by either husband or wife.

Whenever the relation of husband and wife ceases by the entry of a judgment dissolving the marriage, the defendant guilty of adultery is not entitled to any interest in any policy of insurance on the life of the plaintiff, wherein such defendant is named as a beneficiary, and the plaintiff

may apply to the court granting the final decree or to a special term of the supreme court on notice to the defendant, or the attorney who appeared for defendant in action for divorce, and to the insurance company issuing the policy or policies, for an order directing the insurance company issuing the policy or policies to substitute therein such beneficiary as the plaintiff may nominate. In case where it is shown that the defendant has contributed from his or her separate estate toward the payment of the premiums on such policy, the court shall grant such order on such terms as in the discretion of the court shall be equitable. This section shall also apply in like manner when the defendant obtains a decree against the plaintiff on a counterclaim.

Added by L. 1913, ch. 536, in effect Sept. 1, 1913.

§ 1762. For what causes action for separation may be maintained.

Abandonment.—Where a husband ceases living with his wife and expresses a fixed determination not to resume living with her, and there is an absence of consent on her part to such separation living and conduct on her part justifying the husband's withdrawal there is an "abandonment" within the meaning of subd. 3, notwithstanding the husband continues to provide for the wife's support. *Tabor v. Tabor* (1913), 140 N. Y. Supp. 313.

Cruelty involves the idea of wantonness; that an act is done willfully and for the purpose of inflicting suffering; and mere impulsive acts at long intervals, especially when perpetrated by an hysterical woman, are not ordinarily understood as constituting what the law knows as cruelty and inhumane treatment. *Rebstock v. Rebstock* (1913), 144 N. Y. Supp. 289.

Cruel and inhuman treatment.—Finding of court of foreign state that wife was guilty of such "extremely cruelty" as to constitute ground for divorce did not determine that she was guilty of such "cruel and inhuman treatment" as would constitute ground for a separation under this section, and, in consequence, relieve the husband from the support of his wife. *Pearson v. Pearson* (1918), 104 Misc. 675, 173 N. Y. Supp. 563.

Idem; evidence held sufficient to establish.—*Donohue v. Donohue* (1917), 180 App. Div. 561, 167 N. Y. Supp. 715.

Incompatibility of temper leading to quarrels is not a ground for separation. *Umbach v. Umbach* (1918), 183 App. Div. 495, 171 N. Y. Supp. 138.

Pulmonary consumption in the husband is not grounds for a separation where its existence prior to the marriage is not claimed, nor that any false representations as to his health were made, and where the plaintiff has ample opportunities before marriage for making inquiries as to the defendant's health. There is only one form of disease which the courts have thus far recognized as sufficient for a decree of separation on the ground of legal cruelty, and

this only when that particular disease is knowingly or willfully communicated. *Abramowitz v. Abramowitz* (1913), 140 N. Y. Supp. 275.

Where the misconduct of the defendant is the result of the ill conduct of the plaintiff the court will not decree a separation. *Barber v. Barber* (1915) (App. Div.), 153 N. Y. Supp. 256.

Defenses; adultery of wife.—The adultery of a wife, established by competent proof, is such misconduct as constitutes a defense to an action by her to recover an installment due under a separation agreement providing for her support. *Roth v. Roth* (1912), 77 Misc. 673, 138 N. Y. Supp. 573.

Idem; former marriage and husband still living.—In an action for separation upon the ground of abandonment and neglect to provide, the defendant alleged a former marriage of the plaintiff and a husband still living, which marriage had not been dissolved and set up the adultery of the plaintiff as a counterclaim. A judgment dismissing the complaint and the counterclaim and allowing costs to the alleged respondent against the defendant, but awarding alimony to the plaintiff, should be modified by striking out the provision for the dismissal of the complaint and granting the separation. *Curnen v. Curnen* (1913), 155 App. Div. 536, 140 N. Y. Supp. 805.

Idem; non-payment of costs.—Where a husband was defeated in an action for absolute divorce and has failed to pay a judgment for costs, the wife in a subsequent action for separation is entitled to an order staying her husband's counterclaim for an absolute divorce upon the ground of the adultery charge in the former action until he pays the costs in said action. *Hasse v. Hasse* (1912), 149 App. Div. 775, 134 N. Y. Supp. 83.

Separation for limited period; effect.—A person who has been granted a judgment of separation for a limited time, and whose motion made at the end of such

time for a permanent separation has been denied, can maintain a new action for a permanent separation on a complaint alleging the same facts set forth in the first action. *Murdock v. Murdock* (1911), 148 App. Div. 564, 132 N. Y. Supp. 964.

Effect of former judgment of limited separation. *Pollitzer v. Pollitzer* (1917), 178 App. Div. 744, 165 N. Y. Supp. 953.

Limited decree.—A husband, entitled to a separation because of the habitual intemperance of his wife, should be granted

a limited decree, where the wife, though self-supporting at the present time, may subsequently become a public charge. *O'Neill v. O'Neill* (1917), 163 N. Y. Supp. 250.

Jurisdiction of alien.—The supreme court of the state of New York has no jurisdiction of an action brought for a separation by the wife of the consul for the republic of Peru in the city of New York. *Higginson v. Higginson* (1916), 96 Misc. 457, 158 N. Y. Supp. 92.

§ 1763. *Idem*; in what cases.

Wife of nonresident.—Where a husband and wife, when married, were residents of Germany, the wife remaining a nonresident cannot maintain an action for separation in this state against her husband who has become a resident here. *Wacker v. Wacker* (1913), 154 App. Div. 495, 139 N. Y. Supp. 78.

Nonresidence as a defense.—In an action for separation, where plaintiff alleges domicile in this state, the court has jurisdiction of a counterclaim which alleges domicile in a foreign state. *Brownrigg v.*

Brownrigg (1913), 80 Misc. 108, 140 N. Y. Supp. 778.

Amendment inserting allegation as to place of marriage.—Where a complaint in an action for separation fails to show that the court has jurisdiction by omitting to allege that the marriage was performed in this state, the court may allow the defect to be cured by amendment. Such an amendment merely corrects the defective pleading and does not bring the cause of action into being. *Dulso v. Dulso* (1915), 170 App. Div. 67, 156 N. Y. Supp. 90.

§ 1764. Requisites of complaint.

Application.—*Gruber v. Gruber* (1917), 167 N. Y. Supp. 42.

Complaint examined and found insufficient. *Rebstock v. Rebstock* (1913), 144 N. Y. Supp. 289.

The judgment cannot be supported by the evidence with respect to the charges not pleaded, for the nature and circumstances of the defendant's misconduct and the time and place of each act complained of must be pleaded. *Wirth v. Wirth* (1918), 184 App. Div. 643, 172 N. Y. Supp. 309.

Setting up former judgment in complaint.—Where, in an action by a wife against her husband for separation on the ground of abandonment, a copy of the decision in a prior action for abandonment brought by her against her husband is annexed to and

made a part of the complaint, and according to the findings in such decision the plaintiff abandoned the defendant voluntarily, without cause, and with the intention not to return, she having acquiesced in such finding, is bound thereby. *Silberstein v. Silberstein* (1913), 156 App. Div. 689, 141 N. Y. Supp. 376.

Bill of particulars.—Although the acts constituting cruel and inhuman treatment must be specified in a complaint for separation, particulars will not be ordered where the defendant, in a defense to an action for divorce, has alleged acts upon which she bases her charge of cruel and inhuman treatment with reasonable certainty within the information which she possesses. *Geimer v. Geimer* (1916), 161 N. Y. Supp. 415.

§ 1765. Defendant may set up plaintiff's misconduct.

Defenses; adultery of plaintiff.—The adultery of a wife, established by competent proof, is such misconduct as constitutes a defense to an action by her to recover an installment due under a separation agreement providing for her support. *Roth v. Roth* (1912), 77 Misc. 673, 138 N. Y. Supp. 573.

Idem; prior separation agreement.—Where there is a valid, existing separation agreement between a husband and wife, under which provision is made for her support, she has no cause of action against the husband for separation and alimony in excess of the amount provided for in

the agreement. *Benesch v. Benesch* (1918), 182 App. Div. 221, 169 N. Y. Supp. 561.

Idem; grounds for annulment.—Facts constituting a cause of action for the annulment of the marriage do not constitute a defense to an action for a separation. *Ostro v. Ostro* (1915), 169 App. Div. 790, 155 N. Y. Supp. 681.

Idem; dismissal of complaint.—Where a wife brings action against her husband for separation upon the ground that it is unsafe and improper for her to cohabit with him, and after denying the charges he recriminates by alleging the plaintiff's

adultery as a counterclaim, and the court finds both parties at fault, it is proper to dismiss the complaint. *Kamman v. Kamman* (1915), 167 App. Div. 423, 152 N. Y. Supp. 579.

Idem; effect of non-payment of costs.—Where a husband was defeated in an action for absolute divorce and has failed

to pay a judgment for costs, the wife in a subsequent action for separation is entitled to an order staying her husband's counterclaim for an absolute divorce upon the ground of the adultery charge in the former action until he pays the costs in said action. *Hasse v. Hasse* (1912), 149 App. Div. 775, 134 N. Y. Supp. 83.

§ 1766. Support, maintenance, etc., of wife and children.

Examination to ascertain income of husband.—In an action by the wife for a separation in which the husband sets up a counter-claim, an order for the examination of the husband before trial to disclose the amount of his income and property in order that the amount of alimony may be determined should not be granted. *Van Valkenburgh v. Van Valkenburgh* (1912), 149 App. Div. 482, 133 N. Y. Supp. 942.

Effect of absolute divorce in another state.—A judgment of separation granted to a wife in this state is superseded by a judgment of absolute divorce subsequently granted in a foreign state, in favor of the husband, and a motion by the plaintiff in the separation action to punish defendant for non-payment of alimony pursuant to an order in the action will be granted, but only to the extent of the amount found

to be due at the time of the entry of the decree of divorce. *Richards v. Richards* (1914), 87 Misc. 134, 149 N. Y. Supp. 1028.

The provision that a court may render a judgment compelling defendant to make provision for the support of his wife applies only where a separation can be decreed upon the evidence; and where the evidence is insufficient to make such a decree it is improper to incorporate such a provision in the judgment. *Kamman v. Kamman* (1915), 167 App. Div. 423, 152 N. Y. Supp. 579.

Where no provision for alimony is contained in the final judgment granted in an action for separation the court is without power to subsequently insert such provision. *Koehl v. Koehl* (1915), 92 Misc. 579, 156 N. Y. Supp. 234.

§ 1767. Judgment for separation may be revoked.

The code provides for the kind of judgment.—The court has no authority to reserve any question or to modify or change the judgment entered, except to revoke the

same as authorized by this section. *Pollitzer v. Pollitzer* (1917), 178 App. Div. 744, 165 N. Y. Supp. 953.

§ 1769. Alimony, expenses of action, and costs; how awarded.

Attachment of alimony.—Alimony cannot be attached in an action against the wife to whom it was awarded, except in an action for such necessities as the husband would be obliged to furnish had the marital relation continued. *West v. Washburn* (1912), 153 App. Div. 460, 138 N. Y. Supp. 230.

The purpose of alimony is support. *Turner v. Woolworth* (1917), 221 N. Y. 425.

Payment after entry of decree.—Where an interlocutory decree of divorce provides for the payment of "permanent" alimony, the plaintiff is not entitled to alimony until the entry of the final decree. *Shaw v. Shaw* (1912), 154 App. Div. 324, 138 N. Y. Supp. 999.

Action merely to secure maintenance.—Courts of this state have no jurisdiction of an action brought merely to secure maintenance and support or alimony, where there is no prayer for a decree of separation, and in such an action have no power to award alimony or counsel fees pendente lite. *Johnson v. Johnson* (1912), 206 N. Y. 561.

Counsel fees awarded, though the services rendered be found to be greatly in excess of the award, they are the measure of the husband's obligation, and the excess cannot be recovered. *Turner v. Woolworth* (1917), 221 N. Y. 425.

Allowance of counsel fees; effect.—In an action for absolute divorce, an allowance of counsel fees for the wife's attorney limits the husband's liability therefor. *Turner v. Woolworth* (1912), 153 App. Div. 293, 137 N. Y. Supp. 1071.

Idem; **property of wife.**—Although the necessity for granting counsel fees in an action affecting the marital relation must appear, the mere fact that a wife has money or property under her control, does not necessarily compel the denial of her application. *Johnson v. Johnson* (1912), 151 App. Div. 545, 136 N. Y. Supp. 249, rev'd 206 N. Y. 561.

Idem; **when excessive.**—An allowance of \$400 as counsel fee is excessive, where the defendant is a taxicab chauffeur working for a salary of \$12 a week, while the plaintiff, a telephone operator, earns approximately \$25 a week, and the amount should

be reduced to \$200. *LeRoy v. LeRoy* (1916), 175 App. Div. 120, 161 N. Y. Supp. 503.

Idem; payable to wife.—An order directing the defendant in a matrimonial action to pay additional counsel fees should in terms make them payable to the wife, not to her attorney in person. *Kamman v. Kamman* (1915), 167 App. Div. 423, 152 N. Y. Supp. 579; *Kamman v. Kamman* (1915), 167 App. Div. 426, 152 N. Y. Supp. 581.

Idem; liability of husband.—The husband is liable to an attorney for services rendered to the wife in securing an increase of alimony. *Hauser v. Hauser* (1915), 154 N. Y. Supp. 965.

Counsel fees; liability of husband to wife.—Where a wife has paid her attorney for services rendered in securing an increase of alimony out of her allowance of alimony she cannot recover from her husband the amount paid. *Hauser v. Hauser* (1915), 154 N. Y. Supp. 965.

Showing required by plaintiff.—In applications for counsel fees and alimony *pendente lite* the wife must show the court by competent proof that there is at least reasonable prospect of her being able to succeed; and where the complaint is on information and belief and the charge of adultery is positively denied under oath and no competent proof is presented to the court by the plaintiff of the truthfulness of the charges, alimony and counsel fees will be denied. *Winton v. Winton* (1916), 161 N. Y. Supp. 405.

General denial and affirmative defenses.—Alimony and counsel fees may be allowed to a defendant wife in an action for divorce, even though her answer to the charge of her husband is merely a general denial, where she sets up affirmative defenses charging him with adultery and cruel and inhuman treatment and demands affirmative judgment. *Fishbaugh v. Fishbaugh* (1916), 161 N. Y. Supp. 446.

Contempt; stay of trial on failure to pay.—Where a defendant fails to pay alimony and counsel fees he may be punished for contempt and the trial stayed, if the plaintiff so desires, so as to prevent the defendant from taking an affirmative advantage of his own wrong by forcing the case on to trial, while the plaintiff, through his own default, is without means to properly present her case. *Moncrief v. Moncrief* (1915), 155 N. Y. Supp. 592.

Dismissal for fault of both parties; subsequent action by wife.—Although the complaint in a wife's action for separation has been dismissed upon the ground that both parties were at fault, she may bring another action for separation founded upon subsequent offenses by the husband and he may be compelled to pay alimony *pendente lite* and counsel fees, but the latter should be made payable to the wife in person, not to her attorney. *Kamman v. Kamman* (1915), 167 App. Div. 426, 152 N. Y. Supp. 581.

Violation of ante-nuptial agreement.—In a wife's suit for separation on the ground of abandonment a motion for alimony and counsel fee may be granted, although in opposition defendant makes affidavit that he was induced to marry plaintiff upon his father-in-law's agreement to convey to him certain real estate, it appearing that he has brought an action against his father-in-law for breach of the contract to convey. *Peckerman v. Peckerman* (1915), 91 Misc. 114, 154 N. Y. Supp. 297.

Past expenses.—Under this section an allowance may be made for alimony and counsel fees in a divorce action, where the action is pending and the allowance is necessary for the further prosecution or defense of the action but not for past expenses. *Cipro v. Cipro* (1916), 161 N. Y. Supp. 409.

The cost of a transcript of the minutes of a trial for the use of the trial justice, who has requested that he be furnished with such transcript, may be required to be paid for by the husband. *Hock v. Hock* (1914), 149 N. Y. Supp. 1027.

Alimony pendente lite; termination upon entry of interlocutory decree.—A husband should be relieved from his obligation to pay alimony based entirely upon the order directing payment *pendente lite*, after the entry of an interlocutory judgment in his favor, unless facts be presented from which the court can see that there is a reasonable ground for believing that the judgment is erroneous and will be reversed upon appeal. *Poss v. Poss* (1914), 164 App. Div. 213, 149 N. Y. Supp. 587.

Idem; prima facie defense as sufficient basis.—Where in an action for divorce the wife's answer presents a *prima facie* defense she may be allowed temporary alimony, and the court on motion therefor will not prejudice the case in advance of the trial, nor too carefully scrutinize the merits unless the proof on the affidavits submitted is so clear against the wife's innocence as practically to exclude any probability of her prevailing in her defense. *Brown v. Brown* (1914), 83 Misc. 597, 145 N. Y. Supp. 471.

Idem; amount dependent on financial situation of parties.—The amount of alimony to be allowed *pendente lite* is dependent upon the financial situation of the parties, and the wife must show that she has no means under her control sufficient to maintain herself pending the litigation. *Brown v. Brown* (1914), 83 Misc. (N. Y.) 597, 145 N. Y. Supp. 471.

Idem; wife's necessities.—The allowance of temporary alimony and counsel fees to the wife in an action to annul a marriage is to be determined not alone by the husband's means, but by the wife's necessities. *Brand v. Brand* (1917), 178 App. Div. 822, 166 N. Y. Supp. 90.

Idem; enforcement of payment.—There is a distinction and also a different remedy

for the enforcement of payment of accrued alimony awarded under an order *pendente lite* and a final decree in an action of separation or divorce. Where an order is made *pendente lite* for the payment of alimony the remedy seems to be, under §§ 1772, 1773 to move, first, to sequester the property of the husband, and if no property can be found, upon his failure to pay the accrued alimony awarded under the order *pendente lite*, then to move to punish him as for a contempt. *Jacobson v. Jacobson* (1914), 85 Misc. 253, 148 N. Y. Supp. 341.

Application by wife of soldier in United States army.—Where the wife of a soldier in the United States army, receiving thirty-six dollars a month pay, obtains an interlocutory judgment of divorce, a decree awarding her alimony at the rate of forty dollars a month for the support and maintenance of herself and child during the period of defendant's enlistment and for one month thereafter must omit any direction by whom or to whom the alimony is to be paid. Such decree will provide that the receipt by plaintiff of the family allowance of twenty-five dollars under the "War Risk Insurance Act," plus the allotment thereunder of one-half of defendant's pay, to the amount of forty dollars a month, shall be in full satisfaction of all claim for alimony against the

defendant for the term of his enlistment and for one month thereafter; and that beginning after the expiration of his enlistment payments of alimony shall be made by him on a day specified. *Merriman v. Merriman* (1918), 103 Misc. 445, 171 N. Y. Supp. 252.

Appeal; counsel fees and alimony, pending.—Counsel fees and alimony may be granted to enable the defendant to complete the trial of the action and to defend an appeal, although prior to the trial she was granted an allowance. *Miller v. Miller* (1913), 158 App. Div. 766, 144 N. Y. Supp. 278.

Form of order.—It seems, that it is the better practice to employ the "long form" order. But, in any event, the order as a basis for contempt proceedings must state clearly, so as to be understood by a layman, the precise directions, not only as to the amount to be paid, but as to the time and place of payment and the person to whom payment is to be made. However where the defendant clearly shows that he understands the purport of a "short form" order by making a motion to modify the same, he is not in a position to claim that he is ignorant of the requirements of the order. *Adams v. Adams* (1917), 179 App. Div. 152, 166 N. Y. Supp. 167.

§ 1770. What is deemed a counterclaim.

A counterclaim in a matrimonial action is confined to a counterclaim for a divorce or separation and by implication excludes a counterclaim to annul a marriage. Hence in an action for a separation a counterclaim by the defendant to annul his marriage to the plaintiff on the ground of his own physical incapacity may not be

interposed. *Levey v. Levey* (1914), 148 N. Y. Supp. 417.

It is not obligatory that the defendant in an action for divorce interpose a counterclaim which he or she may have for divorce in the same suit; but he or she may maintain a separate action against the other party for divorce. *Davis v. Davis* (1914), 150 N. Y. Supp. 636.

§ 1771. Custody and maintenance of children and support of plaintiff.

Constitutionality.—Those provisions of § 1771 which authorize the court in matrimonial actions to modify a decree respecting the education and maintenance of children of a marriage although retroactive are not unconstitutional. *White v. White* (1912), 154 App. Div. 250, 138 N. Y. Supp. 1082.

Custody of children; premature motion.—Where in an action for separation, a decision has been filed awarding the custody of the children to their father, but judgment has not been entered, a motion by the mother, praying that the care and custody be awarded to her, is premature. *Ullman v. Ullman* (1912), 151 App. Div. 419, 135 N. Y. Supp. 1080.

Idem; validity of separation agreement.—A separation agreement made during the pendency of a wife's action for a separa-

tion, wherein the husband surrenders the custody of his son who is only four and one-half years old, is valid. *Lee v. Lee* (1916), 93 Misc. 677, 157 N. Y. Supp. 821.

Idem; child four and one-half years old.—Where no question of the moral fitness of either the father or the mother is involved, other things being equal, the propriety of giving the mother the custody of a child only four and one-half years old is obvious. *Lee v. Lee* (1916), 93 Misc. 577, 157 N. Y. Supp. 821.

Idem; innocent party.—The custody of children of divorced parties, as a general rule, will be given to the innocent party, especially where there is only one child. *Lester v. Lester* (1917), 178 App. Div. 205, 165 N. Y. Supp. 187.

Children; ability of mother to maintain.—Where a decree of divorce awards

to the plaintiff the sole maintenance, care, custody and control of her child, she having waived counsel fees and alimony, her financial standing being such that she required no support for herself or daughter, an application to amend the judgment so as to require the defendant to maintain the child will not be granted, unless it appears that the mother is unable to provide proper maintenance. *Earle v. Earle* (1913), 158 App. Div. 552, 143 N. Y. Supp. 841.

A judgment by a court is not conclusive upon the court which has awarded the custody of the child to the father with permission to the mother to visit the child at stated times. But the court may from time to time vary its directions for custody according to its views of the necessity of the case, having in mind the welfare of the child. *Davis v. Davis* (1914), 150 N. Y. Supp. 636.

Permanent alimony; modification of decree.—Provision in a judgment for divorce, that the defendant husband pay a certain sum for the maintenance and support of his daughter in the custody of the plaintiff, modified. *Earle v. Earle* (1914), 164 App. Div. 713, 150 N. Y. Supp. 173.

Idem; basis of award.—In an action for absolute divorce, an award of alimony should not be based upon an assumption that if it becomes necessary to enforce the award by contempt proceedings the mother of the defendant will come to his aid rather than allow him to be imprisoned. *Sidway v. Sidway* (1913), 156 App. Div. 61, 141 N. Y. Supp. 14.

Idem; the amount of alimony.—Where the affidavits disclose sufficient facts upon which the court can act advisedly to fix the amount of alimony, it is not necessary to involve the defendant in the costs of a reference as to his property. *Tabor v. Tabor* (1913), 140 N. Y. Supp. 313.

Idem; agreement to provide trust fund in lieu of alimony, see *Hammerstein v. Equitable Trust Co.* (1913), 156 App. Div. 644, 141 N. Y. Supp. 1065, aff'd 209 N. Y. 429.

Idem; change in financial condition.—On an application to reduce the amount of alimony made on the ground of a change in the financial condition of the parties since the entry of the decree, the court may take into consideration a contract for separate support and maintenance previously entered into by the husband and wife. *Levy v. Levy* (1912), 149 App. Div. 561, 133 N. Y. Supp. 1084.

Idem; defendant poor and below normal physically.—Where a wife moves the court for an order punishing her husband for contempt in failing to pay alimony for a period of two years, amounting to the sum of \$320, and at the same time the defendant moves for an order to modify the final decree of divorce by striking therefrom the provision for the payment of al-

imony, and that the defendant be purged of the contempt of court, and it appears that the defendant is poor and below normal physically, but the plaintiff is living comfortably, in good health and in no need of the alimony directed to be paid her, the decree should be modified and the plaintiff's motion denied. *Burdick v. Burdick* (1918), 183 App. Div. 488, 171 N. Y. Supp. 247.

Idem; where separation agreement in existence.—Where there is a separation agreement in existence at the time an action is commenced by the wife to secure a separation, a provision for alimony in the action is unauthorized under the law of this state, although there may be a question as to the allowance of counsel fees. *Randolph v. Field* (1914), 84 Misc. 403, 146 N. Y. Supp. 247.

Idem; provision in prior judgment for separation.—In an action by a husband for an absolute divorce a provision in an interlocutory judgment in his favor, that the plaintiff "shall not be compelled to pay any further sums as alimony for the support of the defendant, by virtue of any judgment of this court heretofore made," does not affect a provision made for the maintenance of the wife in a prior judgment for separation. *Burton v. Burton* (1912), 150 App. Div. 790, 135 N. Y. Supp. 248.

Idem; where no provision in final judgment.—Where no provision for alimony is contained in the final judgment granted in an action for separation the court is without power to subsequently insert such provision. *Koehl v. Koehl* (1915), 92 Misc. 579, 156 N. Y. Supp. 234.

Idem; enforcing payment of accrued alimony.—Where a final decree has been entered in favor of the plaintiff, granting to her a separation from the defendant, plaintiff may apply to the court where the action was pending, without notice to the defendant, for the entry of judgment for installments of alimony in arrears as they accrue, such action not being the rendition of a new judgment, but merely a means of putting into practical effect plaintiff's right to have her judgment in such form that execution can issue thereon. *Jacobson v. Jacobson* (1914), 85 Misc. 253, 148 N. Y. Supp. 341.

Idem; enforcement where foreign divorce is obtained.—Where, after the granting of a decree in an action for separation, plaintiff obtains a foreign decree of absolute divorce, defendant's motion to modify the decree in the separation action as to the payment of alimony will be granted, and plaintiff's motion to punish defendant for contempt for failure to pay alimony in the separation action after the granting of the foreign divorce will be denied. *Gibson v. Gibson* (1913), 81 Misc. 508, 143 N. Y. Supp. 37.

Idem; avoiding payment.—It is not a

civil contempt for the brother of one against whom an interlocutory decree awarding alimony has been entered to advise him to give a mortgage on an undivided interest in lands to his mother to secure the payment of a valid indebtedness and to convey his equity to his brothers and sisters, for its full value. *Sidway v. Sidway* (1913), 156 App. Div. 375, 141 N. Y. Supp. 391.

Idem; action by wife to set aside conveyance.—A wife having obtained a decree of separation, cannot maintain a suit to set aside transfers of lands alleged to have been made by her husband for the purpose of avoiding payment of alimony, without proving that the husband was made insolvent by such conveyance. *Longworth v. Longworth* (1913), 157 App. Div. 377, 142 N. Y. Supp. 71.

Remarriage; annulment of alimony.—The purpose of the amendment of 1904 to § 1771 of the code of civil procedure, authorizing the court to annul the provisions of a judgment directing the payment of alimony upon proof of remarriage, was to prevent a woman who had married, after obtaining a divorce, from being supported wholly or in part by her former husband, and the court, in the exercise of its discretion, should apply the legislative intent to final judgments of divorce granted prior to said amendment. *Skidmore v. Skidmore* (1914), 160 App. Div. 549, 145 N. Y. Supp. 939.

This section requiring the court on a wife's remarriage, after she had secured a divorce, to annul any provision for the payment of money for her support, is clear, distinct and mandatory and the court is without discretion in carrying out its provisions. *Linton v. Hall* (1914), 86 Misc. 560, 149 N. Y. Supp. 385.

A conveyance of real estate by a husband to his wife is unaffected by the fact that the wife subsequently remarried, after she had been granted an absolute divorce. *West v. Burke* (1915), 165 App. Div. 667, 151 N. Y. Supp. 329.

This section indicates by its enactment a legislative intent that as a matter of public policy a wife who has a husband with whom she is living should be supported by him and not by one from whom she has been divorced. *Schley v. Andrews* (1919), 225 N. Y. 110.

Amendment of interlocutory and final decrees because of remarriage of plaintiff.

—A motion to incorporate a written contract providing for alimony and support and education of the child will be denied, the remedy being an action in equity to cancel or modify such contract. *Lester v. Lester* (1918), 102 Misc. 630, 169 N. Y. Supp. 267.

Maintenance of child after mother's remarriage.—A defendant should continue to provide for his child after the mother's remarriage, and the court may so direct by virtue of the authority conferred upon it by statute. *Linton v. Hall* (1914), 86 Misc. 560, 149 N. Y. Supp. 385.

Contract for part of defendant's estate.

—Where, in the course of an action for divorce brought by the wife, the husband entered into an agreement to assign a certain part of the residuary estate of his father to a trustee for the benefit of his wife and children, to which agreement a committee of his person was a party, the agreement was in no way affected by the provisions of this section. *West v. Burke* (1916), 219 N. Y. 7.

Section cited.—*Matter of Brace* (1918), 105 Misc. 178, 173 N. Y. Supp. 636.

§ 1772. Support, maintenance, etc., of wife and children; sequestration.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, or a judgment for divorce or separation rendered in another state, upon the ground of adultery upon which an action has been brought in this state, and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in section seventeen hundred and sixty-nine of this act; the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may

be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires; and if the same shall be insufficient to pay the sums of money required, the court may, on application of the receiver, direct the mortgage or sale by the receiver, under such terms and conditions as it may prescribe of sufficient of his real estate to pay such sums.

Amended by L. 1918, ch. 189, in effect April 12, 1918. The amendment of 1918 inserted the remainder of the section after the word "requires" in line 19.

Sequestration.—Upon an application by a wife to sequester her husband's property, earnings accruing subsequent to the appointment of the receiver cannot be reached. *Tompers v. Tompers* (1916), 159 N. Y. Supp. 817.

An agreement by a husband to pay a certain sum *in praesenti* to his wife in consideration of a release by her of his liability to pay alimony under a foreign decree of divorce does not "relieve the husband from his liability to support his wife," within the meaning of § 51 of the domestic relations law, and will be upheld where the provision is adequate. If, however, such provision is inadequate or has been accepted by the wife unadvisedly or imprudently, a court of equity has power to intervene. *Levy v. Dockendorff* (1917), 177 App. Div. 249, 163 N. Y. Supp. 435.

Award after lapse of time.—Where, though by final decree of divorce in plaintiff's favor no award of alimony was made, she was given the privilege of applying to the court at any time to have the amount of alimony fixed at the foot of the decree, and a motion was made by her several years after the entry of said decree for an award of a gross sum as alimony out of certain moneys about to come to defendant out of his mother's estate, the court, while without power to grant the motion, will award alimony at a certain weekly rate, plaintiff's right to a continued payment thereof being secured by this section. *Doerle v. Doerle* (1916), 96 Misc. 72, 159 N. Y. Supp. 637.

Foreign judgment; sequestration.—A judgment of separation having been procured in Pennsylvania directing the payment of alimony to avoid which defendant moved into this state and an action having been brought in this state on said judgment and recovery had thereon, the plaintiff may resort to the provisions of § 1772 for enforcement thereof. *Moore v. Moore* (1913), 208 N. Y. 97.

Idem; application limited.—This section as amended, is limited in its application to judgments for divorce or separation ren-

dered in another state upon the ground of adultery, and not judgments rendered for other causes. *Tiedemann v. Tiedemann* (1916), 172 App. Div. 819, 158 N. Y. Supp. 851.

Enforcement of foreign decree for alimony.—The courts of this state have jurisdiction to enforce the provisions of a foreign judgment of divorce duly rendered awarding a certain amount as permanent alimony payable at certain times from and after the date of the decree. *Williamson v. Williamson* (1915), 169 App. Div. 597, 155 N. Y. Supp. 423.

A wife is entitled to maintain an action in this state for the enforcement of the payment of alimony under a foreign decree of divorce. Unpaid alimony under a foreign decree of divorce is treated as a judicial debt for which the courts of this state will give a pecuniary judgment. *Levy v. Dockendorff* (1917), 177 App. Div. 249, 163 N. Y. Supp. 435.

Enforcement of payment of alimony.—Where moving papers do not disclose whether security has been given or whether sequestration proceedings have been instituted, or if they would be effectual if instituted, an order to punish for contempt will not be granted. *Taliaferro v. Taliaferro* (1918), 171 N. Y. Supp. 25.

Income.—The supreme court has jurisdiction to reach the income of property held in trust for the benefit of a husband to satisfy a judgment for alimony obtained by his wife in an action for divorce. *Hoagland v. Leask* (1912), 154 App. Div. 101, 138 N. Y. Supp. 790.

The pension of a retired policeman is not exempt under § 352 of the Greater New York charter from sequestration for payment of alimony. But costs and disbursements of the action are not for support and maintenance but are a debt to be collected by execution, and hence the provision of the charter prevents their collection by sequestration. *Monck v. Monck* (1918), 184 App. Div. 656, 172 N. Y. Supp. 401.

§ 1773. *Idem*; when enforced by punishment for contempt.

Where a husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the

court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article nineteen of the judiciary law for the punishment of a contempt of court, other than a criminal contempt, and where the judgment or order directs the payment to be made in instalments, or at stated intervals, failure to make any such single payment or instalment may be punished as therein provided, and such punishment, either by fine or commitment, shall not be a bar to a subsequent proceeding to punish him as for a contempt for his failure to pay subsequent instalments, but for such purpose he may be proceeded against under the said order in the same manner and with the same effect as though such instalment payment was directed to be paid by a separate and distinct order, and the provisions of section one hundred and eleven of this act are hereby superseded so far as they are in conflict herewith. Such order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

Amended by L. 1919, ch. 478, in effect Sept. 1, 1919. The amendment of 1919 substituted the word "a" for the word "the" in line 1, and added the last part of the first sentence beginning with "and where the judgment" in line 11.

It must presumptively appear that payment cannot be enforced by sequestration proceedings or by resort to security, since the order should contain an adjudication to that effect. *Taliaferro v. Taliaferro* (1918), 171 N. Y. Supp. 25.

Enforcement of payment.—Order to show cause why husband should not be punished for contempt in failing to pay alimony and counsel fees will not be granted unless it appears that payment can be enforced by sequestration proceedings or by resorting to the security. *Goldman v. Goldman* (1918), 103 Misc. 700, 171 N. Y. Supp. 26.

Nature of order.—Whether or not an order granted requiring the defendant to show cause why he should not be punished for contempt in failing to pay alimony is a court or a judge's order will be determined not by the form of the order but by the facts whether or not at the time the judge granting the order was holding a term of court and was authorized to grant a court order. *Aiken v. Aiken* (1916), 98 Misc. 561, 160 N. Y. Supp. 876.

Jurisdiction.—In a suit in equity brought by a wife to reform a separation agreement the court has inherent jurisdiction, independent of the statute, to allow the wife counsel fees payable by her husband. *Johnson v. Johnson* (1912), 150 App. Div. 306, 134 N. Y. Supp. 1081.

The remedy for disobedience of an order of a court of this state to pay temporary alimony is exclusive and is governed by §§ 1771, 1772, consequently no action may

be brought upon such an order. *Mills v. Mills* (1916), 95 Misc. 231, 158 N. Y. Supp. 753.

Order futile.—While a party who has failed to pay alimony awarded in a matrimonial action is without the jurisdiction, the court should not grant an order imposing a fine and committing him to custody, for such order would be futile. *Wulff v. Wulff* (1912), 151 App. Div. 22, 135 N. Y. Supp. 289.

Defendant distressingly poor.—Although in a proper case the fact that the defendant is unable to pay alimony is no answer to plaintiff's motion to punish him for contempt, the fact that the defendant is distressingly poor, while the plaintiff is in good health and abundantly able to care for herself is important as bearing upon the question as to whether the decree should be modified by striking out the allowance for alimony. *Burdick v. Burdick* (1918), 183 App. Div. 488, 171 N. Y. Supp. 247.

Effect of dismissal of complaint.—Although a husband sued for divorce has failed to pay alimony *pendente lite*, he cannot be punished for contempt after a dismissal of the complaint. *Hayes v. Hayes* (1912), 150 App. Div. 842, 135 N. Y. Supp. 225.

A fine for nonpayment of alimony is a substitute for the unpaid alimony and is not subject to a lien for counsel fees. Equity confines this fund to the purposes of its creation and declines to charge it with liens which would absorb and con-

sume it. *Turner v. Woolworth* (1917), 221 N. Y. 425.

Foreign orders; enforcement. — Our courts will not punish as for contempt disobedience of the orders made by the courts of sister states. *Mills v. Mills* (1916), 95 Misc. 231, 158 N. Y. Supp. 753.

What must be shown on appeal.—Default must be clearly shown, and an appellate court may not indulge in inferences and assumptions with respect to what occurred on the original hearing, especially where the motion to punish was denied. The moving party in such a case must show as a condition precedent to her right

to the entry of an order upon which her husband may be deprived of his liberty, not only that a certified copy of the judgment has been duly served and due demand made for the precise amount due, but also that the husband failed to pay, for while the authority for enforcing such judgments by civil contempt proceedings is conferred by § 1773 of the code, and the provisions of art. 19 of the judiciary law must be followed, the practice requires substantially the same proof of default as is prescribed in § 1241. *Matzke v. Matzke* (1918), 185 App. Div. 533, 173 N. Y. Supp. 244.

§ 1774. Regulations respecting judgment.

In an action brought as prescribed in this title, a final judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally served upon the defendant; or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for that purpose, obtained as prescribed in chapter fifth of this act, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: "Action to annul a marriage;" "Action for a divorce;" or "Action for a separation;" according to the article of this title, under which the action is brought. Where the summons is personally served, but a copy of the complaint is not served therewith; or where a copy of the summons and copy of the complaint are delivered to the defendant without the state, the certificate or affidavit proving service, must affirmatively state, in the body thereof, that such an inscription, setting forth a copy thereof, was so written or printed upon the face of the copy of the summons delivered to the defendant. In an action brought under either article first or article second of this title for judgment annulling a marriage, or divorcing the parties and dissolving a marriage, the decision of the court or report of the referee must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and can not be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. Three months after the entry thereof the interlocutory judgment shall become the final judgment as of course unless the decision of the court or report of the referee shall require and the interlocutory judgment shall provide for the entry of final judgment or unless for sufficient cause the court in the meantime shall have otherwise ordered. If the interlocutory judgment provides for the entry of final judgment such final judgment must be entered within thirty days after the expiration of said period of three months and can not be entered after the expiration of such period of thirty days except by order of the court on application and sufficient cause being shown for the delay. The interlocutory judgment may, in the discretion of the court, provide for the payment of alimony until the interlocutory judgment becomes final or until the entry of final judgment; it may include a judgment for costs, when costs are awarded, in

which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the interlocutory judgment becomes the final judgment or until the entry of final judgment in said action.

Amended by L. 1919, ch. 277, in effect Sept. 1, 1919. The amendment of 1919 materially amended this section.

L. 1919, ch. 277, § 2.—This act shall take effect September first, nineteen hundred and nineteen, but shall not affect any interlocutory judgment entered prior to such date, and final judgment shall be entered thereon subject to the provisions of section seventeen hundred and seventy-four of the code of civil procedure in the same manner as if this act had not been passed.

Necessity for inscription "Action for divorce."—Where the summons and complaint in a matrimonial action in this state are personally served upon the defendant therein, final judgment on default may be entered if the proof is otherwise sufficient, whether or not the inscription provided for in other cases appears upon the face of the summons. Where the attention of the court was called to the fact that the summons filed with the complaint in the clerk's office did not bear the inscription "Action for a divorce" in conformity with the rules and practice, an order made and entered permitting plaintiff to discontinue the action without prejudice to a new one will be vacated and the case restored to the calendar where the proof of service shows that defendant was personally and duly served with the summons and complaint together. *Braham v. Braham* (1915), 91 Misc. 151, 154 N. Y. Supp. 1044.

Judgment dissolving marriage.—Provisions of § 724 are not amended or their scope and force curtailed by the provisions of this section, and the court upon the return of a motion for final judgment or at any time prior to its entry may refuse to grant final judgment, open the interlocutory judgment and allow an amendment of the pleadings. *Wood v. Wood* (1913), 141 N. Y. Supp. 929.

Delay in moving for final judgment.—Although a plaintiff's delay in moving for final judgment is excusable it is better practice to enter an order excusing the delay and directing a final judgment. But the entry of judgment under the signature of the trial judge answers every requirement of the Code. *Howatt v. Howatt* (1913), 158 App. Div. 28, 142 N. Y. Supp. 908.

Delay in filing final decree will not be excused because of agreement between the attorney and client that it was not to be

filed until attorney had been paid in full. *Kellogg v. Kellogg* (1917), 166 N. Y. Supp. 417.

The provision requiring the final decree to be entered within a specified time is based upon public policy and the parties will not be permitted to ignore or evade it. *Kellogg v. Kellogg* (1918), 183 App. Div. 236, 171 N. Y. Supp. 39.

Entry of final judgment.—In an action by a wife for divorce, either final judgment should be entered, or the interlocutory judgment in her favor vacated without prejudice to the acts done or payments made while it was in force. *Bishop v. Bishop* (1913), 82 Misc. 676, 144 N. Y. Supp. 143.

Interlocutory judgment upon verdict of jury.—Where, in an action for divorce brought by a husband upon the issues respectively of plaintiff's consent, condonation, connivance, privity and procurement of the adultery charged in the complaint, the jury found in favor of plaintiff, the verdict being only advisory is not conclusive as the court may adopt or reject the jury findings, the only issue conclusively determined being that as to defendant's adultery, and plaintiff's motion for an interlocutory judgment upon the verdict in his favor, upon issues directed to be tried by the jury must be denied. *King v. King* (1915), 91 Misc. 254, 154 N. Y. Supp. 794.

The interlocutory judgment does not terminate the marriage of the parties, and they remain husband and wife until the entry of the final decree. *Kingsbury v. Sternberg* (1917), 178 App. Div. 435, 165 N. Y. Supp. 493.

Alimony.—Where no temporary alimony has been awarded, permanent alimony, awarded in the interlocutory decree, is not payable until entry of the final order. *Shaw v. Shaw* (1912), 164 App. Div. 324, 135 N. Y. Supp. 954.

§ 1776. When proof of corporate existence unnecessary.

This section does not preclude proof, under a general denial, that a contract alleged to have been made in the name of the defendant was made at a time when it had no corporate existence. *Galdieri & Co., Inc. v. Arthur Waist Co.* (1917), 98 Misc. 612, 163 N. Y. Supp. 154.

Foreign corporations, section held applicable to. *Stiner v. Tennessee Copper Co.* (1916), 176 App. Div. 209, 161 N. Y. Supp. 986.

Condemnation proceedings.—In condemnation proceedings brought by a railroad company, an answer which merely denies any knowledge or information sufficient to form a belief as to plaintiff's incorporation, raises no issue, for the provisions of § 1776 apply to condemnation proceedings. *Long Island Railroad Co. v. Jones* (1912), 151 App. Div. 407, 135 N. Y. Supp. 954.

The provision that a mere denial of the allegation in the petition does not require

a corporation to prove its corporation existence, does not apply to an answer in condemnation proceedings, as § 3365 permits a landowner in condemnation proceedings to deny any material allegation of the petition. *Flood Abatement Commission v. Merritt* (1916), 94 Misc. 388, 158 N. Y. Supp. 289.

Where there is no affirmative allegation in the answer that a defendant is not a corporation, the plaintiff is not required to prove it. *Lynett v. Sea Beach Railway Co.* (1917), 178 App. Div. 112, 164 N. Y. Supp. 1029.

A denial of the incorporation of the plaintiff is insufficient under this section to put the plaintiff to proof of its incorporation. *Post Publishing Co. v. Bennett* (1914), 164 App. Div. 633, 149 N. Y. Supp. 867.

Section cited.—*Tighe v. Laverty* (1917), 162 N. Y. Supp. 1005.

§ 1777. Misnomer, when waived.

Waiver of misnomer by a corporation defendant takes place where the name stated in the summons is sufficiently similar to its corporate name to fairly apprise it that

it is the defendant intended, unless the misnomer is pleaded. *Grossman v. Loiber Hair Co.* (1915), 155 N. Y. Supp. 1012.

§ 1778. Action against a corporation upon a note, etc.

The provisions of this section cannot be extended to include a corporation, not the maker of the note, but which it is alleged has assumed the indebtedness of the maker. *Fifty-Third Nat. Bank of Cincinnati v. Hudson Refrigerator Co.* (1915), 153 N. Y. Supp. 168.

Entry of judgment before expiration of twenty days where no order obtained di-

recting that the issues be tried. *Smith v. Consumers' Fertilizer* (1910), 172 N. Y. Supp. 598.

Waiver of provisions where plaintiff retains answer and consequently does not treat it as a nullity. *Smith v. Consumers' Fertilizer Co.* (1910), 172 N. Y. Supp. 598.

§ 1779. When foreign corporation may sue.

Application.—*McDowell v. Starobin El. Supply Co., Inc.* (1918), 104 Misc. 596, 172 N. Y. Supp. 221.

Sufficiency of complaint by foreign corporation.—A foreign corporation has a perfect right to sue in the courts of this state on a contract made with a citizen of the state of New York either within or without the state, provided it has not located in the state of New York for the purpose of doing business within the state. Hence a complaint states a good cause of action and is not demurrable unless it appears on the face of the complaint that the foreign corporation was doing business in the state and that it made the contract

sued on in this state. *Frick Co. v. Pultz* (1914), 162 App. Div. 209, 147 N. Y. Supp. 732.

Alleging compliance with section 15 of general corporation law.—If a foreign corporation alleges in its complaint that it is doing business in this state and alleges the making of the contract sued upon in this state, it must also allege compliance with § 15 of the general corporation law, otherwise the complaint is demurrable. *Frick Co. v. Pultz* (1914), 162 App. Div. 209, 147 N. Y. Supp. 732. See cases cited under General Corporation Law, § 15, B., Cumming & Gilbert's Annotated Consolidated Laws (2d Ed.).

§ 1780. When foreign corporation may be sued.

An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An

action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof.
2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.
3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state.
4. Where a foreign corporation is doing business within this state.

Amended by L. 1913, ch. 60, in effect Sept. 1, 1913. The amendment of 1913 added subdivision 4.

Source.—R. S., pt. 3, ch. 8, tit. 4, § 15, as amended by L. 1849, ch. 107; Code of Proc., § 427.

Constitutionality.—A nonresident plaintiff cannot maintain a suit in this state against a foreign corporation for an accounting in relation to a partnership for the development of mines in a foreign territory, and § 1780 which states where nonresidents may sue a foreign corporation in this state is not unconstitutional. *Johnson v. Victoria Chief Copper Mining & S. Co.* (1912), 150 App. Div. 653, 135 N. Y. Supp. 1070.

Constitutionality of section upheld. *Payne v. New York, Susquehanna & Western R. R. Co.* (1913), 157 App. Div. 302, 142 N. Y. Supp. 241; *Interocean F. Co. v. Charles R. McCormick & Co.* (1917), 168 N. Y. Supp. 177.

This section is not unconstitutional so far as it attempts to confer jurisdiction on the courts of the state of New York over foreign corporations which are doing business in this state within the meaning of the term "doing business" as used in subdivision 4, and have not filed a designation pursuant to § 16 of the general corporation law, in cases where the causes of action did not arise within this state or out of any transaction carried on within this state by such foreign corporation. *Tauza v. Susquehanna Coal Co.* (1917), 220 N. Y. 259.

Service due process.—Controlling decisions establish the rule that service under this section and § 432 upon a foreign corporation doing business within the state by delivery to the officer therein mentioned under the circumstances appearing in this case, is due process. *Pomeroy v. Hocking Valley Ry. Co.* (1916), 218 N. Y. 530.

Who may object.—If a foreign corporation has been improperly joined as a defendant it is for it and not for other defendants to raise the objection. *Holmes v. Camp* (1916), 219 N. Y. 359.

Action by nonresident against foreign corporation; amendment of 1913 not retroactive.—The amendment made to this section by L. 1913, ch. 60, conferring jurisdiction in actions brought by a nonresident

or by a foreign corporation against a foreign corporation doing business within this state, is not retroactive to the extent of being applicable to a judgment entered before said amendment took effect. Thus, said amendment is not effective to overturn a judgment dismissing the complaint of a nonresident for lack of jurisdiction of such action, which judgment was entered before the amendment took effect. Although the court had no jurisdiction of a representative action brought by a nonresident stockholder against a foreign corporation in that said amendment was not then in force, the court did gain jurisdiction where subsequently a resident plaintiff intervened in the action in her own separate right without objection. *Grant v. Greene Consolidated Copper Co.* (1915), 169 App. Div. 206, 154 N. Y. Supp. 596; *Morris v. Baltimore & Ohio R. R. Co.* (1917), 177 App. Div. 613, 164 N. Y. Supp. 258; *Fairclough v. Southern Pacific Co.* (1916), 171 App. Div. 496, 157 N. Y. Supp. 862.

The amendment of 1913 providing that an action against a foreign corporation may be maintained by a nonresident "where a foreign corporation is doing business in this state," is retroactive and applies to a cause already in existence and to actions which have been begun before the amendment if the defendant has appeared and answered, joined in interrogatories and asked the court to take affirmative action. *Fairclough v. Southern Pac. Co.* (1915), 165 N. Y. Supp. 621.

The provision that an action may be maintained in this state where a foreign corporation is doing business within this state, although both parties are residents of the foreign state, is not mandatory upon the court, which should exercise its discretion under the special circumstances of each case. Where there is no relation between the tort for which the action is brought and the business being done by the foreign corporation in this state, an order arbitrarily granted by the special term dismissing the complaint will be reversed,

with opportunity for the special term to exercise its discretion. *Waisikoski v. Philadelphia & Reading C. & I. Co.* (1916), 173 App. Div. 538, 159 N. Y. Supp. 906.

The courts of this state, prior to the amendment of 1913, had no jurisdiction of an action by a nonresident arising in another state against foreign corporations doing business within this state. *Fairclough v. Southern Pacific Co.* (1916), 171 App. Div. 496, 157 N. Y. Supp. 862.

The amendment of 1913 makes the decision in *Klunek v. Pennsylvania R. R. Co.*, 148 App. Div. 786, obsolete. *Rubel v. Central R. R. Co. of New Jersey* (1916), 171 App. Div. 456, 156 N. Y. Supp. 1094.

Operation of subdivision 4.—The provisions of subdivision 4 are confined in their operation to the defendant in the action. *Barney & Smith Car Co. v. Bliss Co.* (1917), 100 Misc. 21, 164 N. Y. Supp. 800.

A complaint in action by one foreign corporation against another which does not allege that the contract was made in this state, or that the defendant was doing business here does not give the court jurisdiction. *East Coast Oil Co. v. Toltec Mexican Oil Co.* (1918), 183 App. Div. 76, 170 N. Y. Supp. 582.

Where in an action by a foreign corporation against a like corporation which has been doing business in this state and has been licensed so to do, the court, under subdivision 4, has jurisdiction of the action, though plaintiff had never procured authority to do business in this state. *Barney & Smith Car Co. v. Bliss Co.* (1917), 100 Misc. 21, 164 N. Y. Supp. 800.

In an action against a foreign corporation the residence of plaintiff is not the exclusive basis for jurisdiction where he has pleaded in conformity to the last subdivision of this section that defendant is doing business within this state. *Persick v. Philadelphia & Reading Coal & Iron Co.* (1918), 182 App. Div. 291, 169 N. Y. Supp. 288.

A foreign corporation may maintain an action in tort against a foreign corporation doing business in this state. *Commonwealth M. Co. v. Sargent & Co., Inc.* (1918), 104 Misc. 558, 172 N. Y. Supp. 594.

When jurisdiction should not be exercised.—Jurisdiction over a foreign corporation based on the fact that it has been permitted to acquire and operate part of a line of railroad in this state in the absence of more explicit legislation should only be exercised in favor of a resident plaintiff. Hence where the accident occurred in a sister state where the decedent resided and the plaintiff resides and where the defendant was incorporated, manifestly, the issue should be tried in the jurisdiction where the cause of action arose; and although the courts of this state have jurisdiction, they are not obliged to exercise

it under such circumstances. *English v. New York, etc. R. Co.* (1914), 161 App. Div. 831, 146 N. Y. Supp. 963.

Exercising jurisdiction as a matter of discretion.—Where a defendant which issued a policy of life insurance is a foreign corporation and is sued by a policyholder, a resident of this state, for an injunction to restrain the collection of excessive assessments, the jurisdiction of the court is not raised by a demurrer to the complaint, but should be left to be determined when the plaintiff applies for judgment, for the question is not as to the jurisdiction of the court, but whether the court, having jurisdiction, will exercise it, and that depends upon whether or not the court could enforce a judgment if it made one. *Sauerbrunn v. Hartford Life Ins. Co.* (1913), 159 App. Div. 121, 143 N. Y. Supp. 1009.

Jurisdiction under amendment of 1913.—Amendment of 1913 permitting a nonresident to sue a foreign corporation in this state did not take away the power of our courts to decline jurisdiction on the ground of *forum non conveniens* or other reasons rendering trial here inexpedient. *Bagdon v. Philadelphia & Reading Coal & Iron Co.* (1917), 178 App. Div. 662, 165 N. Y. Supp. 910.

Subject matter of action controls.—This section relates not to the legal capacity of a nonresident to sue in our courts, but to the nature of the subject-matter of the action, hence a defendant may take advantage of the lack of jurisdiction at any stage of the action, although such objection has not been raised by answer. *Payne v. New York, Susquehanna & Western R. Co.* (1913), 157 App. Div. 302, 142 N. Y. Supp. 241.

Doing business.—Where a corporation maintains an office in this state under the direction of a sales agent, with a number of salesmen, and with clerical assistants, and through these agencies systematically and regularly solicits and obtains orders which result in continuous shipments from Pennsylvania to New York, it is "doing business" in this state within the meaning of subdivision 4 of this section. *Tauza v. Susquehanna Coal Co.* (1917), 220 N. Y. 259; *Interocean F. Co. v. Charles R. McCormick & Co.* (1917), 168 N. Y. Supp. 177.

Idem; what constitutes.—*Rosenblatt v. Bridgeport Metal Goods Mfg. Co.* (1918), 105 Misc. 92, 173 N. Y. Supp. 331.

Plaintiff only transacting business within state.—The provision that "an action against a foreign corporation may be maintained by another foreign corporation" * * * 4. Where a foreign corporation is doing business within this state" applies only to the defendant and does not give the court jurisdiction, where the plaintiff only is doing business within this state. *United States Asphalt Refining Co.*

v. Comptoir National D'Escompte (1915), 166 App. Div. 64, 151 N. Y. Supp. 604.

Action on contract to convey real estate.—An action may be maintained by one foreign corporation against another and its officers for the specific performance of a contract to convey real estate situated in another state when demand for performance is made within this state, as the causes of action arose at the time and place where the demand for performance was made. *Wrightsville Hardware Co. v. Assets Realization Co.* (1913), 159 App. Div. 849, 144 N. Y. Supp. 991.

Contract; breach within state.—The courts of this state have jurisdiction over a cause of action between a nonresident and a foreign corporation for breach of contract where the cause of action arose within the state, although the contract contemplated performance in a foreign country. *Wester v. Casein Co. of America* (1912), 206 N. Y. 506.

Creditors' action; right of court of equity to take jurisdiction.—The provisions of of this section do not affect the inherent power of a court of equity to take jurisdiction, when invoked in a case falling within some subject of equity jurisdiction. The supreme court possesses general jurisdiction in equity, and creditors' actions to reach the personal property and things in action of their judgment debtors have always been of equitable cognizance. *Trotter v. Lisman* (1913), 209 N. Y. 174, aff'g

154 App. Div. 922, 139 N. Y. Supp. 1148.

Injuries to property without the state.—The courts of this state have no jurisdiction of an action for damages for injuries to real property lying without the state: this rule is not affected by the fact that the gravamen of the action to recover such damages is negligence. *Brisbane v. Pennsylvania R. R. Co.* (1912), 205 N. Y. 431.

Personal injuries occurring in another state.—The supreme court is without jurisdiction to entertain an action against a foreign railroad company to recover damages for personal injuries where the injury occurred in a foreign state, and the plaintiff is a resident thereof. *Payne v. New York, Susquehanna & Western R. R. Co.* (1913), 157 App. Div. 302, 142 N. Y. Supp. 241.

Court in possession of property.—This section does not apply to a case where the court has possession and jurisdiction of the property and is attempting to determine its ownership and the presence of the foreign corporation as a formal party at least is necessary to the complete disposition of the case. *Holmes v. Camp* (1916), 219 N. Y. 359.

Section cited.—*Bagdon v. Philadelphia & Reading Coal & Iron Co.* (1915), 170 App. Div. 594, 156 N. Y. Supp. 647; *Degnon v. Cook & Wilson's Greatest Wild Animal Circus on Earth* (1917), 162 N. Y. Supp. 1051.

§ 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.

Right to sue in representative or individual capacity.—Although the proper form of action on a cause of action arising out of the administration of the estate is by the personal representative individually, basing his right and title on his letters of administration or letters testamentary, yet he may sue either individually or in his representative capacity, since no matter in which capacity a recovery is had the recovery becomes assets of the estate for which he is accountable, and it does not concern the defendant, whose liability is individual in any event so that the form of judgment is necessarily the same, and the same defences and remedies are available to the defendant whose liability will be discharged by the satisfaction of the recovery no matter in which form it may

be had. *Leavitt v. Scholes Co.* (1913), 210 N. Y. 107, rev'g 148 App. Div. 78, 132 N. Y. Supp. 1033.

Action on contract made by executor.—An action at law upon a contract made by a person since deceased must be brought in the name of his executor or administrator, but an action brought upon a contract made by the executor or administrator must be brought by him individually. Hence, an executrix cannot maintain an action in her representative capacity to recover the purchase price of goods, wares and merchandise belonging to her testator at the time of his death, but sold by her after her appointment. *Ehrman v. Bassett* (1913), 159 App. Div. 752, 144 N. Y. Supp. 978.

§ 1815. When personal and representative cause of action may be joined.

The last sentence of this section, as to judgment showing whether it is awarded against the defendant personally or in his representative capacity, is obeyed in case the judgment distinctly shows or expresses the capacity or capacities in which the defendant is adjudged liable. *Leggett v. Pelletreau* (1914), 213 N. Y. 237, 239.

Conversion of stock.—An action may be brought against an executor individually and in his representative capacity for the conversion of stock loaned to his testator where it is uncertain whether the cause of action arose through the acts of the testator of the defendant individually. *Noble v. Haff* (1915), 155 N. Y. Supp. 560.

§ 1819. Action by legatee, etc., against executor, etc.

Application.—Matter of Warshauer (1918), 183 App. Div. 83, 170 N. Y. Supp. 556.

Jurisdiction.—The court has jurisdiction of an action for breach of an obligation imposed upon the executors by a will to employ him in a business which the executors are directed to carry on. Hughes v. Hiscox (1919), 105 Misc. 521, 174 N. Y. Supp. 564.

Parties.—No persons are required to be made parties except the legatee and the legal representatives of the estate. Hughes v. Hiscox (1919), 105 Misc. 521, 174 N. Y. Supp. 564.

Limitation of action.—Pattee v. Harper (1918), 183 App. Div. 88, 170 N. Y. Supp. 562.

Limitation of action against executor to

recover legacy.—No action can be brought against an executor to recover a legacy until one year after letters are issued, notwithstanding the amendment of § 2721 (now § 2688) allowing an executor to pay a legacy on the completion of publishing notice to creditors. Matter of Brooklyn Trust Co. (1917), 179 App. Div. 262, 166 N. Y. Supp. 513.

Application of section to special proceeding.—The provision that the statute of limitations begins to run only when the executor's account is judicially settled applies only to an action, not to a special proceeding instituted under § 2722 to compel payment of a legacy where the six-year statute begins to run at the time the legacy is payable. Matter of Toms (1914), 84 Misc. 312, 147 N. Y. Supp. 550.

§ 1822. Limitation of action by creditor on claim rejected, etc.

Note.—This section was intended to be repealed by the surrogates' code. Its provisions are included in § 2681 of the code, but the section was not repealed. See § 2681, note, *post*.

This section was repealed by implication by the enactment of § 2681, by L. 1914, ch. 443. Carpenter v. Newland (1915), 92 Misc. 596, 156 N. Y. Supp. 438.

Action in equity to declare claimant a creditor.—The various statutory provisions relating to the administration of estates do not adequately protect holders of notes not due at the time of decedent's death and which will not become due for several years, where the personal representatives have rejected a claim therefor and there is danger that the estate will be distributed without paying or securing the claim, and an action in equity to declare plaintiff a creditor of the estate may be maintained; the validity of the notes once being established, however, the code provisions are adequate. Bankers Surety Co. v. Meyer (1912), 205 N. Y. 219.

Effect of short limitations claim against estate. Hard v. Mingle (1912), 206 N. Y. 179, aff'g 141 App. Div. 170, 126 N. Y. Supp. 51.

Necessity that all consents be filed within six months.—A joint consent filed within six months by any party would fulfill the requirements of the statute. Individual consents may be made and filed but the jurisdiction of the surrogate to act upon the consents is not complete or exercisable unless they are of all the parties and are all filed within the stated six months.

Matter of Martin (1914), 211 N. Y. 328, rev'g 159 App. Div. 926, 144 N. Y. Supp. 306.

Service of notice of rejection by mail.—The service of notice of rejection of claim by mail does not increase the time within which the administrator may file his consent that the same may be heard and determined by the surrogate. Persbacker v. Murphy (1912), 153 App. Div. 492, 138 N. Y. Supp. 537.

Idem; offer to refer.—Defendant having made a claim against the estate of which plaintiff is executor, plaintiff signed and served upon him the following notice: "You will please take notice that I doubt the justice and validity of your claim of \$74,800 against the above named estate, and I hereby dispute the same, and offer to refer it under the statute to some suitable and proper person as referee, to be approved by the surrogate, to hear and determine the same." Held sufficient under § 1822 for the purpose of setting in motion the short statute of limitations. This bar is also operative against a claim pleaded as a set-off in an action brought on behalf of an estate and a claim which has been properly rejected may not be used by way of counterclaim after the expiration of the statutory period. Van Ness v. Canyon (1913), 208 N. Y. 228.

§ 1825. Leave to issue execution against executor, etc.

Except as provided in this section, an execution shall not be issued, upon a judgment for a sum of money, against an executor or administrator, in

his representative capacity, until an order permitting it to be issued has been made by the surrogate from whose court the letters were issued. Such an order must specify the sum to be collected, and the execution must be endorsed with a direction to collect that sum. If a judgment be jointly against an executor or administrator in his representative capacity and one or more other parties, execution may be issued thereon, without such order, against such other party or parties, but it must have endorsed thereon a direction not to levy against any property to the possession of which such executor or administrator as such is or may be entitled.

Amended by L. 1917, ch. 99, in effect Sept. 1, 1917. The amendment of 1917 added the first seven words and also the last sentence.

Source.—R. S., pt. 2, ch. 6, tit. 3, § 32, in part.

Proper application herein is a special proceeding in the surrogate's court; it is a *de novo* proceeding in that court for relief against executors of an estate under the jurisdiction of that court, and upon a judgment not taken in that court, but in another court. Such a proceeding must be started by the filing of a verified petition and the issue of a citation or an order to show cause. Service must be made on each of the executors. *McGinn v. Lighthouse* (1912), 137 N. Y. Supp. 110.

§ 1836. Costs, when awarded, etc.

Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice published as prescribed by law, requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, the court may award costs and disbursements or disbursements without costs against the executor or administrator to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court, or any county court, the facts must be certified by the judge or referee before whom the trial took place.

Amended by L. 1895, chaps. 595, 946; L. 1897, ch. 469; L. 1906, ch. 60; L. 1915, ch. 638, in effect May 14, 1915. The amendment of 1915 omitted from between the word "neglected" and the word "the" in line 4, the words "or that the defendant did not file the consent provided in section eighteen hundred and twenty-two at least ten days before the expiration of six months from the rejection thereof;" and inserted the words "and disbursements or disbursements without costs." in line 5.

Source.—R. S., pt. 2, ch. 6, tit. 3, § 41, in part.

Action not unreasonably resisted or neglected.—A judgment upon a note in an action against an administratrix in her representative capacity should not include costs, where there is no certificate of the trial judge showing that the action was unreasonably resisted or neglected. *Oliver v. Sahler* (1918), 185 App. Div. 85, 172 N. Y. Supp. 637.

Failure to file consent.—Under § 1836 failure by the administrator to file the consent therein mentioned gives the claimant the absolute right to costs, if the recovery is such as would entitle him thereto in an ordinary action. *Persbacker v. Murphy* (1912), 153 App. Div. 492, 138 N. Y. Supp. 537.

§ 1836-a. Actions by or against foreign executors or administrators.

Constitutionality; construction. — This section is remedial and retroactive and a constitutional and proper authorization of an action against foreign executors for the purpose of determining the ownership of property located in our state and within the jurisdiction of our courts, and is broad enough to permit the institution of a stock-

holder's action against directors of a foreign corporation for procuring a fraudulent transfer to themselves of stock of a domestic corporation then held by the foreign corporation. *Holmes v. Camp* (1916), 219 N. Y. 359.

Personal service of summons upon foreign executor while in this state is good.

Thorburn v. Gates (1918), 103 Misc. 292, 171 N. Y. Supp. 198.

Service of process within this state.—The supreme court of this state may, under this section, obtain jurisdiction of a foreign executor as such by personal service of process upon him within this state. Thorburn v. Gates (1918), 184 App. Div. 443, 171 N. Y. Supp. 568.

Damages for death.—Under § 1836-a a husband, appointed administrator of his wife's estate in a foreign state, may, without obtaining ancillary letters, maintain

an action in this state under § 1902 to recover damages for her death. Provost v. International Giant Safety Coaster Co. (1912), 152 App. Div. 83, 136 N. Y. Supp. 654.

Application.—This section does not authorize a writ of attachment against an administratrix appointed in a foreign state, so as to permit the seizure of personal property belonging to the estate located in this state. Bostwick v. Carr (1914), 165 App. Div. 55, 151 N. Y. Supp. 74.

§ 1837. Action by creditor; when action lies against next of kin, legatees, etc.

Counterclaim.—Haberle-Crystal Spring Brewing Co. v. Handrahan (1917), 100 Misc. 163, 165 N. Y. Supp. 251.

§ 1838. Action against next of kin, etc.; may be joint or several.

Marshalling assets.—In a joint action under this section the assets of the estate may be marshalled, and the proportionate sum to be paid by each defendant must be ascertained and the amount to be paid by each separately awarded by the judgment. Duck v. McGrath (1914), 160 App. Div. 482, 145 N. Y. Supp. 1033.

Necessity for allegation as to whether any one primarily liable has derived property from decedent.—Sections 1841, 1842 and 1849 of the code of civil procedure do not apply to a joint action under this sec-

tion. Where such an action is a general one, to which every one who has received any portion of the real or personal estate of the decedent, either "as widow, devisee, legatee, heir at law or next of kin," is a party, it is unnecessary to state whether there are any persons who have derived property from the decedent under any statute, or by the general rules of law, or by any instrument, who are primarily liable for the debt. Duck v. McGrath (1914), 160 App. Div. 482, 145 N. Y. Supp. 1033.

§ 1844. When action therefor may be brought against heirs and devisees.

An action, to enforce the liability declared in section one hundred and one of the decedent estate law, cannot be maintained, except in one of the following cases:

1. Where one year has elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within the state.

2. Where eighteen months have elapsed, since letters testamentary, or letters of administration, upon his estate, were granted, within the state.

Amended by L. 1909, ch. 65; L. 1915, ch. 636, in effect May 14, 1915. The amendment of 1915 substituted the words "one year has" in subdivision 1, for the words "three years have;" and the words "eighteen months" in subdivision 2, for the words "three years."

Source.—R. S., pt. 2, ch. 6, tit. 4, § 53, first clause. The first subdivision is new.

§ 1845. Effect of application to sell real property.

Where it appears that, at the time of the commencement of an action to enforce the liability declared in section one hundred and one of the decedent estate law, a proceeding for the judicial settlement of the accounts of the executor or administrator of decedent in which an order to dispose of real property of the decedent for the payment of his debts may be made,

is pending in a surrogate's court having jurisdiction, the proceedings in the action, subsequent to the complaint, must be stayed by the court, until the proceeding is disposed of, unless the plaintiff elects to discontinue. If an order to dispose of real property is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he cannot share, as a creditor, in the distribution of the money, arising from the disposal of the real property, described in the order, and the judgment in the action does not charge, or in any way affect, that property.

Amended by L. 1916, ch. 444, in effect May 9, 1916. The amendment of 1916 inserted lines 3-5, and made other changes in phraseology.

Source.—R. S., pt. 2, ch. 6, tit. 4, § 53, in part.

§ 1861. When action to establish a will may be brought.

Presumption as to destruction of will.—Where the will of testatrix, which was last in her custody was not found at her death, the presumption of law is that she destroyed the will, *animo revocandi*. The burden of overcoming such presumption is on those interested therein and must be conclusive. *Matter of Ascheim* (1912), 75 Misc. 434, 135 N. Y. Supp. 515.

Enforcement of ante-nuptial agreement.—Where a woman marries on the faith of her husband's oral ante-nuptial agreement to make a will in her favor, which promise

he subsequently fulfilled, but afterwards made other testamentary disposition of his property, the supreme court under its inherent equitable powers has jurisdiction to enforce such ante-nuptial agreement to procure a judgment establishing the will made pursuant to said agreement, the same being inaccessible owing to the fact that it has been probated in a foreign state, and in such suit the court may enjoin the probate of the subsequent will. *Adams v. Swift* (1915), 169 App. Div. 802, 155 N. Y. Supp. 873.

§ 1865. Proof of lost will in certain cases.

Presumption as to destruction.—Where the will of testatrix, which was last in her custody was not found at her death, the presumption of law is that she destroyed the will, *animo revocandi*. The burden of overcoming such presumption is on those interested therein and must be conclusive. *Matter of Ascheim* (1912), 75 Misc. 434, 135 N. Y. Supp. 515.

The facts necessary to establish the last will must be satisfactorily proved. A judgment establishing a will upon scanty, unconvincing and conflicting evidence especially where there is no attempt at any proof that the will was fraudulently destroyed during the lifetime of the testa-

tor. *Schultheis v. Schultheis* (1913), 143 N. Y. Supp. 324.

Where one of the two witnesses is a legatee under a lost or destroyed will and is therefore incompetent to testify to a personal transaction with testatrix the evidence is insufficient. *Hollender v. Wallace* (1917), 180 App. Div. 393, 167 N. Y. Supp. 824.

This article applies only to cases where the whole will has been lost or destroyed and not to cases where only a part is missing. *Matter of Kent* (1915), 89 Misc. 16, 22, 152 N. Y. Supp. 557.

§ 1866. Action to establish, etc., will, relating to real property.

Application.—*Ferguson v. Glover* (1918), 103 Misc. 341, 170 N. Y. Supp. 141.

Construction of will.—An action cannot be maintained for construction of a will where the will creates no trusts and the estates given by it are all legal, not equit-

able, except under § 1866. *Davis v. Tre-main* (1912), 205 N. Y. 236.

Interpretation of language.—The natural sense in which words are used, as it appears from judicial inspection, always prevails over both punctuation and capitals,

which are regarded as such uncertain aids in the interpretation of written instruments as to be resorted to only when all other means fail. *Matter of Turner* (1913), 208 N. Y. 261.

Heir at law or legatee may bring action.—This section only bestows the right of action for the construction of a will upon the heir at law or devisee of the decedent

whose will is offered for construction. *Matter of Bouchoux* (1915), 89 Misc. 47, 152 N. Y. Supp. 548.

Application to procedure under surrogate's code.—The provisions of this section are applicable generally to the procedure under the new surrogates' code. *Matter of Harden* (1914), 88 Misc. 420, 150 N. Y. Supp. 743.

§ 1869. Receiver, as successor of surviving executor, etc.

Receiver; right to recover for injury to freehold.—A receiver, appointed to take charge of real property and to collect and hold the rents and profits during the pendency of an action for partition does not

take title or have power to sue for permanent injury to the freehold by adjoining owners. *Rinehart v. Hasco Building Co.* (1912), 153 App. Div. 153, 138 N. Y. Supp. 258.

§ 1871. When judgment creditor may bring action.

Life insurance policy.—A judgment debtor's life insurance policy which provides that he may change the beneficiary at any time, is his personal property, and may be reached in a judgment creditor's action. *Cavagnaro v. Thompson* (1912), 78 Misc. 687, 138 N. Y. Supp. 819.

Action to set aside conveyance; complaint.—Where the complaint in a judgment creditor's action to set aside a conveyance does not in words allege that the plaintiff has no adequate remedy at law but does allege and the proof shows that an execution against the property of the

judgment debtor had been returned wholly unsatisfied it brings the case within this section and plaintiff is entitled to maintain the action. *Shenk v. Oliva* (1916), 94 Misc. 702, 158 N. Y. Supp. 437.

The scope of an action by judgment creditor for the discovery of property belonging to the judgment debtor seems not to be limited to personal property, and property not specifically set forth in the complaint may be recovered. *Koellhoffer v. Peterson* (1913), 82 Misc. 180, 143 N. Y. Supp. 353.

§ 1872. To what county execution must have issued.

Right to file transcript in another county and issue execution thereon.—Where a debtor against whom a judgment has been entered in one county resides in a foreign country and has no office in this state for the regular transaction of business in person the judgment creditor by filing a tran-

script of the judgment in another county and by issuing execution thereon, which is returned unsatisfied, is not entitled to maintain a judgment creditor's action in the latter county. *Demuth v. Kemp* (1913), 159 App. Div. 422, 144 N. Y. Supp. 690.

§ 1879. Application of this article; what property cannot be reached.

As to accrued earnings for services rendered by a husband within 60 days, the statutory exemption cannot be asserted against the wife in an action to secure

payment of alimony, since she is one of the persons for whose benefit the exemption is made. *Valentine v. Williams, Inc.* (1916), 159 N. Y. Supp. 815.

§ 1888. Actions upon official bonds of other officers.

Section cited.—*Allen v. Wolkof* (1917), 102 Misc. 122, 168 N. Y. Supp. 336.

§ 1898. When part of a penalty may be recovered.

Authority to fit award to the offense.—*Loucks v. Standard Oil Co.* (1918), 224 N. Y. 99.

§ 1902. Action for causing death by negligence, etc.

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country,* of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

Amended by L. 1909, ch. 221; L. 1915, ch. 620, in effect Sept. 1, 1915. The amendment of 1915 inserted the words "duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country," in lines 1, 2 and 3.

Source.—L. 1847, ch. 450, § 1, and § 2, in part, as amended by L. 1849, ch. 256, and L. 1870, ch. 78.

Administrator's action.—Although intestate permitted his action for personal injuries to lapse, an administrator's action brought on behalf of next of kin, within two years after intestate's death, is in time. *Kelleher v. New York Central & H. R. R. Co.* (1912), 77 Misc. 330, 136 N. Y. Supp. 256. See s. c. 153 App. Div. 617, 138 N. Y. Supp. 894, aff'd 212 N. Y. 207.

Letters must be granted before the action is brought, even though the plaintiff filed a petition for letters on the day the action was brought. And the complaint must allege the granting of letters prior to commencement of action. *Smith v. New York Central Railroad Co.* (1918), 183 App. Div. 478, 171 N. Y. Supp. 64.

Release of cause of action by sole next of kin of decedent after assigning his interest to the administratrix, see *Bruck v. New York Central & H. R. R. Co.* (1915), 165 App. Div. 621, 151 N. Y. Supp. 286.

Release barred by statute of limitations.—An executor or administrator is not authorized by § 1902 to recover damages for injuries sustained by a decedent from negligence, where an action by the decedent, if living, would be barred by the three-year statute of limitations. *Kelliher v. New York Central & H. R. R. Co.* (1912), 153 App. Div. 617, 138 N. Y. Supp. 894.

Section 405 allowing the commencement of a new action within one year, although the statute of limitations on the original cause of action has expired, applies to an action brought under this section, where the dismissal of the complaint at the close of plaintiff's evidence was affirmed on appeal without granting a new trial. *Hoff-*

man v. Delaware & Hudson Co. (1914), 163 App. Div. 50, 148 N. Y. Supp. 509.

A recovery for such death after the expiration of two years cannot be justified on the theory that the action is against the surety on a sealed instrument as to which the twenty years statute of limitations applies. *Fallert v. Massachusetts Bonding & Insurance Co.* (1916), 172 App. Div. 690, 158 N. Y. Supp. 658.

The general provisions of the code dealing with the limitation of actions apply to actions brought under this section. *Boffe v. Consolidated Telegraph & Electrical Subway Co.* (1916), 171 App. Div. 392, 157 N. Y. Supp. 318.

Release procured by fraud.—In an action by administratrix where a defendant sets up release alleged by plaintiff to have been procured by fraud the plaintiff should so allege by way of reply. *Ishie v. Norton Co.* (1918), 183 App. Div. 94, 170 N. Y. Supp. 655.

Limitation raised by answer.—The complaint in an action to recover for death caused by a wrongful act need not allege that the action is commenced within two years after the decedent's death, for said period prescribed by the statute is a limitation upon the remedy only and is not a condition precedent; the defense must be taken by answer. *Agresta v. Federal Steam Navigation Co.* (1915), 169 App. Div. 467, 155 N. Y. Supp. 343.

Where action barred at time of decedent's death.—No action is maintainable under this section unless the decedent at the time of his death, could have maintained an action. Accordingly, the rule is that where the cause of action was barred

* So in original

by the statute of limitations at the date of the decedent's death, no action can be maintained by his representative. *Kelleher v. New York Central, etc. R. Co.* (1914), 212 N. Y. 207, aff'g 153 App. Div. 617, 138 N. Y. Supp. 894.

Limitation applies to remedy.—The provision that an action to recover damages for default caused by wrongful act, must be commenced within two years after decedent's death, is a limitation upon the remedy and not upon the right. Hence, the omission of an allegation to that effect in a complaint is not ground for a demurrer. *Sharrow v. Inland Lines, Ltd.* (1915), 214 N. Y. 107.

Action brought before appointment of representative, premature.—As an action to recover damages for negligence causing death is wholly statutory, and as such action can only be brought by a personal representative of the decedent, an action brought before the appointment of a representative is premature, and the defendant is entitled to a dismissal of the complaint. *Boffe v. Consolidated Telegraph & Electrical Subway Co.* (1916), 171 App. Div. 392, 157 N. Y. Supp. 318.

An action against a hospital for breach of contract in failing and refusing to care for and protect an infant is maintainable. *Roche v. St. John's Riverside Hospital* (1916), 96 Misc. 289, 160 N. Y. Supp. 401.

The right of next of kin to sue for fraud of defendant in procuring a release from the plaintiff of a cause of action for the death of plaintiff's son resulting from defendant's negligence is unaffected by §§ 1902-1905. *Rice v. Postal Telegraph-Cable Co.* (1916), 174 App. Div. 39, 160 N. Y. Supp. 172.

Assignee of next of kin cannot bring action.—Such a right of action is vested by the statute in the executor or administrator of the deceased for the benefit of the next of kin, each of them becoming vested with a further right in such cause of action that is descendible and transferable or which they can release, but if the next of kin do assign their interest, the assignee does not acquire the right to prosecute the action which is vested in the executor or administrator of the deceased. Since the next of kin cannot bring the action, they cannot assign to another such right. *Travelers Insurance Co. v. Padula Co., Inc.* (1918), 184 App. Div. 791, 170 N. Y. Supp. 869.

Nature of action.—It is now settled beyond the possibility of profitable discussion that this statute gives a cause of action that is new and distinct from the common law action for damages on account of personal injuries based on negligence. *Kelleher v. New York Central, etc. R. Co.* (1914), 212 N. Y. 207, aff'g 153 App. Div. 617, 138 N. Y. Supp. 894.

The cause of action is created by the statute and is original and not derivative. It is not a part of, and has no relation

with the estate of the decedent. The damages are allowed, not for an injury to his estate, but for an injury, through the loss of him, to the estate of the beneficiaries. The executor or administrator of the decedent is a mere nominal party, without any interest in the damages, holding them, when recovered, in the capacity of a trustee or agent for the beneficiaries. While the statute declares that the damages recovered are exclusively for the benefit of the decedent's husband or wife, and next of kin, the denomination "next of kin" in connection with the preceding designation is merely a convenient means of designating, comprehensively and definitely, the distributees of the damages recovered. The damages are theirs, not through the laws of intestacy or as a part of the estate of the intestate, but through their original right to them created by the statute. *Hamilton v. Erie R. R. Co.* (1916), 219 N. Y. 343; *Matter of Atterbury* (1917), 179 App. Div. 648, 167 N. Y. Supp. 88; *Travelers Insurance Co. v. Padula Co., Inc.* (1918), 184 App. Div. 791, 170 N. Y. Supp. 869.

Idem; not reviver of decedent's cause of action.—A cause of action for the recovery of damages for the pecuniary injury resulting from death is purely a statutory one. It is not founded upon the violation of any natural right known to the common law. It is a new cause of action which is wholly distinct from and not a reviver of the cause of action which, if he had survived, the decedent would have for his bodily injury. *Matter of Brennan* (1914), 160 App. Div. 401, 145 N. Y. Supp. 440.

Cause of action as property right.—This cause of action is in the nature of a property right arising out of the interest which one has in the life of another upon whom one is or may be dependent or to whose services he is entitled. *Matter of Brennan* (1914), 160 App. Div. 401, 145 N. Y. Supp. 440.

Authority of administratrix to engage counsel.—As the right to bring an action is given by the code to the administratrix, she must be deemed empowered to engage the services of an attorney, and incidentally to agree upon the compensation therefor, provided the amount is fair and reasonable. *Matter of Weber* (1918), 102 Misc. 635, 170 N. Y. Supp. 293.

Loss of society.—The rule is well settled that the death statute does not cover loss of society. *Costello v. Buffalo General Electric Co.* (1918), 183 App. Div. 48, 170 N. Y. Supp. 1006.

Negligence of sole next of kin as bar to action.—This action is not brought to recover for personal injuries done to the beneficiaries, although arising out of a personal injury to another. Hence, negligence of the sole next of kin which contributed to the injury, if not imputable to the decedent, is not a bar to the action. *Matter of*

Brennan (1914), 160 App. Div. 401, 145 N. Y. 440.

Where an action is brought by a husband, as administrator, under this section, to recover for the negligent killing of his wife, his contributory negligence is not a defense, even though he is the sole beneficiary. *McKay v. Syracuse Rapid Transit Railway Co.* (1913), 208 N. Y. 359.

Ancillary letters not required.—Under § 1836-a a husband, appointed administrator of his wife's estate in a foreign state, may, without obtaining ancillary letters, maintain an action in this state under § 1902 to recover damages for her death. *Provost v. International Giant Safety Coaster Co.* (1912), 152 App. Div. 83, 136 N. Y. Supp. 654.

Jurisdiction to enforce similar statute of another state.—The courts of this state have jurisdiction where a resident seeks to enforce herein a private remedy afforded by a statute of a sister state similar in principle to this section. *Loucks v. Standard Oil Co.* (1915), 92 Misc. 475, 156 N. Y. Supp. 7.

The Imperial Russian consul-general is not authorized by either international law or by treaty with Russia to settle and release a cause of action accruing to beneficiaries thereof. *Hamilton v. Erie R. R. Co.* (1916), 219 N. Y. 343.

Limited letters of administration may be granted under §§ 2559 and 2592 for the purpose of permitting an administrator to prosecute an action arising under this section. *Matter of Pelotti* (1914), 87 Misc. 81, 150 N. Y. Supp. 421.

Effect of marriage.—Widow entitled to recover substantial damages, although married to her husband after accident resulting in his death. *Radley v. Leray Paper Co.* (1915), 214 N. Y. 32.

The remedy provided by § 16 of the workmen's compensation law is exclusive, and administratrix representing only adult brothers and sisters of an intestate, who left no widow or next of kin entitled to compensation under that statute, cannot maintain an action under §§ 1902-1905.

Shanahan v. Monarch Engineering Co. (1916), 219 N. Y. 469.

Jurisdiction to fix compensation of attorneys in actions brought under this section. *Matter of Atterbury* (1918), 222 N. Y. 355.

Action under workmen's compensation law, § 29; assignment of cause of action.

—Under the title subrogation to remedies of employees, § 29 of the workmen's compensation law, as it stood prior to amendments (L. 1917, ch. 705, § 8), provided that if the dependents of an employee killed by the negligence or wrong of another not in the same employ should elect to take compensation under that chapter, the cause of action against such other should be assigned to the state or insurance carrier liable for the payment of such compensation. Held, that this with other provisions of the section expresses that within the legislative mind and comprehension the section provided to the dependents of the employee a cause of action, independent of and not that created by this section for the negligently caused death, and that in case the dependents elect to assign the cause of action, the assignment creates its ordinary and established effects. It transfers to and rests in the assignee the cause of action. If the assignment is to the state the cause of action is thereby made the property of the state; if to another the cause of action becomes by virtue of the assignment the property of that other. *Travelers Ins. Co. v. Padula Co.* (1918), 224 N. Y. 397.

Under § 29 of the workmen's compensation law a widow may elect, not only for herself but for her minor child, to take under the statute rather than pursue the remedy against the wrongdoer. And she need not have been appointed administratrix to make such election. *Hanke v. New York Consolidated R. R. Co.* (1917), 181 App. Div. 53, 168 N. Y. Supp. 234.

Section cited.—*Meng v. Emigrant Industrial Savings Bank* (1915), 169 App. Div. 27, 154 N. Y. Supp. 509; *Matter of Dearborn Peugeot Auto Import Co.* (1915), 170 App. Div. 93, 155 N. Y. Supp. 769.

§ 1903. Distribution of damages recovered.

The damages recovered in an action, brought as prescribed in the last section, or obtained through settlement without action, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, or representative, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration; subject, however, to the following provisions, to wit:

1. In case the decedent shall have left him surviving a wife, or a husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband.

2. In case the decedent leaves neither husband, wife, nor issue, but leaves a mother, and a father who has abandoned him, or who has left the maintenance and support of their child to the mother, the damages or recovery shall be for the sole benefit of such mother.

3. In case the decedent leaves no husband or wife, issue or father, or having left a father entitled to recovery, who dies prior to the recovery or verdict, the damages or recovery shall be for the sole benefit of the mother if then living.

The reasonable expenses of the action, or settlement, the reasonable funeral expenses of the decedent, and the commissions of the plaintiff or representative, upon the residue may be fixed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper or upon the judicial settlement of the account of the plaintiff, or representative, and may be deducted from the recovery.

Amended by L. 1904, ch. 515; L. 1911, ch. 122; L. 1915, ch. 641, in effect Sept. 1, 1915. The amendment of 1915 materially changed this section.

Source.—L. 1847, ch. 450, § 2, in part, as amended by L. 1849, ch. 256, and L. 1870, ch. 78.

Application.—*Cahill v. Terry & Treach Co.* (1916), 173 App. Div. 418, 159 N. Y. Supp. 1060; *In re Vena's Estate* (1917), 170 N. Y. Supp. 291.

To whom cause of action belongs.—A cause of action to recover damages for negligence causing death belongs to the widow or next of kin of the decedent, not to his personal representatives as a part of his estate. It vests in the widow and next of kin immediately upon the death of the decedent. Hence, in such an action the recovery should be distributed pursuant to the provisions of this section as it existed at the time of the husband's death, notwithstanding a subsequent amendment prior to the recovery of the judgment. *Matter of Brennan* (1914), 160 App. Div. 401, 145 N. Y. Supp. 440.

Where the death of the decedent was negligently caused in 1914, and his father and mother were the only next of kin, a fund received for the negligently causing of decedent's death, under the provisions of this section as in force in 1914, will belong to the father only. *Matter of Connor* (1917), 98 Misc. 538, 164 N. Y. Supp. 748.

Distribution of compromise.—Where, in 1914, and after the reversal of three successful verdicts in favor of the plaintiff in an action commenced in 1908 by an administratrix to recover for the death of her intestate by defendant's wrongful act, the action was compromised and settled, the amount received in excess of attorney's fees and expenses must be distributed as provided by this section as it stood prior to the amendment of 1911. *Matter of Marble* (1914), 88 Misc. 339, 151 N. Y. Supp. 953.

The distribution of the fund recovered is regulated by the special statute, and the widow of testator is not solely entitled to receive the net sum recovered to the exclusion of grandchildren of testator where

he did not leave children him surviving. *Matter of Meng* (1916), 96 Misc. 126, 159 N. Y. Supp. 535.

An accounting by an executor of a fund recovered in an action brought under §§ 1902, 1903, 1904, for causing the death of plaintiff's testator by wrongful act, is not an accounting in respect of the estate of plaintiff's testator, but an accounting *sui generis* regulated by particular statutory rules. Upon such an accounting the executor is entitled to deduct from the fund only the reasonable expenses of the action. *Matter of Meng* (1916), 96 Misc. 126, 159 N. Y. Supp. 535.

The proper construction of the word children in the amendment of 1911 is that it signifies children generally in a direct line, and is not limited to immediate offspring. *Matter of Meng* (1916), 96 Misc. 126, 159 N. Y. Supp. 535.

Deduction from recovery.—The provision that a plaintiff may deduct from the recovery the reasonable expenses of the action, reasonable funeral expenses of decedent and his commissions upon the residue only contemplates a deduction of funeral expenses when the beneficiaries of the recovery are under obligation to pay them, and no such obligation exists where the expenses have been paid from a fund charged with its payment. *Matter of Huth* (1914), 88 Misc. 458, 152 N. Y. Supp. 215.

Allowance of expenses by surrogate.—The surrogate is given sole jurisdiction to determine and allow for the expenses of the action and the supreme court has no jurisdiction to make any determination upon that subject. And an order of the supreme court in so far as it provides for the determination by that court of the fees of the plaintiff's attorneys and for the deposit of part of the moneys recovered to secure such fees is made without jurisdiction of the subject matter and is, there-

fore, void. The action is purely statutory and the statute provides for the disposition of any damages collected. *Cunningham v. City of New York* (1913), 141 N. Y. Supp. 1000.

Reasonable expenses of action.—The surrogate is not bound by the opinions of experts as to the value of services rendered but he is bound to find what such expenses were. Proof of the rendition of the services and expenses incurred require the surrogate to make a finding as to what is the reasonable amount to be allowed. *Matter of Cunningham* (1916), 175 App. Div. 791, 162 N. Y. Supp. 764.

The surrogate is given jurisdiction to allow expenses and attorney's fees, and the special term has no jurisdiction to de-

termine the amount the attorney shall receive under his contract of retainer. *Matter of Atterbury* (1917), 179 App. Div. 648, 167 N. Y. Supp. 88.

Jurisdiction to fix compensation of attorney.—There is nothing in this section showing an intention to deprive the supreme court of the jurisdiction which it possessed for many years to fix and enforce an attorney's lien by action or of the later but well-established power to do the same thing upon petition. *Matter of Atterbury* (1918), 222 N. Y. 355.

Mother held entitled to entire recovery for death of unmarried son, where it is proved father abandoned son and left his support to the mother. *In re Paris* (1918), 172 N. Y. Supp. 607.

§ 1904. *Id.*; amount of recovery.

The damages awarded to the plaintiff may be such a sum as the jury upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. If the decedent leaves surviving a father and a mother, the death of such father prior to the verdict shall not affect the amount of damages recoverable. When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report or decision, may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits.

Amended by L. 1895, ch. 946; L. 1913, ch. 756, in effect Sept. 1, 1913. The amendment of 1915 added the second sentence.

Source.—L. 1847, ch. 450, § 2, as amended by L. 1849, ch. 256, and L. 1870, ch. 78.

Application.—*Cahill v. Terry & Treach Co.* (1916), 173 App. Div. 418, 159 N. Y. Supp. 1060.

Excessive verdict.—In an action by the personal representative of the deceased, to recover damages for the death, the jury has a right to award only a fair and just compensation based upon the evidence introduced and an excessive verdict will not be allowed to stand. *Morton v. Smith Hoisting Co.* (1912), 152 App. Div. 738, 137 N. Y. Supp. 829.

Verdict of \$49,000 for death of laborer and mechanic was excessive. *Smith v. New York Central Railroad Co.* (1918), 183 App. Div. 478, 171 N. Y. Supp. 64.

Interest on verdict secured under federal employer's liability act.—Where a recovery for wrongful death is secured exclusively under the federal employer's liability act the plaintiff is not entitled to interest on the verdict under this section. For while an action under this act may be brought in the state courts and the state practice invoked, so far as procedure is concerned,

the right of action rests exclusively on the federal statute which does not allow interest to be added to a verdict. *Norton v. Erie R. Co.* (1913), 83 Misc. 159, 144 N. Y. Supp. 656.

The plaintiff in an action for death brought under the federal employers' liability act, is not entitled to tax interest on a verdict in her favor from the date of the death. *Norton v. Erie Railroad Co.* (1914), 163 App. Div. 468, 148 N. Y. Supp. 771, aff'g 83 Misc. 159, 144 N. Y. Supp. 656.

The reasons for the rule excluding proof of uncertain and fluctuating profits are just as cogent in a death case as in an action for personal injuries not resulting in death and we think it applies to both classes of actions alike. But where decedent was engaged in a business where personal earnings predominated, the widow may testify as to how much she customarily received from him weekly. *Spreen v. Erie R. R. Co.* (1916), 219 N. Y. 533.

§ 1905. Next of kin defined.

The term "next of kin," as used in the foregoing section, has the meaning specified in section eighteen hundred and seventy of this act, except if decedent leaves surviving a father and mother but no widow, child or descendant, it shall mean both the father and the mother.

Amended by L. 1913, ch. 756, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "except if decedent leaves surviving a father and mother but no widow, child or decedent, it shall mean both the father and mother," in lines 2, 3 and 4.

Source.—New.

Term next of kin includes all those entitled under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent after payment of the debts and expenses, other than a surviving husband or wife. *Carpenter v. Buffalo General Elec-*

tric Co. (1913), 155 App. Div. 655, 140 N. Y. Supp. 559, aff'g 213 N. Y. 101.

Next of kin of adopted child, who died unmarried and intestate, leaving no one surviving, except the brothers and sisters of his deceased foster mother and his natural father, see *Carpenter v. Buffalo General Electric Co.* (1914), 213 N. Y. 101.

§ 1906. Action for slander of a woman.

Section cited.—*Dahm v. O'Connell* (1916), 161 N. Y. Supp. 909.

§ 1907. When action for libel cannot be maintained.

Report of judicial proceeding.—The qualified privilege of one publishing a fair and true report of judicial proceedings created by § 1907 of the Code does not extend to other matters added to the report of the proceedings. *Smith v. New Yorker Staats-Zeitung* (1913), 154 App. Div. 458, 139 N. Y. Supp. 325.

As depending on whether court had jurisdiction of parties.—When a proceeding in a court is one relating to a matter

of which the magistrate had jurisdiction, which the public had the right to hear, and the defendant had the right in the public interest to report, a full, fair and impartial report thereof is privileged, and it is unimportant how the jurisdiction was invoked or exercised, or whether the magistrate in fact had jurisdiction of the person of the accused. *Lee v. Brooklyn Union Pub. Co.* (1913), 209 N. Y. 245, aff'g 151 App. Div. 924, 135 N. Y. Supp. 1123.

§ 1908. The last section qualified.

The question whether headlines are justified by the matter to which they relate is not always a question of fact for the

jury. *Walling v. Commercial Advertiser Association* (1916), 173 App. Div. 491, 159 N. Y. Supp. 329.

§ 1913. Action upon judgment regulated.

A final decree in an action for divorce which provides for the payment of alimony by installments is a judgment for the payment of money within this section. *Farquhar v. Farquhar* (1916), 172 App. Div. 242, 158 N. Y. Supp. 194.

Judgment obtained in violation of section.—Where it is admitted that the object of an action instituted in plain vio-

lation of this section upon a judgment by fault was to increase the amount of the judgment so that summary proceedings could be instituted thereunder, the entry of the second judgment is unauthorized, but defendant has no standing in court except to move to open his default. *Myers v. Klein* (1916), 95 Misc. 548, 159 N. Y. Supp. 877.

§ 1915. Action upon a penal bond.

Application to bond of highway contractor.—*Fosmire v. National Surety Co.*

(1918), 104 Misc. 166, 171 N. Y. Supp. 474.

§ 1919. Actions, etc., against association of seven or more persons.

Limitation.—An action against the president or treasurer is not limited to one where money damages is claimed. *Heitkamper v. Hoffmann* (1917), 99 Misc. 543, 164 N. Y. Supp. 533.

Not maintainable against both president and treasurer.—While an action to recover damages for an assault and battery may be maintained against the president or treasurer of an unincorporated association consisting of seven or more persons, such an action cannot be maintained against both of such officers. *Mazurajtis v. Maknawyce* (1916), 93 Misc. 337, 157 N. Y. Supp. 151.

Application.—The provisions of this section, in an action against an unincorporated association, are limited to a cause of action by which the plaintiff might maintain an action against all the associates by reason of their liability either jointly or severally. *Schouten v. Alpine* (1915), 215 N. Y. 225.

Action against labor union.—The president of a manufacturers' association, not incorporated, may maintain an action under this section to restrain any action upon the part of the members of a labor union which affects the civil rights and interests of all the members of the plaintiff association. *Garside v. Hollywood* (1914), 88 Misc. 311, 150 N. Y. Supp. 647.

Injunction against labor organization.—An injunction is binding on all the members of a labor organization, an unincorporated association, although only the officers are served. *Neal v. Hutcheson* (1916), 160 N. Y. Supp. 1007.

Voluntary unincorporated mutual life assurance association; liability of president for contractual obligation.—The by-laws of a teachers' mutual life assurance association, a voluntary unincorporated association consisting of more than seven members, provided for the payment upon the death of a member of \$500 to the assignee of said member, and for an assessment of fifty cents to be collected from each surviving member, and the only penalty prescribed for the failure to pay an assessment was forfeiture of membership. In an action by an assignee of a deceased member against the president of the association to recover the death benefit solely upon the theory of a contractual obligation created by the constitution and by-laws, the defendant pleaded a general denial, and alleged as a defense that the association had been dissolved and had gone out of existence. It was held, that since there was no contractual obligation on the part of the members either jointly or severally

to the beneficiaries of deceased members, no recovery can be had and that the complaint should be dismissed. *Doscher v. Vanderbilt* (1917), 177 App. Div. 813, 164 N. Y. Supp. 264.

Where a fraternal benefit association, unincorporated, has its principal office in England, and has a United States branch with a local president, the plaintiff, in order to obtain a judgment against the society itself, should bring the action against the foreign president or treasurer, though, if the plaintiff claims that the members of the United States branch are liable for the full amount, the action may be brought against the local president. *Stewart v. Thorburn* (1916), 171 App. Div. 258, 157 N. Y. Supp. 242.

The local branch of a membership corporation organized under the laws of this state may not maintain an action to recover moneys due such local branch, as though it were an incorporated association. The right of action is in the corporation itself and it is the proper party to bring the action, unless the local branch possesses some expressed derivative right to maintain such an action. *Conboy v. Mathews* (1916), 174 App. Div. 523, 160 N. Y. Supp. 538.

Representatives of a class.—Every member of an unincorporated association may be sued, and if the members are numerous, some of them may be made parties defendant, as representatives of a class. *Bossert v. Dhuy* (1914), 166 App. Div. 251, 151 N. Y. Supp. 877.

All members must be liable.—It is essential to a recovery under this section that all the members of the association be liable to the plaintiff, either jointly or severally, and where the complaint fails to allege that the wrong complained of was committed by all the members of the association, it will be dismissed. *Mazurajtis v. Maknawyce* (1916), 93 Misc. 337, 157 N. Y. Supp. 151.

While an unincorporated association has no standing as a legal entity, a convenient method by which such an association can sue or be sued is provided, and each member, the agents and employees of the association are bound by the judgment rendered in an action against it. *Heitkamper v. Hoffmann* (1917), 99 Misc. 543, 164 N. Y. Supp. 533.

Evidence examined and plaintiff determined not to be the president of an association. *Goller v. Stubenhaus* (1912), 77 Misc. 29, 134 N. Y. Supp. 1043.

Section cited.—*Miller v. Blood* (1916), 217 N. Y. 517.

§ 1925. Action by a taxpayer against a public officer.

The purpose of the statutes authorizing a taxpayer's action is not to confer upon the taxpayer the power to bring actions which the public authorities have no

power to bring, but they are designed to confer upon the taxpayer the right to bring such an action in the cases specified in the statute which are cases where the relief sought could be obtained by appropriate proceedings on the part of public officers. *Altschul v. Ludwig* (1916), 216 N. Y. 459.

When action lies.—A taxpayer's action to restrain waste or injury to the property or funds of a municipality, or to prevent any illegal official act on the part of its officers, lies, in a proper case, under this section, or § 51 of the general municipal law: in either case the principles governing the action are substantially the same. The statute was not intended to subject the official acts of boards, officers or municipal bodies acting within their jurisdiction and discretion to the supervision of the courts, simply because some taxpayer might conceive the same to be unwise, improvident or based on errors of judgment. *McBride v. Ashley* (1915), 91 Misc. 585, 154 N. Y. Supp. 1010.

Not maintainable against state officer.—The right to maintain a taxpayer's action is not given against an officer, agent, commissioner, or other person acting for or on behalf of the state. The right to maintain such an action is confined to one against such persons acting, or who have acted, for or on behalf of any county, town, city, village or other municipal corporation. *Olmstead v. Meahl* (1916), 219 N. Y. 270.

Waste of public funds.—The remedy given by this section and § 51 of the general municipal law to enjoin waste of public funds and illegal official acts, and to compel restitution of public funds corruptly or illegally disbursed, is confined to cases where fraud or corruption or illegal official acts are shown, and it was not intended to empower the courts to review discretionary action or acts of public boards or officials. *Western New York Water Co. v. Laughlin* (1916), 157 N. Y. Supp. 257.

While § 51 of the general municipal law and this section are independent acts, they cover common grounds upon the subject of the waste of municipal funds and such a cause of action may be maintained under either. *Gregory v. Simpson* (1916), 173 App. Div. 6, 159 N. Y. Supp. 1016.

Restraining violation of building code.—An action may not be maintained under this section by a taxpayer of the city of New York to restrain the superintendent of buildings from approving the plans for, and permitting, the erection or remodeling of a theatre in that city where such plans do not comply with the provisions of the building code, as the threatened act in no way involves the prevention of waste or injury to the estate of the city. Such an action may be maintained, however, under § 51 of the general municipal law. *Altschul v. Ludwig* (1916), 216 N. Y. 459.

Cancellation of lease of town lands.—A taxpayer has no common-law right of ac-

tion for the cancellation of a lease of town lands, and an action under the statute must allege every fact necessary to bring the action within it. *Bachia v. Piepenbrink* (1912), 77 Misc. 362, 136 N. Y. Supp. 435.

Violation of civil service law.—Where a newly-elected clerk of the county of Erie publicly announces that he will remove certain existing special deputy clerks and replace them with others without regard to examination or certification under the civil service law, a taxpayer may maintain suit for an injunction against the county clerk. *Wilcox v. Meahl* (1916), 172 App. Div. 263, 160 N. Y. Supp. 708.

Acts of civil service commission.—A taxpayers' action is inappropriate as a remedy for correcting illegal action on the part of civil service commissioners; their official acts are not judicial in a technical sense, but executive and ministerial, and are therefore to be reached by way of a writ of mandamus. A taxpayer's action is allowed by § 1925, and by the general municipal law, and it is recognized by the civil service law; but under neither one of these statutes will an action lie to restrain municipal civil service commissioners from recognizing and enforcing an amendment of the civil service rules which they had proposed and had caused to be duly approved. *Slavin v. McGuire* (1912), 205 N. Y. 84.

Highway officers.—Where town officials buy a steam roller on a conditional contract of sale in violation of the highway law, a taxpayer may maintain an action to restrain a waste of public funds under such illegal contract. *Gardner v. Town of Cameron* (1913), 155 App. Div. 750, 140 N. Y. Supp. 634.

Public service commission.—A taxpayer may maintain an action against the public service commission under § 1925 to restrain the waste or injury of the property, funds or estate of a municipal corporation. *Hopper v. Wilcox* (1913), 155 App. Div. 213, 140 N. Y. Supp. 277.

Contracts; notice for bids.—Sole test of sufficiency of notice for bids to furnish coal for a school is: "could bidders bid understandingly so public would get advantage of competitive bidding?" An action to restrain letting of contract must show a clear violation of law. *Maloney v. Maddover* (1912), 77 Misc. 340, 136 N. Y. Supp. 498.

Taxpayer's action to restrain officers of municipality from letting certain contracts or incurring indebtedness in connection therewith, see *Western New York Water Co. v. Laughlin* (1913), 82 Misc. 496, 143 N. Y. Supp. 737.

Contracts; preparation of plans for public building.—Where on motion for an injunction *pendente lite* in a taxpayer's action to restrain a city from entering into a contract with a firm of architects to prepare plans for a proposed public building, it appears the real purpose is to compel

the city to approve an oral contract made several years before but which has been disapproved by the corporation counsel, and it is conclusively shown the employment thereunder was simply for preliminary drawings at a stated compensation, the motion will be denied. *Hoyt v. Steers* (1912), 76 Misc. 21, 136 N. Y. Supp. 58.

Manner of raising funds to pay a lawful obligation of a city, action is not maintainable where it relates only to. *Schieffelin v. Craig* (1916), 183 App. Div. 515, 170 N. Y. Supp. 603.

Street improvements; contracts for. Taxpayer's action to restrain city and a contractor from executing a contract for street improvements upon the ground that the common council had no power to pass an ordinance for pavement of the kind indicated in the proposed contract. *Whitmore, Rauber & Vicinus v. Edgerton* (1914), 87 Misc. 216, 149 N. Y. Supp. 508.

State highways; contracts for.—A producer of road material cannot maintain a suit to enjoin the letting of contracts for state highways purely as a taxpayer's action. *Warner-Quinlan Asphalt Co. v. Carlisle* (1913), 158 App. Div. 638, 144 N. Y. Supp. 70.

Election; action to restrain on ground that statute is unconstitutional.—The clear weight of authority in this state is against the alleged power and authority of the courts to pass upon the constitutionality of a statute except in an action or proceeding in behalf of a person whose special, peculiar, personal rights are affected thereby. An action cannot be maintained by a taxpayer under this section to restrain the holding of an election on the ground that the statute is unconstitutional. *Schieffelin v. Komfort* (1914), 212 N. Y. 520, aff'g 163 App. Div. 741, 149 N. Y. Supp. 65.

Recovery of moneys paid to supervisor on improper audit.—An action may be brought by a taxpayer to set aside audits made by the board of supervisors and to recover on behalf of the county moneys alleged to have been allowed to a supervisor for services in preparing the tax rolls of the town, where certain items for which payment had been made were not properly chargeable to the county under § 23 of the county law. The legal capacity of a plaintiff to maintain such an action is not affected by the mere fact that he is a tenant in common of the lands assessed on which he has paid the taxes, and that they are listed on the assessment rolls in the name of the estate of plaintiff's ancestor. *Smith v. Hedges* (1915), 169 App. Div. 115, 154 N. Y. Supp. 867.

Supervisors; copying assessment roll.—Taxpayer's action to recover money allowed by a board of supervisors to a supervisor for copying assessment roll on the ground that the defendant was allowed and paid for more than he had in fact copied.

Smith v. Hedges (1914), 87 Misc. 439, 150 N. Y. Supp. 899.

At common law a taxpayer has right to bring an action of this character. And a person seeking to maintain an action under the statute must state every fact necessary to bring the case within the statute. *Bachia v. Piepenbrink* (1912), 77 Misc. 362, 136 N. Y. Supp. 435.

Where the complaint charges various sums as misapplied, and illegally paid, with knowledge that the same were without warrant of law, the allegations are sufficient without the averment that such appropriations were "waste of, or injury to," the funds of the municipality, which would merely be a pleader's conclusion of law. *Hicks v. Cocks* (1915), 167 App. Div. 862, 153 N. Y. Supp. 776.

Fraud or bad faith; unwise acts insufficient.—An action under § 1925 can be maintained only where the acts of public officials are illegal or where fraud or collusion or bad faith exists, but not to enjoin official acts which are simply unwise and improvident. *Admiral Realty Co. v. City of New York* (1912), 76 Misc. 345, 135 N. Y. Supp. 384.

Idem; complaint must allege.—A complaint in a taxpayer's action brought against the supervisor, auditors and clerk of a town, which in substance merely alleges that during a certain year the supervisor unlawfully paid the town clerk a certain sum of money, and that the town clerk unlawfully audited the claim, fails to state a cause of action. It is necessary to set out facts showing the illegality or fraudulent character of the claim. *Daly v. Haight* (1914), 163 App. Div. 239, 148 N. Y. Supp. 46.

A taxpayer in order to maintain an action against the supervisor and auditor of a town, must specifically allege facts which entitle him to maintain the action under the provisions of this section and section 51 of the general municipal law. *Daly v. Haight* (1914), 163 App. Div. 234, 148 N. Y. Supp. 42.

Parties.—Where a taxpayer is in no danger of being required to contribute to a municipal expenditure claimed by him to be illegal, and so far as appears the officers charged therewith have refused to make the alleged wasteful expenditure, an action cannot be maintained under § 1925. In order to obtain relief in such an action all the parties interested should be brought in. *Hanrahan v. Terminal Station Commission* (1912), 206 N. Y. 494.

Idem; persons to whom payments were made.—Persons to whom payments have been made by the supervisor of a town upon an alleged illegal audit by the board of auditors, are necessary parties to a taxpayer's action brought against the supervisor and board of auditors. *Daly v. Haight* (1914), 163 App. Div. 234, 148 N. Y. Supp. 42.

A municipality is not required to be joined in a taxpayer's action. The act is to enable the taxpayer himself to assert the rights of the municipality, by clothing the individual taxpayer with such representative power. In favor of such a remedy against a use of public money contended to be illegal, a somewhat liberal construction should be given. No doubt the town may voluntarily come in and make itself a party. Neither are the beneficiaries of the payments, alleged to be illegally made, necessary to be joined. Hicks

v. Cocks (1915) (App. Div.), 153 N. Y. Supp. 776.

Judgment on pleadings.—Where a complaint in a taxpayer's action fails to state a cause of action, and a demurrer has been interposed by some of the defendants and an answer by others, motions for judgment on the pleadings made by all the defendants will be granted. Gross v. Gaynor (1912), 78 Misc. 216, 139 N. Y. Supp. 177.

Section cited.—Riverdale Realty Co. v. City of New York (1915), 168 App. Div. 103, 153 N. Y. Supp. 742.

§ 1926. Actions by certain specified officers.

A trustee of a dissolved school district has a right to maintain in his official capacity an action to restrain an illegal con-

solidation. Bullock v. Cooley (1918), 183 App. Div. 529, 171 N. Y. Supp. 105.

§ 1929. Designation of such officers in the summons, etc.

Failure of plaintiff to state official capacity.—An objection that the plaintiff in his summons did not name himself as school district trustee cannot be taken for

the first time upon appeal. Bullock v. Cooley (1918), 183 App. Div. 529, 171 N. Y. Supp. 105.

§ 1931. When execution against officer not to issue.

Claims by school trustees for moneys paid in satisfaction of judgment recovered against them, cannot be allowed, as it is otherwise specially prescribed by law (education law, §§ 850-862) precisely how

and in what manner such claims may be allowed and paid. Matter of Humphrey (1916), 94 Misc. 377, 157 N. Y. Supp. 807.

§ 1932. Judgment against defendants jointly indebted, when all are not served.

One of two or more parties served.—Where the complaint is against the defendants, who are copartners, jointly, and not severally, judgment must be taken against all the defendants, although but one is served. The fact that the partner who is served had assumed and agreed to pay the partnership liabilities is of no avail. Brandagee v. Cleary (1915), 152 N. Y. Supp. 628.

All partners must be served with a summons in a suit of foreclosure of a mortgage in order that the purchaser may obtain a marketable title. Liebert v. Reiss (1916), 174 App. Div. 308, 160 N. Y. Supp. 535.

Judgment collectible out of copartnership property, although but one partner was personally served. Cohn v. King (1918), 172 N. Y. Supp. 288.

§ 1947. Continuance of partnership business during action for accounting, etc.

Appointment of receiver.—The courts should be cautious in appointing a receiver of a partnership, especially where the partnership agreement is denied and the business is not definitely defined. In so far as money has been received or is still to be received there is no occasion for appointing a receiver upon the application of one

of the partners, because a bond may be required of the alleged partners, if it appears that their financial condition is such as to require it for the protection of the applicant. Hannevig & Johnsen, Inc. v. Loughheed (1917), 180 App. Div. 579, 167 N. Y. Supp. 785.

§ 1948. Attorney-general may maintain action.

The law was framed for the purpose of protecting a public official from the at-

tacks of disappointed competitors and persons not actually aggrieved, and only those

that have actual grievances and can show that the office is illegally held are entitled to seek redress. *Matter of Carp* (1917), 179 App. Div. 387, 166 N. Y. Supp. 243.

Title to public office can only be determined by quo warranto. This remedy is exclusive. *Matter of Carp* (1917), 179 App. Div. 387, 166 N. Y. Supp. 243.

Corporations. — Where a corporation created by chapter 1033 of 1895, neither organized nor commenced the transaction of business within two years from the time when said act took effect, it is subject to the provisions of § 36 of the general corporation law and the attorney-general may maintain an action under § 1948

(3) against said corporation for exercising powers not granted to it. *People v. Stillwell* (1912), 78 Misc. 96, 138 N. Y. Supp. 693.

The title to public office can only be determined by an action brought by the attorney-general under the provisions of this section, though in certain cases an action in equity may be maintained where one person is actually in office and exercising the powers thereof, to restrain another from interfering with the acting official until the title to the position can be legally tested. *Jewell v. Mohr* (1912), 136 N. Y. Supp. 273.

§ 1957. Action to vacate letters patent; when attorney-general may maintain action.

Action under subdivision 2.—*People v. Ireland Realty Co.* (1916), 96 Misc. 18, 160 N. Y. Supp. 988.

§ 1962. Action for forfeiture, etc.

The state is not confined to the remedy of a civil action when it punishes misdemeanors by fine. *Chapman v. Selover* (1919), 225 N. Y. 417.

Section cited.—*Municipal Gas Co. v. Public Service Comm.* (1919), 225 N. Y. 89.

§ 1966. Action on recognizance.

Interest.—The recovery should be limited by the penalty and interest from the date

of the forfeiture should not be allowed. *People v. Parisi* (1916), 217 N. Y. 24.

§ 1969. Action in courts of the state for public funds illegally obtained, converted, etc.

Moneys paid for publication of notices.—Where a newspaper has been paid under a designation both as a state paper and a county paper, an action may be brought under this section to recover the sum paid under one of said designations. *People v. Journal Co.* (1913), 158 App. Div. 326, 143 N. Y. Supp. 389, aff'd 213 N. Y. 2.

Action to recover alleged excessive payments to publisher of state paper, see *People v. Journal Co.* (1914), 213 N. Y. 1.

If a state commission has acted in bad faith and has expended money outside of the scope of the appropriation a remedy is

provided under the provisions of this section. And it is peculiarly improper that the comptroller, who is alleged to have shared in some degree in the improper use of funds, should be called upon to audit the expenditures. *People ex rel. Heinrich v. Travis* (1916), 175 App. Div. 721, 161 N. Y. Supp. 860.

Moneys illegally raised and expended for lighting districts do not become town moneys, and if restoration be sought for the lighting districts it must be under this section. *Montgomery v. Smead* (1916), 97 Misc. 283, 161 N. Y. Supp. 431.

§ 1973. Limitation of action.

Application of section, see *People v. Journal Co.* (1914), 213 N. Y. 1, 9.

The statute of limitations to recover moneys erroneously audited and paid by

the state comptroller is ten years. *People v. Journal Co.* (1913), 158 App. Div. 326, 143 N. Y. Supp. 389, aff'd 213 N. Y. 2.

§ 1978. Action to recover property escheated; notice to be published before trial or judgment.

Purpose of notice.—In an action in ejectment by the state under the provisions of §§ 1977-1980, upon the theory that cer-

tain real estate has escheated to the state, the requirement regarding notice is designed, not as a limitation upon the juris-

diction of the supreme court, but as a protection to the heirs of persons dying possessed of real property within the state, and is merely a condition precedent to the right of the state to a judgment in its favor. *People v. Troupe* (1916), 171 App. Div. 1, 156 N. Y. Supp. 950.

§ 1986. Relator; when to be joined as plaintiff.

Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person, having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person. In such a case, the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people, against the costs and expenses thereof. Where security is so given all costs and disbursements taxed in favor of the plaintiff shall be payable to the relator.

Amended by L. 1918, ch. 104, in effect Sept. 1, 1918. The amendment of 1918 materially changed the entire section.

The complaint must allege that the attorney-general has required relator to furnish security to indemnify people against the costs and expenses of the action and that such security has been given. *People ex rel. Delehanty v. McIntyre* (1917), 179 App. Div. 528, 166 N. Y. Supp. 634.

§ 1990. When people, municipal corporation, etc., not required to give security.

Liability of municipal corporation for damages caused by injunction afterward vacated; contents of order.—There was no liability at common law for damages resulting from an injunction erroneously granted save in cases of malicious prosecution. The code requirements for security upon application for provisional remedies must be read in the light of the rule at common law, and invariably the undertaking required is limited to a sum specified by the court or judge. Special rules apply, however, to provisional remedies granted at the instance of municipal corporations. In such cases no security was required, but an amendment in 1894 modified the exemption so as to require that where a municipal corporation is excused from giving security on obtaining an injunction, such corporation shall be liable for all damages that may be sustained by the opposite party by reason of such order or injunction in the same case and to the same extent as sureties to an undertaking would have been if such an undertaking had been given. Sureties would be liable, however, to an extent not greater than the sum specified by the court or judge. The court or judge must, therefore, prescribe in the order of injunction the maximum extent to which a municipal corporation shall be liable. If the amount stated is too low, the defendant may move to increase it. Until some amount is stated, there is no liability on the part of the municipality. *City of Yonkers v. Federal Sugar Refining Co.* (1917), 221 N. Y. 206.

§ 1991. State writs enumerated.

Certiorari is a common law writ known from early times and issued by the Kings bench, the jurisdiction of which became vested in the supreme court of this state, and the method of the exercise of which is prescribed by the code of civil procedure. *People ex rel. Republican and Journal Co. v. Lazansky* (1913), 208 N. Y. 435.

Writ of habeas corpus a civil proceeding.

—A writ of habeas corpus to inquire into the detention of one confined in a prison under conviction and sentence is a civil, not a criminal, proceeding, to enforce a civil right, although its purpose is to effect the release of the person from imprisonment or custody under a criminal prosecution. *People ex rel. Curtis v. Kidney* (1919), 225 N. Y. 299.

§ 1994. Relator, when joined with people; parties, how styled.

Requirement that writ be issued upon relation of private person.—The requirement, that a writ of mandamus awarded upon the application of a private person must show that it was issued upon the relation of that person, is not dispensed with by anything in the provisions of § 2070. *People ex rel. Dunphy v. Chaney* (1916), 171 App. Div. 303, 156 N. Y. Supp. 1035.

§ 2005. Persons served to obey; as to certiorari.

Papers on return.—Upon the demand of a relator accompanied by the tender of the fees as prescribed by law, it is the duty of the state board of tax commissioners to furnish sworn and certified copies of the papers incorporated into a return by reference, but it is discretionary with the board to permit inspection of its records with a privilege of making copies of the same. *Attorney-General Rep.* (1912), page 406.

§ 2008. Habeas corpus to testify; when allowed by court or judge.

Order of arrest; power to vacate.—Where a defendant arrested in a civil action was brought before the court upon a writ of *habeas corpus ad testificandum* the court has no authority summarily and without notice to the plaintiff to vacate the order of arrest, and especially so where previous applications to vacate the order have been denied. *Polo v. D'Achille* (1913), 157 App. Div. 300, 142 N. Y. Supp. 511.

§ 2011. The last three sections qualified.

Such a writ may be issued by the appellate division of the supreme court in any department, or by the presiding justice thereof, upon such terms and conditions, and under such regulations as such appellate division or presiding justice prescribed, to bring up a prisoner sentenced to death, upon the application of or upon notice to the district attorney of the county in which the attendance of the prisoner is desired and upon proof that such prisoner is a necessary and material witness in a criminal action then pending and that the interests of public justice require his attendance.

A writ shall not be issued, by virtue of either of the last three sections, or in any way except as in this section provided for, to bring up a prisoner sentenced to death. Nor shall it be issued to bring up a prisoner confined under any other sentence for a felony; except by and in the discretion of a justice of the supreme court upon such notice to the district attorney of the county wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations, as the judge prescribes.

Amended by L. 1880, ch. 301; L. 1895, ch. 946; L. 1914, ch. 133; L. 1915, ch. 354. in effect April 23, 1915. The amendment of 1914 omitted from between the word "except" and the word "by" in the last sentence, the words "where the application is made in behalf of the people to bring him up as a witness on the trial of an indictment, and then only." The amendment of 1915 added the entire first paragraph and inserted the words "or in any way except as in this section provided for," in the last sentence.

Source.—New.

§ 2015. Who entitled to prosecute the writs. Habeas corpus may issue on Sunday.

The presentation to the governor of this state of a copy of a duly certified information, with the requisition of the governor of another state demanding relator's extradition, charging relator with the commission of an offense certified by such demanding governor to be a crime in his state, is sufficient to require the surrender of the relator. Where relator refuses to offer any evidence as to his whereabouts at the time the crime charged was committed, the statements in the governor's warrant must be taken as proof of the fact that relator was corporeally present in the state at the time the crime charged was committed. *People ex rel. Currier v. Chief of Police* (1916), 97 Misc. 254, 162 N. Y. Supp. 845.

§ 2016. When neither writ shall be allowed.

When writ dismissed.—Where a petition for a writ of habeas corpus shows that relator was duly convicted of murder in the second degree and duly sentenced to life imprisonment in a state prison from which he was transferred to a state hospital as an insane person, the writ must be dismissed on the ground that on the face of the petition it appeared that relator was detained by virtue of a final judgment of a competent tribunal of criminal jurisdiction. *People ex rel. Stephani v. North* (1915), 91 Misc. 616, 155 N. Y. Supp. 595.

Delay in prosecution.—One charged with crime cannot invoke the aid of a writ of habeas corpus in order to obtain a discharge from imprisonment because of a delay in prosecution. *People ex rel. McGowan v. Warden of City Prison* (1914), 155 App. Div. 484, 140 N. Y. Supp. 864.

Jurisdiction.—A writ of habeas corpus cannot perform the functions of an appeal from a judgment of conviction; the court can only inquire into the question of jurisdiction and if it appears that the power existed to pronounce the judgment, the writ must be dismissed. *People ex rel. Hubert v. Kaiser* (1912), 206 N. Y. 46.

The question of jurisdiction of the court of general sessions which imposed sentence upon relator is properly raised on a writ of habeas corpus. *People ex rel. McKenna v. Kennedy* (1912), 78 Misc. 482, 138 N. Y. Supp. 581.

Guilt or innocence.—Habeas corpus is not a proper proceeding to try the question of the guilt or innocence of one accused of crime. *People ex rel. Edelstein v. Warden of City Prison* (1912), 154 App. Div. 261, 138 N. Y. Supp. 1095.

Relief from unlawful imprisonment.—The writ of habeas corpus is not a writ of review; its sole function is to relieve from unlawful imprisonment, and the sole inquiry whether the mandate or the judgment by virtue of which the prisoner is detained is void. *People ex rel. Hubert v. Kaiser* (1912), 150 App. Div. 541, 135 N. Y. Supp. 274.

Imprisonment at hard labor.—A judgment convicting a defendant of petit larceny not charged as a first offense is not illegal and excessive because it includes a provision that he be imprisoned "at hard labor." *People ex rel. Gainance v. Platt* (1911), 148 App. Div. 579, 132 N. Y. Supp. 939.

§ 2017. How and to whom application for habeas corpus or certiorari made.

The provisions of the insanity law, conferring upon one in custody as an insane person a right to a writ of habeas corpus to determine his sanity, do not prescribe the procedure in such cases, and hence it is regulated by the provisions of the code of civil procedure, which, among other

things, vest the supreme court at special term with full and complete authority to entertain and finally determine such proceedings. *People ex rel. Woodbury v. Hendrick* (1915), 168 App. Div. 553, 163 N. Y. Supp. 188.

§ 2028. Proceedings on disobedience of writ.

An *ex parte* order adjudging a defendant guilty of criminal contempt in willfully disobeying a writ of habeas corpus

is unauthorized by this section. *People ex rel. Bishop v. Bishop* (1918), 184 App. Div. 297, 171 N. Y. Supp. 562.

§ 2031. Proceedings on return of habeas corpus.

Irregularities precluding discharge of prisoner.—Where it does not appear upon whom a writ of habeas corpus was served, or by whom the prisoner was produced before the supreme court, or that any notice of the proceeding was given to a person interested in continuing the imprisonment, or that any one made formal return to the writ, as required by the statute, the court has no jurisdiction to direct the discharge of the prisoner. *People v. Warden Kings County Jail* (1914), 160 App. Div. 408, 145 N. Y. Supp. 1064.

Matters to be determined.—Whether a judge conducting the trial of a cause is a *de facto* judge or not may be determined in habeas corpus proceedings. *People v. Hayes* (1914), 86 Misc. 88, 149 N. Y. Supp. 115.

Evidence, when to be taken.—Proceedings having been instituted in the supreme court, by means of a writ of habeas corpus, to recover from the guardian custody of a child, upon the return and traverse to which other facts were alleged than those testified to on a previous hearing, the special term should have taken evidence upon the issues of fact presented instead of sustaining the writ upon the papers. *Matter of Lee* (1917), 220 N. Y. 532.

Jury trial.—There is ample precedent for the impaneling of a jury to aid in trying the issues of fact raised upon the traverse to the return in a habeas corpus proceeding. *People v. Gripenhagen* (1915), 154 N. Y. Supp. 965.

§ 2032. When prisoner to be remanded.

Constitutionality.—Section 2032 requiring the court on habeas corpus to remand the prisoner if he is detained "By virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction," is not unconstitutional. *People ex rel. Hubert v. Kaiser* (1912), 150 App. Div. 541, 135 N. Y. Supp. 274; see *People ex rel. Goldstein v. Clancy* (1914), 163 App. Div. 614, 616, 148 N. Y. Supp. 977.

Where the magistrate who pronounced final judgment on a person for disorderly conduct had jurisdiction of the person and of the offense and had power to impose the sentence under which the relator is held, the matter is determined as a final judgment so far as relator under the writ of habeas corpus is concerned, and the court before which the writ is returnable is precluded from reviewing the evidence on which the judgment rests. *Cohen v. Warden of Workhouse* (1913), 150 N. Y. Supp. 596.

Excessive punishment.—A judgment convicting a defendant of petit larceny not charged as a first offense is not illegal and excessive because it includes a provision that he be imprisoned "at hard labor." *People ex rel. Gainance v. Platt* (1911), 148 App. Div. 579, 132 N. Y. Supp. 939.

Inquiry as to jurisdiction.—A writ of habeas corpus cannot perform the functions of an appeal from a judgment of conviction; the court can only inquire into the question of jurisdiction and if it appears that the power existed to pronounce the judgment, the writ must be dismissed. *People ex rel. Hubert v. Kaiser* (1912), 206 N. Y. 46.

Not a writ of review.—Habeas corpus is not a writ of review, and errors of law

and mere irregularities or errors of judgment committed by the court, whose judgment, decree or process is in question, cannot be inquired into or corrected thereunder. *People ex rel. Price v. Hayes* (1912), 151 App. Div. 561, 136 N. Y. Supp. 854.

Sufficiency of indictment in another state.

—The only question before the court on habeas corpus for the release of a person alleged to be a fugitive from justice from another state, are whether the relator is unlawfully deprived of his liberty, and whether the governor of this state in honoring the demand of a foreign state has acted without authority of law. It is not enough for the relator to show that the indictment is defective under the laws of this state; he is bound to overcome the presumption that the governors of the two states have performed their duties under the laws of the United States. *People ex rel. Marshall v. Moore* (1915), 167 App. Div. 479, 153 N. Y. Supp. 10.

A decision of the court of special sessions cannot be reviewed on the hearing of a writ of habeas corpus. That writ is not a substitute for a writ of error or an appeal. *People v. Warden of N. Y. County Penitentiary* (1917), 168 N. Y. Supp. 704.

Relator not entitled to parole.—A writ of habeas corpus must be dismissed, irrespective of the legality of a parole under which the relator has been at liberty, where it appears that he is being held by virtue of a final judgment of a competent tribunal of criminal jurisdiction, and it does not appear that his time of service under said judgment has expired. *People ex rel. Johnson v. Kidney* (1918), 185 App. Div. 769, 173 N. Y. Supp. 388.

§ 2034. The last section qualified.

Inquiry; as to jurisdiction.—A writ of habeas corpus cannot perform the functions of an appeal from a judgment of conviction; the court can only inquire into the question of jurisdiction, and if it appears that the power existed to pronounce the judgment, the writ must be dismissed. *People ex rel. Hubert v. Kaiser* (1912), 206 N. Y. 46.

Idem; guilt of party.—The question as to whether or not a party is guilty of the offense charged cannot be determined on a proceeding for a writ of habeas corpus. *People ex rel. Isaacs v. Moran* (1912), 150 App. Div. 226, 134 N. Y. Supp. 931.

Upon habeas corpus proceedings the court may look back of the warrant to see if the facts stated in the depositions of the prosecutor conferred jurisdiction upon the magistrate to issue the warrant. *People ex rel.*

Wilson v. Warden of City Prison (1912), 151 App. Div. 108, 135 N. Y. Supp. 841.

Idem; merits not considered.—Upon a hearing in habeas corpus proceedings to inquire into the cause of detention of relator, who was under indictment for murder in the first degree, the court will not go behind the indictment to inquire into the merits. *People ex rel. Burke v. McLaughlin* (1912), 77 Misc. 13, 136 N. Y. Supp. 122.

Not a writ of review.—Habeas corpus is not a writ of review, and errors of law and mere irregularities or errors of judgment committed by the court, whose judgment, decree or process is in question, cannot be inquired into or corrected thereunder. *People ex rel. Price v. Hayes* (1912), 151 App. Div. 561, 136 N. Y. Supp. 854.

§ 2035. Proceedings on irregular commitment.

Offense charged, not supported by evidence.—Where the warrant of commitment is the sole authority for the confinement which is being inquired into in a habeas corpus proceeding, and where it specifies as the crime with which the accused is charged an offense which is not supported by the evidence, and wholly fails

to specify the crime which the evidence does tend to establish, it is not simply "irregular" and may not be made the basis for holding the accused on account of the latter offense, under the provisions of § 2035. *People ex rel. Howey v. Warden*, etc. (1913), 207 N. Y. 354.

§ 2039. Prisoner may controvert return; proofs thereupon.

Evidence in support of return.—Section 2039 providing that a prisoner produced upon the return to a writ of habeas corpus may controvert the return, does not authorize the special term to accept as true statements of fact contained in his answer to the return without evidence to support them. *People ex rel. Moore v. Holmes* (1912), 151 App. Div. 257, 135 N. Y. Supp. 467.

Summary procedure.—The command of the statute for a "summary" way of procedure, means that it shall be prompt and without unreasonable and unnecessary delay, but whether the question of fact as to the sanity of the prisoner should be

submitted to the jury for the aid of the court, is within the discretion of the justice to be decided by the circumstances of the particular case. The trial justice is not precluded by this section from calling a jury. *People ex rel. Woodbury v. Hendrick* (1915), 215 N. Y. 339.

Jury trial.—The court has power to try issues of fact in a habeas corpus proceeding with the aid of a jury. *People v. Grifenhagen* (1915), 154 N. Y. Supp. 965.

Insanity law.—This section and § 93 of the insanity law are mutually exclusive. *People v. Grifenhagen* (1915), 154 N. Y. Supp. 965.

§ 2043. When discharge to be granted; when proceedings to cease.

If it appears, that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order, discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order, dismissing the proceedings. A final order made in a proceeding brought on behalf of a person imprisoned or detained in any of the state hospitals mentioned in section forty of the insanity law or in the Matteawan State hospital or in the Dannemora hospital for insane convicts, shall be conclusive evidence, upon a hearing of any subsequent proceeding involving the detention of the same person, of all the facts determined by the court, unless such final order shall otherwise specify.

Amended by L. 1913, ch. 544, in effect May 16, 1913. The amendment of 1913 added the last sentence.

Source.—R. S., pt. 3, ch. 9, tit. 1, § 51.

§ 2058. When appeal may be taken in cases under this article.

Application.—*People ex rel. Woodbury v. Hendrick* (1915), 168 App. Div. 553, 153 N. Y. Supp. 188.

Appeal from order of discharge.—The first sentence of § 2058 gives the people the unqualified right to appeal from a final order discharging the prisoner. The succeeding sentence is permissive and was intended to authorize an appeal before bail is given, where the discharge, instead of being absolute, is conditional, and to provide that in such case an appeal by the people should not stay the discharge of

the prisoner upon giving bail. *People ex rel. Hubert v. Kaiser* (1912), 206 N. Y. 46.

Suspension of privilege of habeas corpus.—Section 2058 authorizing an appeal by the people from an order discharging a prisoner on habeas corpus is not invalid on the theory that it suspends the privilege of the writ of habeas corpus contrary to the provisions of the state and federal constitutions. *People ex rel. Hubert v. Kaiser* (1912), 150 App. Div. 541, 135 N. Y. Supp. 274.

§ 2059. Appeal by people.

Necessity that appeal be in name of people.—An appeal must be taken in the name of the people as required by this section or it will be dismissed. *People v. Gittens* (1913), 209 N. Y. 527.

§ 2062. Admission to bail; on appeal to court of appeals.

A prisoner held under conviction of a crime and the court has no power to admit the prisoner to bail pending an appeal. *People ex rel. Hubert v. Kaiser* (1912), 150 App. Div. 915, 135 N. Y. Supp. 694.

§ 2066. Application of this article to other writs of habeas corpus.

A proceeding under the insanity law is one of the cases mentioned in this section as "otherwise expressly provided for by statute." *People v. Grifenhagen* (1915), 154 N. Y. Supp. 965.

§ 2067. Kinds of writ; how alternative writ granted.

A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation board, or other body, officer, or other person to which or to whom it is directed.

Amended by L. 1913, ch. 574, in effect Sept. 1, 1913. The amendment of 1913 omitted at the end of the first sentence the words "and either with or without previous notice of the application, as the court thinks proper;" and added the last sentence. Source.—New.

A writ of mandamus is an extraordinary remedy, not demandable as matter of right, and whether it shall be granted in a given case rests in the sound discretion of the court. When such a remedy is sought a clear and unquestioned legal right must be presented, for the writ will not issue in doubtful cases. So where there are questions both of law and fact they should be determined in an action. *Matter of Brooklyn Improvement Co. v. Pounds* (1916), 174 App. Div. 448, 161 N. Y. Supp. 150; *People ex rel. Clements v. Williams* (1917), 100 Misc. 569, 166 N. Y. Supp. 560.

The court can be moved in a proceeding under § 381 of the election law, only by allegations of the nature and quality essential, under the settled rules, on the part of an applicant for the issuance of the writ of mandamus as provided by the common law or by the code. *Matter of Whitman* (1918), 225 N. Y. 1.

Receiving amount of tax and compelling cancellation of lien.—A motion to compel the collector of assessments and arrears of the city of New York, upon his refusal to accept the amount of a tax lien, tendered by a person interested in the premises, to receive payment and cancel a "transfer of tax lien" is unauthorized and will be denied, the proper remedy being mandamus. *Matter of Connell* (1912), 77 Misc. 251, 137 N. Y. Supp. 667.

When mandamus lies; to review acts of discretion.—The general rule is that mandamus will not lie to review the determination of public boards or officers in matters involving the exercise of discretion or judgment, if they have proceeded within their jurisdiction, and in substantial compliance with the forms of law. *People v. Board of Education* (1914), 212 N. Y. 463, aff'g 160 App. Div. 557, 145 N. Y. Supp. 853.

Idem; against foreign corporation.—When a foreign corporation accepts a license to do business in this state or does some act which subjects itself to the jurisdiction of this state, it may be treated as a domestic corporation to the extent of rendering it subject to the writ of mandamus. Where, however, it has not been authorized to do business in this state and has done no act to subject it to the jurisdiction of this state, its actions in reference to its internal affairs may not be controlled by the writ of mandamus. *People ex rel. Solomon v. Brotherhood of Painters* (1916), 218 N. Y. 115.

Idem; to compel counting of votes.—A writ of mandamus directing the inspectors of election of a town meeting where local option questions under the liquor tax law were voted upon to count certain ballots which were by them returned as void, is a proceeding that may not be entertained by virtue of any inherent powers of the court,

but must find authorization and support in the express provisions of some statute or statutes. *Tamney v. Atkins* (1913), 209 N. Y. 202, rev'g 151 App. Div. 309, 136 N. Y. Supp. 865.

Idem; requiring election officials to perform duties.—While mandamus will not issue for the doing of a vain thing, or a thing physically or mentally impossible, it should not be refused because it imposes a difficult task or one which might upon attempt prove impossible, and, hence, the writ may require election officers to attempt to perform their statutory duties although compliance therewith may prove to be difficult. *People ex rel. Brown v. Freisch* (1915), 168 App. Div. 370, 153 N. Y. Supp. 277.

Idem; election to federal office.—The writ of mandamus may issue from a state court to require election officers to fulfill their duties, although it concerns an election to a federal office. *People ex rel. Brown v. Freisch* (1915), 168 App. Div. 370, 153 N. Y. Supp. 277.

Idem; where question involved is simply matter of departmental discipline.—Where a proceeding of a board of education involves simply a matter of school discipline, it is not subject to review by mandamus. Thus, where a teacher is dismissed on a charge of neglect of duty, the proceedings will not be reversed by mandamus. *People v. Board of Education* (1914), 212 N. Y. 463, aff'g 160 App. Div. 557, 145 N. Y. Supp. 853.

Idem; qualified abandonment of highway.—Where a petition alleges that a filing in the town's clerk's office by the superintendent of highways of a certificate of qualified abandonment of a highway pursuant to § 234 of the highway law is colorable only and part of a wrongful and fraudulent scheme to permanently abandon the road and deprive petitioner and the public of its benefit, relator will be granted an alternative writ of mandamus requiring the superintendent of highways to cancel such certificate and put the highway in a suitable condition for travel. *Matter of Marvin* (1915), 91 Misc. 287, 155 N. Y. Supp. 28.

Idem; to compel town superintendent of highways to perform duties.—Mandamus lies to compel a town superintendent of highways to perform his statutory duties. *Matter of Marvin* (1915), 91 Misc. 287, 155 N. Y. Supp. 28.

Idem; to compel restoration to membership in benevolent society.—Although the constitution of a society provides that a member may file a written appeal from a decision of the society, which the president shall read at the next meeting, and if the majority are of the opinion that an injustice has been done, or that the decision is contrary to the constitution, the matter may be taken up *de novo*, a member who has been expelled is not limited to such remedy within the society itself,

but may invoke the writ of mandamus to compel his restoration to membership. *People v. Bernstein Sick, etc., Benefit Soc.* (1914), 161 App. Div. 823, 146 N. Y. Supp. 886.

Idem; to try title to office.—Under the law of the state of New York, a proceeding by mandamus really designed to try the title to an office held by another, to which the incumbent of the office is not a party, is not a proper or available remedy. *People v. Sohmer* (1914), 211 N. Y. 565, aff'g 162 App. Div. 921, 146 N. Y. Supp. 1108.

Mandamus will not lie against voluntary unincorporated associations in the absence of some statutory duty imposed on them. *People ex rel. Solomon v. Brotherhood of Painters* (1916), 218 N. Y. 115.

Dismissal of application for writ as bar to further application.—An application for a writ of mandamus is not barred where an application for a prior writ for the same purpose was dismissed "without prejudice" and there was no decision upon the merits. *People v. Bernstein Sick, etc., Soc.* (1914), 161 App. Div. 823, 146 N. Y. Supp. 886.

Refusal of writ as bar to subsequent application for writ on other grounds.—Although a member of a mutual benefit society incorporated under the membership corporation law has been suspended for three years for misconduct, and although a writ of mandamus to compel his reinstatement on account of such suspension has been refused by the court, that is no bar to a subsequent application for a reinstatement by mandamus where he was subsequently expelled for an alleged failure to pay dues. *People v. Philip Bernstein Sick, etc., Soc.* (1914), 161 App. Div. 823, 146 N. Y. Supp. 886.

Review of verdict.—Where the jury finds for the relator on the trial of an alternative writ of mandamus, but a motion for a peremptory writ is denied, the verdict cannot be reviewed upon appeal where there was no motion for a new trial. *People v. Johnson* (1914), 161 App. Div. 625, 146 N. Y. Supp. 977.

An alternative writ of mandamus is in the nature of an order to show cause. It affects no substantial right because it determines nothing for or against either party, except questions as to the jurisdiction of the court. *People ex rel. Wilson v. African W. M. E. Church* (1913), 156 App. Div. 386, 141 N. Y. Supp. 394.

Idem; affidavits raising question of fact.—Where, on a proceeding by an order to show cause seeking a writ of mandamus, the opposing affidavits put in issue questions of fact, the court may issue an alternative writ. *People ex rel. Goldschmidt v. Travis* (1915), 167 App. Div. 475, 152 N. Y. Supp. 1058.

Laches.—Where a county has unlawfully appropriated taxes upon bank stock, a city entitled to receive the same may enforce its

right by action, though, under some circumstances, mandamus is also a proper remedy. But where there has been a long delay by the city in enforcing its right and the moneys collected may have gone into the general fund of the county and have been diverted to other purposes, so that a tax levy may be necessary to satisfy the claim of the city, the writ of mandamus should be denied upon the ground of laches and the city should be left to

its remedy by action. *People ex rel. City of Tonawanda v. Fitzhenry* (1915), 170 App. Div. 227, 156 N. Y. Supp. 70.

Where an issue of fact such as laches is raised, an alternative rather than a peremptory writ should issue in cases where mandamus is an appropriate remedy. *People ex rel. City of Tonawanda v. Fitzhenry* (1915), 170 App. Div. 227, 156 N. Y. Supp. 70.

§ 2068. When writ granted at special term.

Jurisdiction of county court to issue peremptory writ of mandamus under the drainage law. *People ex rel. Dunphy v.*

Claney (1916), 171 App. Div. 303, 156 N. Y. Supp. 1035.

§ 2070. When peremptory mandamus to issue in first instance.

A peremptory writ of mandamus issues only where the applicant's right to it depends upon questions of law. In every other case it cannot be issued until after an alternative writ. Where opposing affidavits are read which are in conflict with the averments in the affidavits of the relator, and notwithstanding this the relator demands a peremptory writ, it is equivalent to a demurrer, and the question as to the right to the writ must be determined upon the assumption that the averment of the opposing affidavits are true. *People ex rel. Giles v. Klauder-Weldon D. M. Co.* (1917), 180 App. Div. 149, 167 N. Y. Supp. 429.

Review by appeal.—Upon an appeal to the appellate division from an order simply denying an application for a peremptory writ of mandamus, when the answering affidavits, if true, constitute a defense, there is nothing for the court to review. *Matter of Whitten* (1912), 152 App. Div. 506, 137 N. Y. Supp. 360.

Issuance of writ in discretion of court.—The mere existence of an undisputed legal right, although necessary to the granting of a writ of mandamus, is not of itself sufficient to require the issuance of the writ, for that rests in the sound judicial discretion of the court. *People ex rel. Britton v. Am. Press Assn.* (No. 1) (1912), 148 App. Div. 651, 133 N. Y. Supp. 216; *Matter of Aquino v. Riegelman* (1918), 104 Misc. 228, 171 N. Y. Supp. 716.

The writ of mandamus is not always demandable as an absolute right, and whether it shall be granted or not frequently rests in the discretion of the court. The writ will be granted to prevent failure of justice, but never to promote manifest injustice. It is a remedial process and may be used to remedy a wrong, but not to promote one; to compel the discharge of a duty which ought to be performed, but not to compel the performance of an act which will work a public o pri-

vate mischief, or to compel a compliance with the strict letter of the law in disregard of its spirit or in aid of a palpable fraud. The relator must come into court with clean hands, and he cannot invoke this extraordinary remedy to gain an advantage which would not be accorded him in a court of law or equity. *People ex rel. B. D. Pierce, Jr. Co. v. Sohmer* (1915), 167 App. Div. 437, 153 N. Y. Supp. 195.

Idem; performance of futile act.—The writ of mandamus is prerogative in character issuing only in the discretion of the court and will not be granted to compel the performance of a futile act. *People ex rel. Lindgren v. McGuire* (1912), 151 App. Div. 413, 136 N. Y. Supp. 88.

Idem; inspection of books of corporation.—The common law right of a stockholder to inspect the books of his corporation has not been changed, and the court in its discretion may enforce the right by a peremptory writ. *Matter of Wygant* (1917), 101 Misc. 509, 167 N. Y. Supp. 369.

Questions in advance of action.—While ordinarily courts will not assume jurisdiction to decide questions in advance of some action taken or refused, actually involving the rights of persons interested, where the situation is exceptional and extraordinary, and the facts warrant the remedy, a peremptory writ of mandamus may issue. *People ex rel. Hotchkiss v. Smith* (1912), 206 N. Y. 231.

Petition based on information and belief.—A peremptory writ of mandamus will not be issued upon a petition based on information and belief. *People ex rel. Keating v. Prendergast* (1912), 151 App. Div. 541, 136 N. Y. Supp. 184.

Truth of opposing affidavit assumed.—On a motion for a peremptory writ of mandamus the allegations of the opposing affidavits will be considered to be true. If the relator, notwithstanding the conflicting statements in the affidavit, still demands a peremptory writ, it is equivalent to a demurrer. *Matter of Rexford Flats*

Bridge Co. (1915), 168 App. Div. 558, 153 N. Y. Supp. 154.

Issuance of alternative writ after denial of peremptory writ.—Where a peremptory writ is denied because the relator is not entitled thereto, if the allegations of the return are taken to be true, the relator may request that an alternative writ issue. *Matter of Rexford Bridge Co.* (1915), 168 App. Div. 558, 153 N. Y. Supp. 154.

Due process of law.—The legislature may provide a remedy by mandamus so long as the constitutional guaranty of due process of law is observed. *Public Service Commission v. New York R. Co.* (1912), 77 Misc. 487, 136 N. Y. Supp. 720.

Contract; compelling sewer commission to enter into.—Where a contract is awarded to relator, the lowest bidder, by the sewer commission, for the building of an outlet and they refuse to enter into the contract, pleading lack of available funds, a peremptory writ of mandamus is proper where there is money for construction purposes and no preference as to matter of payments. *People ex rel. Phoenix Const. Co. v. Hoyle* (1912), 75 Misc. 515, 133 N. Y. Supp. 669.

Peremptory writ granted; to compel hearing of charges.—Where the letter of the commission of bridges of the city of New York requiring relator to appear before him on April 26, 1912, at ten a. m., was not delivered until after five p. m. on April 25, 1912, and an adjournment was refused, relator was not given a fair opportunity to make an explanation of the charges against him as guaranteed by § 1543 of the Greater New York Charter; and he is entitled to a peremptory writ of mandamus to compel said commissioner to give him a hearing. *People ex rel. La Chicotte v. O'Keefe* (1913), 80 Misc. 344, 141 N. Y. Supp. 28.

Idem; to compel inspection of reports.—A writ of mandamus will lie to compel the commissioners of water supply to the city of New York to afford taxpayers in that city an opportunity to inspect reports of engineers relating to the passing upon and awarding a contract under the provisions of chapter 724 of 1905, although the petitioner does not allege that he has suffered special injury or that he contemplates bringing a taxpayer's action. *Matter of Egan* (1912), 205 N. Y. 147.

Idem; to compel public officer to perform duties.—Where a public officer announces that he will not comply with the requirements of a statute, mandamus lies to compel him to do so and any citizen may institute proceedings to compel a public officer to perform duties of a public character. *People ex rel. Hotchkiss v. Smith* (1912), 152 App. Div. 514, 137 N. Y. Supp. 387, *aff'd* 206 N. Y. 231.

Although certiorari will not lie to review the action of the board of supervisors in making an improper designation, man-

damus may lie to compel them to perform their official duty. *People ex rel. Guernsey v. Somers* (1912), 153 App. Div. 623, 130 N. Y. Supp. 761.

Idem; to compel reclassification of positions.—Where the comptroller has refused to countersign a warrant passed by the common council and approved by the mayor, in mandamus proceedings to have a position reclassified by civil service commission, on application for a peremptory writ of mandamus directed to the comptroller requiring him to sign and deliver, it was held the common council had authority to allow the claim and relator was entitled to the relief asked for. *Matter of Peters v. Justice* (1912), 75 Misc. 504, 133 N. Y. Supp. 847.

Peremptory writ denied; in application for re-instatement of official.—Where relator, a volunteer fireman, was suspended as foreman in the bureau of highways, a classified civil service position, pending the disposition of charges against him for forgery and grand larceny, and after his acquittal from them and upon application for peremptory writ of mandamus for re-instatement, opposing affidavits set forth corrupt practices in public service, the writ will be refused. *Matter of Burke v. Connolly* (1912), 76 Misc. 337, 135 N. Y. Supp. 179.

Idem; to compel re-instatement of militia officer.—The retirement of a commissioned officer because of age limit under the military law is not a removal from office or an infringement of constitutional rights and he is not entitled to a peremptory writ of mandamus to compel his re-instatement. *Matter of Kirby* (1912), 76 Misc. 313, 134 N. Y. Supp. 905.

Idem; to reverse decree of surrogate on final settlement.—Where a decree of the surrogate on final judicial settlement has not been appealed from, he cannot be compelled by mandamus proceedings to reverse his decree as to an issue formally raised on such judicial settlement. *Matter of DeNuber v. Millard* (1912), 152 App. Div. 774, 137 N. Y. Supp. 731.

Idem; because of laches.—Where a period of fifteen years has elapsed between the enactment of a statute relative to the cancellation of tax sales and the application for relief by a person claiming the benefit thereof, a writ of mandamus is properly denied for laches of the relator. *People ex rel. Staples v. Sohmer* (1912), 206 N. Y. 39.

Idem; continuing duty or duty arising in future.—A peremptory writ of mandamus is not the appropriate remedy to compel performance of a continuing duty or duty arising in the future. *Matter of Public Service Commission v. Interborough Rapid Transit Co.* (1916), 172 App. Div. 324, 158 N. Y. Supp. 480.

Idem; to compel payment on highway contract.—Where the allegations of a petition by a contractor that it has duly per-

formed its contract for the construction of a state highway; that said highway has been accepted by the state, and that there is a certain balance due, are controverted by an affidavit of the state commissioner of highways, to the effect that said contract has not been duly performed; that the acceptance of the highway was void and of no effect, for the reason that at the time it was not completed, as provided in the contract, and said acceptance was based upon insufficient and incorrect information and was subsequently rescinded; and by a report attached to said affidavit giving details of alleged defects in the highway, making it practically valueless within one

year of its alleged completion, which, if true, constitute a fraud upon the people of the state, a peremptory writ of mandamus should not be issued compelling the payment of the amount due under the contract. *People ex rel. B. D. Pierce, Jr., Co. v. Sohmer* (1915), 167 App. Div. 437, 153 N. Y. Supp. 195.

Idem; when dispute as to questions of act.—A peremptory writ of mandamus will not issue except in the case of clear legal rights, and it should not be granted if there is any dispute on questions of fact. *Matter of Rexford Bridge Co.* (1915), 168 App. Div. 558, 153 N. Y. Supp. 154.

§ 2073. Return or demurrer to first writ.

Effect of opposing affidavits.—Where a petition for a peremptory writ of mandamus is met by opposing affidavits of the respondent, the relator standing upon the pleadings, is in the position of a demurrant who admits the facts alleged by the respondent. *Matter of Hitchcock* (1912),

149 App. Div. 824, 134 N. Y. Supp. 174.

Res judicata.—The allowance of the alternative writ does not render the question of its sufficiency *res judicata* for if it were so this section would, in some cases, be rendered nugatory. *Reynolds v. Williams* (1914), 154 N. Y. Supp. 407.

§ 2076. Contents of alternative writ; demurrer thereto.

Practice.—Where a petition for a peremptory writ of mandamus is met by opposing affidavits of the respondent, the relator, standing upon the pleadings, is in the position of a demurrant who admits the facts alleged by the respondent. *Matter of Hitchcock* (1912), 149 App. Div. 824, 134 N. Y. Supp. 174.

Form.—An alternative writ is insufficient which does not contain a statement of facts constituting the grievance to redress which it is issued, but merely contains legal conclusions or deductions of illegality based upon facts assumed *arguendo*, but not stated. *Reynolds v. Williams* (1914), 154 N. Y. Supp. 407.

§ 2077. Form and contents of return.

Adequate legal remedy.—The objection that an applicant for a writ of mandamus has an adequate legal remedy, must be set up in the return. *Matter of Mahoney v. Board of Education* (1917), 179 App. Div. 782, 167 N. Y. Supp. 222.

Answering affidavit accepted as true.—On an application for a peremptory writ

of mandamus requiring a city magistrate to take and receive an information against one charged with crime, the answering affidavit of the respondent must be accepted as true. *People ex rel. Lindgren v. McGuire* (1912), 151 App. Div. 413, 136 N. Y. Supp. 88.

§ 2078. Further return cannot be compelled; demurrer to return.

Reply affidavits setting forth new matter.—On an application for an alternative writ of mandamus the relator should not be permitted to submit an affidavit in reply to the return and controverting statements therein contained and setting forth additional matters in support of his petition. The consideration of such additional affidavit is error and it should be stricken from the record. *Matter of Griffin v.*

Williams (1915), 168 App. Div. 63, 153 N. Y. Supp. 926.

Effect of failure to demur.—Where the return to an alternative writ of mandamus to compel the reinstatement of a civil service appointee admitted the correctness of the charges as set forth by the relator, by a failure to demur, there is an admission of the formal sufficiency of the charges. *People ex rel. Rudd v. Cropsey* (1916), 173 App. Div. 714, 159 N. Y. Supp. 641.

§ 2079. Issues of fact; when it arises.

Issues of fact from the pleadings.—The writ and return thereto are in substance pleadings upon which issues of fact or law

arise according as there may be demurrers or denials of the facts alleged. Upon these pleadings the issues are to be de-

terminated and no substantial right is affected until such determination. Hence, an alternative writ cannot be quashed or set aside upon motion for any matter involving the merits. *People ex rel. Wilson v. African W. M. E. Church* (1913), 156 App. Div. 386, 141 N. Y. Supp. 394.

§ 2080. Application of certain provisions of chapter sixth.

Amendment of writ.—See *Reynolds v. Williams* (1914), 154 N. Y. Supp. 407.

§ 2087. Appeals.

An appeal from an order granting a peremptory writ of mandamus, where an alternative writ of mandamus was not previously issued, and an appeal from an order granting or denying an application for an alternative writ of mandamus, must be taken as from a final order made in a special proceeding. An appeal from a final order made upon an alternative mandamus, must be taken as an appeal from a judgment; and each provision of law, relating to an appeal from a judgment, either to the appellate division or to the court of appeals, is applicable thereto. But where an appeal is taken, as prescribed in this section, from an order of the appellate division, granting a peremptory mandamus, made upon an original application, or from a final order, made upon an alternative mandamus, granted at the appellate division, the execution of the order appealed from shall not be stayed, except by the order of the same appellate division, made upon such terms, as to security or otherwise, as justice requires.

Amended by L. 1895, ch. 946; L. 1913, ch. 574, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "and an appeal from an order granting or denying an application for an alternative writ of mandamus," in lines 2, 3 and 4.

Source.—L. 1854, ch. 270, § 1; L. 1859, ch. 174, § 3; L. 1873, ch. 70, § 3.

Appeal from order denying application.—Upon an appeal to the appellate division from an order simply denying an application for a peremptory writ of mandamus, when the answering affidavits, if true, constitute a defense, there is nothing for the court to review. *Matter of Whitten* (1912), 152 App. Div. 506, 137 N. Y. Supp. 360.

Writ of mandamus.—Order granting or denying a peremptory writ of mandamus is appealable. *Matter of Haydorn v. Carroll* (1918), 184 App. Div. 151, 171 N. Y. Supp. 601.

Court may look to opinion for grounds of decision below.—When an order of the

appellate division denying an application for a writ of mandamus fails to indicate whether it was denied as a matter of law or in the exercise of discretion, the court of appeals may look into the opinion to ascertain upon which ground it based its decision, and, if it appears therefrom that the application was denied solely as a matter of law, the order is appealable. *People ex rel. Flynn v. Woods* (1916), 218 N. Y. 124.

Denial and exercise of discretion of application for alternative writ of mandamus is not reviewable by the court of appeals. *People ex rel. Elmira Advertiser Assn. v. Gorman* (1918), 222 N. Y. 712.

§ 2088. When relator to recover damages.

Where a return has been made to an alternative writ of mandamus, issued upon the relation of a private person, the court, upon making a final order for a peremptory mandamus, must also, except where said writ is directed to a state officer or officers, or an officer or officers of a municipal or private corporation, if the relator so elects, award to the relator, against the defendant who made the return, the same damages, if any, which the relator might recover, in an action against that defendant, for a false return. The relator may require his damages where entitled thereto as aforesaid, to be assessed upon the trial of an issue of fact, if the verdict, re-

port, or decision is in his favor. Such an assessment of damages bars an action for a false return.

Amended by L. 1913, ch. 574, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "except where said writ is directed to a state officer or officers, or an officer or officers of a municipal or private corporation," in lines 3 and 4; and the words "where entitled thereto as aforesaid," in line 8. It also omitted the former next to the last sentence which read: "Where he is entitled to a final order, for any other cause, he may require them to be assessed as in an action."

Source.—R. S., pt. 3, ch. 9, tit. 2, §§ 57, 58.

Damages, failure to ask does not take rights in another action.—Although plaintiff, if he had so elected, might have, on proper allegations, had damages awarded to him in the mandamus proceeding wherein he was reinstated to position of volunteer fireman, that does not prevent a recovery in an action for wrongful discharge. The alternative was not between such election and a waiver of his rights. Where such a statute gives a right it does not follow that other consistent rights are taken away. *McGraw v. Gresser* (1919), 226 N. Y. 57.

§ 2091. Kinds of writ; how granted.

A writ of prohibition is either alternative or absolute. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation board, or other body, officer, or other person to which or to whom it is directed.

Amended by L. 1913, ch. 573, in effect Sept. 1, 1913. The amendment of 1913 omitted at the end of the second sentence the words "and either with or without previous notice of the application, as the court thinks proper;" and added the last sentence.

Source.—R. S., pt. 3, ch. 9, tit. 2, § 61, in part.

Jurisdiction conferred by statute.—The exercise of jurisdiction expressly conferred by statute upon the state commissioner of education to determine school controversies will not be interfered with by the issuance of a writ of prohibition. *People ex rel. Board of Education v. Draper* (1912), 78 Misc. 329, 138 N. Y. Supp. 351, aff'd 211 N. Y. 51.

When issuable; excess of jurisdiction.—Under the general rule that a writ of prohibition will lie to enjoin a court or other tribunal from proceeding without jurisdiction or in excess of its jurisdiction, the excess of jurisdiction, as distinguished from want of jurisdiction, for which a writ of prohibition will lie, does not relate to the prevention of errors of law or of procedure in an action or proceeding over which the court has jurisdiction, but to a threatened exercise of jurisdiction to make a determination or decision which the court has not acquired or cannot acquire jurisdiction to make, although it has general jurisdiction of the action or proceeding. The writ only lies where the relator has no other remedy, either by appeal, by writ of certiorari, by suit in equity or otherwise. Hence, the court at special term having jurisdiction to determine the sanity of a person on a writ of habeas corpus, cannot be prevented by a writ of prohibition from calling a jury to aid it in determining the question of sanity, as this falls within the class of errors in procedure

to prevent which such a writ will not lie, for there is an adequate remedy by appeal. *People ex rel. Woodbury v. Hendrick* (1915), 168 App. Div. 553, 153 N. Y. Supp. 188.

A writ of prohibition can only issue where the tribunal sought to be prohibited is acting without or in excess of its jurisdiction. *People v. Municipal Court* (1914), 162 App. Div. 477, 147 N. Y. Supp. 815.

Acts of court *de facto* but not *de jure*.—A writ of prohibition is the proper remedy to prevent the acts of a court that may be such *de facto* but is not *de jure*. *People ex rel. Childs v. Extraordinary Trial Term* (1918), 184 App. Div. 829, 171 N. Y. Supp. 922.

Anticipation of erroneous decision.—Writ of prohibition will not lie to restrain a judicial body or quasi judicial tribunal from making an erroneous decision, even though such a decision be fully and satisfactorily indicated in the brief as contemplated by the alleged offending body. *People ex rel. City of New York v. Public Service Commission* (1918), 104 Misc. 306, 171 N. Y. Supp. 830.

Jurisdiction of supreme court over proceedings in Indian peacemaker's court.—Where a judgment in favor of plaintiffs, in an action brought in the peacemaker's court of the Cattaraugus Indian reservation for the partition of certain lands therein, has been affirmed on appeal to the

council of the nation, the supreme court has no jurisdiction to interfere by a writ of prohibition and prevent the sale of lands pursuant to the judgment. *People v. Shongo* (1913), 83 Misc. 325, 144 N. Y. Supp. 885.

§ 2093. Idem; by the appellate division of the supreme court.

To enjoin further hearing upon writ of habeas corpus.—An application for an absolute writ of prohibition to enjoin the further hearing upon a writ of habeas corpus should be made to the appellate division of the department where the writ of habeas corpus originated and not to the appellate division of an adjoining department, where at the time the alternative writ was granted the justices of the first mentioned appellate division were in attendance at the court house ready to attend to any court business presented although the court had taken a recess but had not adjourned. *People ex rel. Whitman v. Woodward* (1912), 150 App. Div. 180, 134 N. Y. Supp. 1030.

Inspection of minutes of grand jury.—The only function of a writ of prohibition is to prevent a court or a judicial officer from acting without or in excess of its or his jurisdiction. Hence, such a writ should not be granted to restrain a justice of the supreme court from granting leave to inspect the minutes of the grand jury, for he has power to make such order. *People ex rel. Martin v. Brady* (1915), 168 App. Div. 108, 153 N. Y. Supp. 893.

§ 2101. Appeals.

An order granting or denying an application for an alternative writ of prohibition, and a final order, made as prescribed in the last section, can be reviewed only by appeal. Where the order was made by the appellate division, the execution of the order appealed from shall not be stayed, except by an order, made at a term of the appellate division in the same department upon such terms, as to security or otherwise, as justice requires.

Amended by L. 1895, ch. 946; L. 1913, ch. 573, in effect Sept. 1, 1913. The amendment of 1913 inserted at the beginning of the first sentence the words "An order granting or denying an application for an alternative writ of prohibition, and."

Source.—Partly new, and partly from L. 1873, ch. 70. § 3.

§ 2120. Cases where writ of certiorari may issue.

The provisions of the code apply to every statutory or common law writ except in cases where the statute has made provisions superseding them. *People ex rel. N. Y. C. R. R. Co. v. Block* (1917), 178 App. Div. 251, 164 N. Y. Supp. 962.

Review of claims disallowed by town board.—The claimant's only remedy on a disallowed claim is by an appeal, in some cases to the board of supervisors and in others by certiorari to the appellate division of the supreme court. The supreme court at special term is without power to review the action of the board of town auditors in disallowing a claim upon the ground that it was not a legal charge. *People ex rel. Anderson v. Snedeker* (1912), 75 Misc. 194, 132 N. Y. Supp. 785.

Rejection of claim by town board.—Where a claim is audited and rejected by a duly constituted town board the remedy of the claimant is by a writ of certiorari to review the action of the board and not by an action against the town itself. *Murphy v. Benton* (1914), 86 Misc. 72, 148 N. Y. Supp. 273.

Determination of board of supervisors in disallowing claim.—Where a board of supervisors pass on a claim and disallow it, either in whole or part, the sole remedy

of the claimant is to review the determination, if erroneous, by certiorari; an action against the board will not lie. *New York Catholic Protectory v. Rockland County* (1914), 212 N. Y. 311, aff'g 159 App. Div. 455, 144 N. Y. Supp. 552.

Review of orders of police commissioner of New York city.—While a proceeding to remove a police officer is not subject to the strict rules held in civil and criminal actions, it is nevertheless a trial and the determination of the commissioner on such trial is in the nature of a judicial or semi-judicial function; and the fact that the courts have uniformly entertained proceedings by certiorari to review orders of the police commissioner under the charter of the city of New York is authority for holding that the proceeding is judicial in its nature and that it is properly reviewed by a writ of certiorari. *People v. Waldo* (1914), 212 N. Y. 156, aff'g 159 App. Div. 901, 133 N. Y. Supp. 1138.

Review of denial of license.—The granting or denying of a license to operate a moving picture show is not a judicial act which can be reviewed by certiorari. *Matter of Whitten* (1912), 152 App. Div. 506, 137 N. Y. Supp. 360.

Judicial proceedings.—If a proceeding is

judicial in its nature it may be reviewed by certiorari. *People v. Waldo* (1914), 212 N. Y. 156, aff'g 159 App. Div. 901, 133 N. Y. Supp. 1138.

A writ of certiorari will only lie for the review of determinations of judicial tribunals and of other tribunals when engaged in the exercise of powers of a judicial nature. *Matter of Carp* (1917), 179 App. Div. 387, 166 N. Y. Supp. 243.

Idem; what constitutes.—When by statute or by implication of law the power of removal can only be exercised for cause or after a hearing the proceeding although an exercise of an administrative power is judicial in its nature and as a necessary consequence it is subject to review by certiorari. *People v. Waldo* (1914), 212 N. Y. 156, aff'g 159 App. Div. 901, 133 N. Y. Supp. 1138.

Idem; purpose in general for which certiorari may be used.—A writ of certiorari is appropriate to review the judicial or semi-judicial action of inferior courts or of public officers or bodies exercising, under the laws, judicial functions, and there is no authority unless it is expressly given by statute sanctioning its use for any other purpose. *Matter of Standard Bitulithic Co.* (1914), 212 N. Y. 179, aff'g 161 App. Div. 191, 146 N. Y. Supp. 386.

Effect of pendency of proceedings upon indictment.—A grand jury has jurisdiction to indict a defendant, notwithstanding the pendency of certiorari proceedings in his behalf, to review the action of the magistrate by whom he had previously been committed to await the action of the supreme court. *People v. Friedman* (1912), 205 N. Y. 161.

§ 2122. Cases where it cannot issue.

Final determination.—The determination of the commissioner of labor that a municipal contractor is violating § 3 of the labor law, prescribing the wages payable to laborers on municipal contracts for eight hours' work, is not a final determination, and hence certiorari does not lie to review it. *Matter of Keystone State Const. Co. v. Williams* (1912), 152 App. Div. 575, 137 N. Y. Supp. 405.

Determination.—An order of the public service commission overruling a demurrer to a complaint is not a "determination" within the meaning of this section. *People ex rel. Pennsylvania Gas Co. v. P. S. Comm.* (1917), 181 App. Div. 147, 168 N. Y. Supp. 59.

Right to relief by writ of prohibition.—Upon the dismissal of the writ upon the ground that it would not lie to review any other than a final determination and that the order overruling the demurrer was not reviewable under this section, the relator may seek relief by a writ of prohibition. *Matter of Pennsylvania Gas Co.* (1918), 103 Misc. 37, 169 N. Y. Supp. 820.

Supervisors.—Although certiorari will not lie to review the action of a board of supervisors in making an improper design-

nation, mandamus may lie to compel them to perform their official duty. *People ex rel. Guernsey v. Somers* (1912), 153 App. Div. 623, 130 N. Y. Supp. 761.

The review provided by § 951 of the New York city charter is not an appeal. *People ex rel. Uvalde Asphalt P. Co. v. Seaman* (1915), 168 App. Div. 870, 154 N. Y. Supp. 539.

Award for change of street grade in New York city.—As the New York city charter does not provide that the review by the board of revision of assessments shall be final, a writ of certiorari will issue to review the determination of the board of assessors and of the board of revision of assessments as to the damages caused by a change of street grades. *People ex rel. Uvalde A. P. Co. v. Seaman* (1916), 217 N. Y. 70.

The action of a town superintendent of highways in filing a certificate of qualified abandonment of a town highway does not finally determine the rights of the parties and is not, therefore, reviewable by certiorari. *Matter of Marvin* (1915), 91 Misc. 287, 155 N. Y. Supp. 28.

Section cited.—*Matter of Carp* (1917), 179 App. Div. 387, 166 N. Y. Supp. 243.

§ 2123. When issued from supreme court.

Jurisdiction of county court under liquor tax law.—Under subdivision 1 of § 27 of the liquor tax law, providing that a writ of certiorari to review the action of a county treasurer in refusing to issue a liquor tax license may be issued by a

county judge or a justice of the supreme court, the county court, as such, has no jurisdiction to issue the writ. This objection may be taken at any time. *People v. Slocum* (1914), 161 App. Div. 733, 146 N. Y. Supp. 556.

§ 2125. Limitation of time for review.

Review of order closing town highway.—An order closing a town highway not recorded as required by § 191 of the highway law is not final and though made and

filed in November, 1912, constitutes no ground for quashing a writ of certiorari served in October, 1913, to review the determination made in a proceeding to close

the highway as § 2125 of the Code provides that said writ must be served within four calendar months "after the determination to be reviewed becomes final and binding," etc., nor should the writ be quashed on the ground of relator's laches because at the time of the filing of the order sought to be

reviewed he knew of the action which had been taken. *People v. Dowling* (1914), 84 Misc. 201, 146 N. Y. Supp. 919.

Time for review, generally, see *City of Buffalo v. Buffalo Gas Co.* (1913), 82 Misc. 304, 307, 143 N. Y. Supp. 716.

§ 2127. Application for writ; where and how made.

Discretion of court.—The writ is discretionary, and while the discretion is not an arbitrary one and the writ should be allowed in a proper case, it can only be allowed where the petitioner shows a proper case, and it should not be allowed except where sufficient reasons are shown. *People ex rel. B. H. R. R. Co. v. P. S. Comm.* (1917), 101 Misc. 10, 166 N. Y. Supp. 825.

Party aggrieved.—The relator, a company which has for many years furnished electricity for light, heat and power in the boroughs of Manhattan and the Bronx, is directly interested in a proceeding which involves the determination of the right of

the petitioner to place wires for those uses in those boroughs or acquire property or construct a plant to be used in competition with it. The public service commission legally permitted it to become a party to the proceeding and the determination adverse to it after its intervention is reviewable under certiorari upon its application as the party aggrieved thereby. *People ex rel. N. Y. Edison Co. v. Willcox* (1912), 207 N. Y. 86, rev'g 151 App. Div. 832, 136 N. Y. Supp. 1031.

Title to public office.—Writ may not be invoked to try. *Matter of Carp* (1917), 179 App. Div. 387, 166 N. Y. Supp. 243.

§ 2129. To whom writ directed.

Issuance of writ to officers making assessment. *People ex rel. N. Y. C. R. R.*

Co. v. Block (1917), 178 App. Div. 251, 164 N. Y. Supp. 962.

§ 2134. Return; when and how made.

Public service commission.—A record in the appellate division on certiorari directed to the public service commission and to a public service corporation should contain the return of the latter as well as that of the commission. *People ex rel. New York Edison Co. v. Willcox* (1912), 149 App. Div. 671, 134 N. Y. Supp. 241.

Necessity that return show authority of tribunal to act.—Where a proceeding is

in a tribunal of inferior jurisdiction it is necessary that the return to the writ show that the tribunal had authority to act in making the order, for there is no presumption in favor of the authority and jurisdiction of inferior magistrates or tribunals exercising judicial functions. *People v. Waldo* (1914), 212 N. Y. 156, aff'g 159 App. Div. 901, 143 N. Y. Supp. 1138.

§ 2135. Idem; how compelled; fees for making.

Defective return.—The remedy of a relator if the return is defective or contains improper matter is a motion for a further return, and in the absence of such motion the return cannot be excluded from the record. *People ex rel. New York Edison Co. v. Willcox* (1912), 149 App. Div. 671, 134 N. Y. Supp. 241.

Upon the demand of a relator accom-

panied by the tender of the fees as prescribed by law, it is the duty of the state board of tax commissioners to furnish sworn and certified copies of the papers incorporated into a return by reference, but it is discretionary with the board to permit inspection of its records with a privilege of making copies of the same. *Attorney-General Rep.* (1912), page 406.

§ 2137. When third person may be brought in.

Upon the application of a person, specially and beneficially interested in upholding or annulling the determination to be reviewed, the court may, in its discretion, admit him as a party in the special proceedings, upon such terms as justice requires. And a term of the appellate division of the supreme court, at which the cause is noticed for hearing, and is placed upon the calendar, may, in a proper case, direct that notice of the

pendency of the special proceeding be given to any person, in such a manner as it thinks proper; and may suspend the hearing until notice is given accordingly.

Amended by L. 1895, ch. 946, and L. 1917, ch. 687, in effect Sept. 1, 1917. The amendment of 1917 inserted the words "or annulling" in the second line and omitted the word "defendant" from the fourth line.

Source.—New.

Discretion of court.—This section does not relate to the person to whom the writ shall be directed and who shall make the return, but allows the court in its discretion to admit a person as a party. *People ex rel. N. Y. C. R. R. Co. v. Block* (1917), 178 App. Div. 251, 164 N. Y. Supp. 962.

Review of assessment; company "especially and beneficially interested in upholding the determination to be reviewed." *People ex rel. N. Y. C. R. R. Co. v. Block* (1917), 178 App. Div. 251, 164 N. Y. Supp. 962.

§ 2140. Questions not to be determined.

The rule is now settled that on a common-law certiorari the court will examine the record not only for the purpose of seeing whether the subordinate tribunal kept within its jurisdiction but also to ascertain whether there was any legal proof of facts authorizing the adjudication, and whether any rule of law affecting the rights of the relator has been violated. But if the tribunal had jurisdiction, and there was evidence legitimately tending to support its decision, and no rule of law was violated, the adjudication is final, and cannot be reviewed on certiorari because the evidence upon which it proceeded was weak or inconclusive, or because the court issuing the writ would, if the case had originally been presented for its decision, have decided differently upon the facts. *People ex rel. Co. of Delaware v. State Tax Comm.* (1918), 184 App. Div. 691, 172 N. Y. Supp. 445.

Allegations of fact are essential to support a statement of the questions to be determined. *People ex rel. B. H. R. R. Co. v. P. S. Comm.* (1917), 101 Misc. 10, 166 N. Y. Supp. 825.

Dismissal of writ; decision included.—An order of the appellate division dismissing a writ of certiorari and unanimously affirming the proceedings before a police commissioner, dismissing a policeman from the department, necessarily includes a decision that there was evidence supporting, or tending to sustain, the finding of the commissioner that the relator was guilty of the charges made against him. *People ex rel. Stephenson v. Bingham* (1912), 205 N. Y. 168.

Administrative acts; review of.—The action of the commissioner of highways of the state in canceling a contract for the construction of a state highway is wholly administrative and not subject to review by certiorari. *Matter of Standard Bitulithic Co.* (1914), 212 N. Y. 179, aff'g 161 App. Div. 191, 146 N. Y. Supp. 386.

Discretionary acts; review of.—In deter-

mining that the conduct of a police officer is of such a nature as to require his punishment to the end that the morale and discipline of the department may be preserved, a police commissioner exercises a discretion not subject to judicial review; and when the uncontradicted evidence shows that the officer was guilty of the acts stated in the specifications, the extent of the penalty to follow is not a subject of review on certiorari. *People v. Waldo* (1914), 212 N. Y. 174, rev'g 161 App. Div. 955, 146 N. Y. Supp. 1107.

Finding of fact; proof required.—In reviewing a finding of fact by the public service commission the court can only set it aside when there is such a preponderance of proof against the existence of the fact found that the verdict of a jury affirming the existence thereof would be set aside by the court as against the weight of evidence. *People ex rel. N. Y. Edison Co. v. Willcox* (1912), 151 App. Div. 832, 136 N. Y. Supp. 1031, rev'd 207 N. Y. 86; see *People ex rel. Hansen v. Waldo* (1914), 163 App. Div. 665, 148 N. Y. Supp. 985.

Civil service examination; acts administrative.—The court will not conduct or supervise civil service examinations nor review them by certiorari, the official acts of the commissioners not being judicial in a technical sense but executive, ministerial and administrative. *People ex rel. Caridi v. Creelman* (1912), 150 App. Div. 746, 135 N. Y. Supp. 718.

Dismissal of policemen; opportunity for hearing.—Proceedings of trustees of a village, dismissing a policeman charged with intoxication while on duty, will be annulled where no reasonable opportunity to be heard has been given. *Matter of Reddy* (1912), 148 App. Div. 725, 132 N. Y. Supp. 937.

Idem; proof of misconduct.—In order to justify the removal of a police officer it is not necessary that the proof of misconduct should be sufficient to warrant an indictment. *People ex rel. Lynch v. Waldo*

(1913), 155 App. Div. 134, 139 N. Y. Supp. 1044.

Idem; right to reverse in absence of conflict of proof.—This subdivision does not authorize the reversal of the act of a police commissioner in dismissing an officer where there is neither conflict of proof as to the existence of any facts, nor conflict as to the inferences to be drawn from them. *People v. Waldo* (1914), 212 N. Y. 174, rev'g 161 App. Div. 955, 146 N. Y. Supp. 1107.

State board of tax commissioners; determination of disputed questions of fact.—The authority and powers of the appellate division in certiorari proceedings to review determinations of the state board of tax commissioners, are expressly limited and defined by §§ 2140 and 2141. The former section regulates the jurisdiction of the court in respect to the questions to be reviewed, and the latter section regulates the

mode in which its determination may be declared and its judgment made effectual, and authority is not given to the court by these sections to determine disputed questions of fact involving the rights of the parties or to granting final judgment upon the facts so found by it. *People ex rel. Town of Hempstead v. Tax Commissioners* (1915), 214 N. Y. 594.

Order of the public service commission.—The appellate division does not have power on a writ of certiorari to determine that the extension of the gas mains and pipes of a public service corporation, ordered by the public service commission, is unreasonable in the sense that it is unwise or inexpedient, but may only determine that it is unreasonable if it is an unlawful, arbitrary or capricious exercise of power. *People ex rel. N. Y. & Queens Gas Co. v. McCall* (1916), 219 N. Y. 84.

§ 2141. Final order upon the hearing.

Assessment for public improvement.—On certiorari to review the action of the common council in levying a sewer assessment, the appellate division has no power to modify the assessment, but if error is

found, the matter should be remitted to the common council for further consideration. *People ex rel. Empire v. Smith* (1915), 216 N. Y. 95, rev'g 166 App. Div. 406, 152 N. Y. Supp. 295.

§ 2143. Costs.

Denial of costs for unreasonable delay.—Where a relator delays the hearing on a writ of certiorari for more than a year after its issuance, costs and disbursements

should be denied to him because of such delay. *People v. Waldo* (1914), 162 App. Div. 345, 147 N. Y. Supp. 848.

§ 2148-a. Writ of certiorari or mandamus; amendment of proceedings.

Whenever a writ of certiorari shall be applied for or granted under this article, and it shall appear at any stage of the proceedings, or upon appeal, that the appropriate remedy upon the facts pleaded or proved is mandamus, the proceedings may be amended upon such terms as may be just, and may be continued and determined by the court and at the term where then pending, or remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for a writ of mandamus under article four of this title; and likewise, if a writ of mandamus is applied for or issued under article four of this title, and it shall appear, at any stage of the proceedings, or upon appeal, that certiorari under this article is the appropriate remedy, the proceedings may be amended accordingly upon such terms as are just, and continued and determined by the court and at the term where then pending, or be remitted to the proper term or court to be disposed of; and such relief may be finally ordered as might have been granted if such writ of certiorari had been issued or applied for in the first instance. And in either case, the court may correct by amendment all defects and irregularities in matters of form, or procedure, and may bring in all parties necessary to completely

determine the matter and award the appropriate relief upon the facts established.

Added by L. 1915, ch. 231, in effect April 7, 1915.

Writ not quashed.—When writ of certiorari to review an assessment should not be quashed because relator charged illegal- | ity when he should have charged overvaluation. *People ex rel. Gleason v. Purdy* (1918), 223 N. Y. 88.

§ 2231. When tenant may be removed.

In either of the following cases, a tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house or other dwelling, and his assigns, under-tenants, or legal representatives, may be removed therefrom, as prescribed in this title:

1. When he holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of his term, without the permission of the landlord; including, elsewhere than in the city of New York and Brooklyn, a case where the person to be removed became the occupant of the premises as a servant or employe and the relation of master and servant or employer and employe has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties, has expired; but if by such agreement the servant was to be permitted to occupy such premises for a period beyond the term of employment such removal shall not be had under this subdivision unless such period so permitted for occupancy has expired, or the relation of master and servant or employer and employe was lawfully terminated before the expiration of such term of employment; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner. (Amended by L. 1894, ch. 333.)

2. Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of the rent or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owning it, as prescribed in this title for the service of a precept.

3. Where in any city in this state he holds over and continues in possession of the demised premises, or any portion thereof, after default in the payment, for sixty days after the same shall be payable, of any taxes or assessment levied on such demised premises which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held, and a demand for the payment of such taxes or assessments has been made, or at least three days' notice in writing, requiring, in the alternative, the payment thereof and of any interest and penalty thereon, or the possession of the premises, has been served, in behalf of the landlord, upon the lessee, as prescribed in this title for the service of a precept. An acceptance of any rent by the lessor or his legal representatives shall not be construed as a waiver of the agreement of the lessee to pay taxes or assessments, so as to preclude the lessor from the benefits of this chapter.

4. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has

been adjudicated a bankrupt, under a bankrupt law of the United States.

5. Where the demised premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.

Amended by L. 1885, ch. 13; subdivision 5 was amended by L. 1913, ch. 448, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "or place" in line 2; and the words "or for purposes of prostitution," in lines 2 and 3.

Source.—R. S., pt. 3, ch. 8, tit. 10, § 28, subs. 1-3, as amended by L. 1849, ch. 193; L. 1868, ch. 764, § 1; L. 1873, ch. 583, § 1.

The only effect of a judgment in summary proceedings against a tenant is the determination as to whether he or his landlord is entitled to the possession of the premises. Where in a summary proceeding the evidence for the landlord tending to show the existence of the lease described in the petition is met by evidence for the tenant tending to show that there was no lease but merely an agreement for the storage of certain goods, a judgment in the usual form awarding possession of the premises to the landlord, is not *res adjudicata* in an action to recover rent based thereon, though there is incorporated in said judgment a finding that a certain amount of rent was due and unpaid, and upon proof simply that there was a lease and that some rent was due thereunder, the plaintiff is only entitled to recover nominal damages. *Sea Gate Hotel Co. v. Nahmacher* (1919), 106 Misc. 315, 175 N. Y. Supp. 721.

Effect of proceedings on claim for rent.—Where a landlord serves notice on his tenant that the lease is terminated for non-payment of rent, the institution of summary proceedings under subdivision 1 of this section against the tenant as a hold-over is not an election which bars a proceeding against the tenant for non-payment of rent under subdivision 2 upon the abandonment of the former proceedings. *Fifty-Fourth Street Realty Co. v. Goodman* (1913), 80 Misc. 639, 141 N. Y. Supp. 959.

Employment lawfully terminated.—The words "lawfully terminated," as used in this section, simply mean that the right of removal would arise whenever the relation of master and servant or employer and employee should be brought to an end as a matter of law, without reference to the fact that either party may or may not have been justified in thus ending the relation. *Shufelt v. Boyles* (1914), 88 Misc. 133, 151 N. Y. Supp. 783.

Tenant in possession.—It is essential to the jurisdiction of the court to entertain and make a final order in summary proceedings that the tenant should be in possession. *Warren v. Haverty* (1912), 149 App. Div. 564, 133 N. Y. Supp. 959.

Where tenant is not in actual possession.—Where, at the institution of summary proceedings to dispossess a tenant, he

claims possession of the premises but is not in possession, the court has jurisdiction. *Equitable Trust Co. v. King* (1913), 83 Misc. 450, 145 N. Y. Supp. 94.

Relation of landlord and tenant must exist.—The right to institute summary proceedings is dependent on the existence of the conventional relation of landlord and tenant between the parties. *Fifth Avenue Shop v. Fox-Steifel Co.* (1913), 83 Misc. 127, 144 N. Y. Supp. 705.

New lease.—A landlord can maintain summary proceedings to remove a tenant holding over after the expiration of the term, although he has made a new lease of the premises to begin upon the expiration of the term of the tenant in possession. *Fells v. Borse* (1913), 208 N. Y. 103.

The lessee of a life tenant who holds over after the death of the life tenant is no longer a tenant by sufferance, but becomes a trespasser under § 1664. *Williams v. Alt* (1918), 170 N. Y. Supp. 506.

An occupant under a lease from a life tenant becomes a trespasser under § 1664 upon refusal to yield possession after the death of the life tenant, and the remedy of the owners is by action in ejectment and not by summary proceedings, since the conventional relation of landlord and tenant does not exist. *Williams v. Alt* (1919), 186 App. Div. 235, 174 N. Y. Supp. 460.

Partial eviction.—In summary proceedings for non-payment of rent, a final order in favor of the landlord is *res adjudicata* that the tenants continued in possession of the premises and defaulted in the payment of rent reserved; and in a subsequent action to recover the rent defendants will not be permitted to plead a partial eviction. *Seventy-Eighth St. & Broadway Co. v. Arches* (1912), 76 Misc. 438, 135 N. Y. Supp. 4.

Failure to prove demand.—Where the landlord's evidence, in a proceeding instituted under subdivision 2 shows that no demand was made on the tenant for the rent, the proceeding should be dismissed on the tenant's motion made at the conclusion of the trial. *Halcyon Real Estate Corporation v. Van Bayer* (1915), 155 N. Y. Supp. 350.

§ 2232. Person holding over land sold, etc., may be removed.

The inception of the occupation of the lessee of a life tenant being rightful the statute does not apply on the death of the life tenant. *Williams v. Alt* (1918), 170 N. Y. Supp. 506.

A purchaser of real property at judicial sale who finds others in possession cannot, except in the cases provided, without further proof assume that they are his tenants, and cannot have the benefit of summary proceedings which are applicable only where the conventional relation of landlord and tenant is shown to exist by agreement. *Milligan v. Gabbett* (1917), 101 Misc. 253, 167 N. Y. Supp. 558.

Squatters on land derived from state.—In summary proceedings to remove squatters from lands, it is error to refuse to allow the petitioner claiming a title derived from the state to introduce in evidence a document claimed to be letters patent in the absence of any claim or proof by the respondent of a defect in the title. *White v. Lancraft* (1912), 148 App. Div. 692, 132 N. Y. Supp. 1016.

The presence of the husband on the premises at the time of the wife's death does not constitute a legal occupancy. And where the legal title was in the wife and where immediately upon her death the

title descended to the heirs at law the husband becomes an intruder within the meaning of subd. 4 and may be proceeded against under that subdivision. *Newman v. O'Rourke* (1914), 149 N. Y. Supp. 514.

Where a husband and wife are living together upon premises owned by her he is not a squatter or an intruder upon the property within the meaning of subdivision 4. *Cipperly v. Cipperly* (1918), 104 Misc. 434, 172 N. Y. Supp. 351.

Intrusion upon land without consent of owner.—In a summary proceeding to dispossess a relator on the ground that he had entered into possession without the consent of petitioner, who claimed to be entitled to possession under a lease from the alleged owner, no question of title is raised by an answer denying the alleged ownership and right to possess. *People ex rel. Hill v. Kelsey* (1913), 82 Misc. 491, 144 N. Y. Supp. 135.

Under § 21, subd. 13 of the charter of the city of Buffalo the city court has jurisdiction to entertain a summary proceeding under subd. 4 of this section to recover possession of, and to remove squatters from premises situated in said city. *Matter of Pirew* (1918), 105 Misc. 21, 172 N. Y. Supp. 307.

§ 2233. Id.; in case of forcible entry or detainer.

Upon the relationship of landlord and tenant the remedy under this section and § 2235 is not dependent, particularly so far as they authorize the bringing of summary proceedings in case of forcible entry

and detainer. These sections are remedial and should be liberally construed. *Markun v. Weckstein* (1917), 100 Misc. 668, 166 N. Y. Supp. 736.

§ 2234. Application; to whom made.

Application for removal of a person from real property, as prescribed in this title, may be made to the county judge, or special county judge of the county, or a justice of the peace of the city or town, or the mayor or recorder of the city, wherein the real property, or a portion thereof, is situated. Application may also be made, if the property, or a portion thereof, be situated in the city of New York, to a judge of the city court of the city of New York or the district court of the district within which the property, or a portion thereof, is situated; or if the judge of such court be for any reason disqualified, to the district court of an adjoining district; if in the city of Brooklyn, to a police justice of that city; if in the city of Albany, or the city of Troy, to a justice of the justices' court of that city; if in the city of Yonkers, to the city judge of that city; if in the city of Syracuse, to a judge of the municipal court of said city; if in the cities of Rochester or Buffalo, to a judge of the city court of said cities. Where the property is situated in an incorporated village, the boundaries of which embrace portions of two or more towns, application may be made to a justice of the peace of either town, who keeps an office in the village.

Amended by L. 1918, ch. 493, in effect July 1, 1918. Before the amendment of 1918 the remainder of the sentence after the fourth word "city" in line 12 read: "if in the cities of Syracuse, Rochester or Buffalo, to a judge of the municipal court of said cities."

§ 2235. Who can maintain proceedings; contents of petition.

The application may be made by the landlord or lessor of the demised premises; the purchaser upon the execution or foreclosure sale; the person forcibly put out or kept out; the person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement, to cultivate the property upon shares, or for a share of the crops; or the person lawfully entitled to the possession of the property intruded into or squatted upon, as the case requires; or by the legal representative, agent, or assignee of the landlord, purchaser, or other person, so entitled to apply; or by the person or corporation authorized to proceed under section twenty-two hundred and thirty-seven of this act. The applicant must present to the judge or justice, a written petition, verified in like manner as a verified complaint in an action brought in the supreme court; describing the premises of which the possession is claimed, and the interest therein of the petitioner, or the person whom he represents; stating the facts, which, according to the provisions of this title, authorize the application by the petitioner, and the removal of the person in possession; naming, or otherwise intelligibly designating the person or persons against whom the special proceeding is instituted, and, if there are two or more such persons, and some are undertenants or assigns, specifying who are principals or tenants, and who are undertenants or assigns; and praying for a final order to remove him or them respectively.

Amended by L. 1913, ch. 448, in effect Sept. 1, 1913. The amendment of 1913 inserted at the end of the first sentence the words "or by the person or corporation authorized to proceed under section twenty-two hundred and thirty-seven of this act."

Source.—R. S., pt. 3, ch. 8, tit. 10, §§ 2, 3, 29.

Petition; defects waived.—Defects in the form of a petition in summary proceedings to remove a tenant are waived, where the parties agreed to proceed to try the proceeding upon its merits. *Matter of Steele* (1912), 154 App. Div. 860, 139 N. Y. Supp. 550.

Holding over after expiration of term.—A landlord can maintain summary proceedings to remove a tenant holding over after the expiration of the term, although

he has made a new lease of the premises to begin upon the expiration of the term of the tenant in possession. *Eells v. Morse* (1913), 208 N. Y. 103.

Where delay will render relief inadequate.—A person forcibly kept out of possession may institute a summary proceeding when the delay incident to an action in ejectment will render such relief inadequate. *Koenig v. Eagle Waist Co.* (1917), 176 App. Div. 726, 163 N. Y. Supp. 1019.

§ 2236. Notice to be given in certain cases.

Allegations as to notice to remove.—Where the petition in a summary proceeding to remove a tenant at will alleges that the petitioner on a certain day caused a notice in writing to be served on the tenant, requiring him to remove from the premises within thirty days, and it is impossible to determine therefrom in which of the alternative methods required by statute the notice was served, the justice acquired no jurisdiction. *Witherbee, Sherman & Co. v. Wykes* (1913), 81 Misc. 474, 143 N. Y. Supp. 95.

Notice as jurisdictional; waiver of notice.—A tenant in possession under an invalid lease is a tenant at will, and a petition in summary proceedings for his re-

moval which does not allege that he was given the notice required by § 228 of the real property law is jurisdictionally defective; but where the tenant enters a general appearance, goes to trial upon the merits and makes no motion in regard to such defect, it is waived. *Carman v. Fox* (1914), 86 Misc. (N. Y.) 197, 149 N. Y. Supp. 213.

Sufficiency of petition as to termination of tenancy.—A mere allegation of service of notice, without alleging the manner of service or that the same was duly made, is insufficient to give the justice jurisdiction to grant the order. *Witherbee v. Wykes* (1913), 159 App. Div. 24, 143 N. Y. Supp. 1067.

§ 2237. Petition in case of bawdy-houses, etc.

An owner or tenant, including a tenant of one or more rooms of an apartment house or tenement house, of any premises within two hundred feet from other demised real property used or occupied in whole or in part, as a bawdy-house, or house, or place of assignation for lewd persons, or for purposes of prostitution, or any domestic corporation organized for the suppression of vice, subject to or which submits to visitation by the state board of charities, and possesses a certificate from such board of such fact and of conformity with its regulations, may serve personally upon the owner or landlord of the premises, so used or occupied, or upon his agent, a written notice, requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord, or his agent, does not make such application, within five days thereafter; or, having made it, does not in good faith diligently prosecute it; the person or corporation giving the notice may make an application for such removal on a petition stating the jurisdictional facts, which application shall have the same effect, except as otherwise expressly prescribed in this title, as though the applicant were the owner or landlord of the premises, and shall have precedence over any similar application thereafter made by such owner or landlord or to one theretofore made by him and not prosecuted diligently and in good faith. Proof of the ill repute of the demised premises or of the inmates thereof or of those resorting thereto shall constitute presumptive evidence of the unlawful use of the demised premises, required to be stated in the petition for removal.

Amended by L. 1913, ch. 448, in effect Sept. 1, 1913. The amendment of 1913 materially changed this section.

Source.—R. S., pt. 3, ch. 8, tit. 10, §§ 56, 61; L. 1868, ch. 764.

§ 2240. Idem; how served.

The precept must be served as follows:

1. By delivering, to the person to whom it is directed, or, if it is directed to a corporation, to an officer of the corporation, upon whom a summons, issued out of the supreme court, in an action against the corporation, might be served, a copy of the precept, together with a copy of the petition, and at the same time showing him the original precept.

2. If the person, to whom the precept is directed, resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made by delivering a copy thereof, together with a copy of the petition, at his dwelling-house, to a person of suitable age and discretion, who resides there; or, if no such person can, with reasonable diligence, be found there, upon whom to make service, then by delivering a copy of the precept and petition, at the property sought to be recovered, either to some person of suitable age and discretion residing there, or if no such person can be found there, to any person of suitable age and discretion employed there.

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept and petition upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every

other case, it must be served at least two days before the day on which it is returnable.

Amended by L. 1913, ch. 277, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "together with a copy of the petition," in subdivisions one and two; the word "precept," in line 5 of subdivision one; and the words "and petition," in subdivisions two and three.

Source.—R. S., pt. 3, ch. 8, tit. 10, § 32, as amended by L. 1857, ch. 684, and L. 1868, ch. 828.

§ 2244. Answer.

At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or in a district court in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of the premises, or a part thereof, may answer, orally or in writing, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new matter constituting a legal or equitable defence, or counterclaim. Such defence or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action. If such answer be oral the substance thereof shall be endorsed upon the petition.

Amended by L. 1919, ch. 639, in effect May 19, 1919. The amendment of 1919 substituted the words "answer, orally or in writing" in line 5 for the words "file with the judge or justice who issued the precept, or with the clerk of the court, a written answer, verified in like manner as a verified answer in an action in the supreme court;" and also added the last sentence.

Application.—There is no doubt that this section applies to the municipal court of the city of New York. *Mandel v. Koerner* (1914), 149 N. Y. Supp. 455.

Counterclaim.—A tenant in summary proceedings to dispossess him may counterclaim his damages because of the false and fraudulent representations of the landlord in reliance upon which the tenant claimed to have entered into the lease, and the exclusion of evidence tending to establish such counterclaim is error for which a final order awarded in favor of the landlord will be reversed and a new trial ordered. *Simpson v. Twenty-Eighth Street Company* (1915), 92 Misc. 398, 156 N. Y. Supp. 89.

Counterclaim based upon a breach of contract by a landlord may be interposed by the tenant to defeat a summary proceeding. *Franklin Building Co. v. Finn* (1914), 165 App. Div. 469, 150 N. Y. Supp. 995.

Counterclaim based on acts of independent contractor.—Where in a summary proceeding for non-payment of rent the tenant counterclaims for damages caused by the negligent performance of subway construction work done pursuant to an order of the public service commission, and it clearly appears that the work was done by an independent contractor over which the landlord had no control and for the acts of

which he could not be held legally liable, it was held that the submission to the jury of the counter-claim after the denial of plaintiff's motion to dismiss them is prejudicial error for which a judgment in favor of the tenant upon such counter-claims will be reversed. *Franklin Bldg. Co. v. Finn* (1914), 86 Misc. 20, 148 N. Y. Supp. 90.

Set-off.—A tenant is entitled to set-off against a claim for rent due to a private banker whose bank has been taken charge of by the superintendent of banks, a deposit in the landlord's bank. *Mandel v. Koerner* (1914), 149 N. Y. Supp. 455.

Settlement and agreement to discontinue as defense.—The tenants had the right to plead that the claim upon which the summary proceeding was brought had been settled and that an agreement had been entered into between the landlord and the tenants to discontinue the present proceeding. *Cohen v. Hirsowitz* (1914), 84 Misc. 429, 146 N. Y. Supp. 195.

Failure to furnish heat.—A tenant may counterclaim for damages caused by landlord's failure to furnish heat as provided by the lease. *Green v. Brenner* (1918), 169 N. Y. Supp. 682.

Discontinuance as to one not a necessary party does not deprive him of his right to file an answer. *Dalury v. Rezinias* (1918), 183 App. Div. 456, 170 N. Y. Supp. 1045.

§ 2249. Final order upon trial.

Application.—People ex rel. Kilgallon v. Nuhn (1915), 92 Misc. 312, 152 N. Y. Supp. 559.

Where no final order was entered an appeal from that part of order fixing amount will be dismissed. Manhattan Fee Co., Inc. v. Mittelstadt (1918), 172 N. Y. Supp. 665.

Final order when some rent is due.—Where the verdict in a summary proceeding to dispossess a tenant for non-payment of rent establishes that some rent is due, the landlord is entitled to a final order awarding to him the possession of the premises. Loth v. Harris (1912), 76 Misc. 505, 135 N. Y. Supp. 553.

Final order must be made by justice.—In a summary proceeding instituted in the

municipal court of the city of New York for the nonpayment of rent a final order awarding possession of the premises to the landlord must be made by the justice and signed by the clerk of the court and the warrant is issued, when so signed and delivered for execution. Upon making the final order the justice, as to the proceeding, becomes functus officio except on motion to set aside the verdict and to grant or deny a new trial, and he has no authority by an indorsement at the foot of said order to stay the issuance of the warrant to remove the tenant, and any such attempted stay is a nullity. People ex rel. Kilgallon v. Nuhn (1915), 92 Misc. 312, 156 N. Y. Supp. 559.

§ 2251. Warrant to dispossess defendant.

Application.—People ex rel. Kilgallon v. Nuhn (1915), 92 Misc. 312, 156 N. Y. Supp. 559.

§ 2253. When warrant cancels lease; exception.

Application and effect generally, see Hinton v. Bogart (1915), 166 App. Div. 155, 158, 151 N. Y. Supp. 796.

The relation of landlord and tenant in effect is preserved after the issuance of a dispossess warrant for the purposes of an action to recover for use and occupation to the time of the issuance of a warrant. The statute was undoubtedly enacted because such relationship is a necessary element of an action for use and occupation. Matter of Sweeney (1916), 94 Misc. 617, 150 N. Y. Supp. 984.

The provision of this section as to the issuing of a warrant for the removal of a tenant does not destroy the right of the landlord to the unpaid back rent or value of the use and occupation, where rent was not provided for. Terwilliger v. Brown- ing, King & Co. (1917), 222 N. Y. 47.

A lease is not canceled by the issuance of the precept or the making of a final order. Cornwall v. Sanford (1918), 222 N. Y. 248.

Agreement to contrary.—The parties may, however, agree to the contrary and render the lessee liable to the end of the term although out of possession. Mann v. Munch Brewery (1919), 225 N. Y. 189.

This section and § 230 of the real property law together afford to a landlord a complete remedy by action for use and occupation against a tenant wrongfully holding over after the expiration of his term which neither gives separately. Under § 220 of the real property law a landlord could only recover where the relationship of landlord and tenant existed either expressly or impliedly, while under the

code a landlord could recover for use and occupation to the time when the warrant is issued, although a new relationship of landlord and tenant had not been created, the former relationship being continued for the purpose of such an action. Matter of Sweeney (1916), 94 Misc. 617, 159 N. Y. Supp. 984.

After the issuance of a precept in summary proceedings upon the default of a tenant, the landlord cannot recover rent payable in advance for the following month, but only the reasonable value of the use and occupation. Gulick v. Thompson (1917), 165 N. Y. Supp. 788.

Deposit by tenant.—Where the tenant deposits with the landlord a sum to be held as security for the payment of rent and for reimbursement for any expenses or damage incurred because of the failure of the tenant to perform the conditions of the lease, the landlord is not bound to return the amount of the tenant's deposit at the time of the issuing of the warrant in summary proceedings and the landlord may retain the deposit as security for any loss or difference in rent received upon a re-letting after the issuance of the warrant. And this despite the fact that the relation of landlord and tenant is terminated upon the issuance of the warrant. Horowitz v. Eidelheit (1915), 151 N. Y. Supp. 283.

The right to recover rent accruing prior to the issuance of the precept under which the warrant of dispossess was granted, is given by statute and this right is not abridged by the issuance of precepts which are dismissed, but continues to the time of the issuance of the precept upon which

the final order is based. *McGrory v. Lange* (1913), 142 N. Y. Supp. 301.

The liability of the tenant to pay rent accruing in the future is terminated by an eviction by summary proceedings. The tenant thereafter is not liable to damage for failure to perform the covenants contained in the lease unless there is an express provision permitting the landlord to re-enter, lease the property and hold the tenant liable for the difference between the amount received and the amount agreed to be paid. *Mann v. Munch Brewery* (1916), 173 App. Div. 746, 160 N. Y. Supp. 314.

No offset will be allowed where the rent is payable in advance and the issuance of the warrant is made unnecessary by reason of the vacation of premises after the service of the precept for dispossession, although immediately after the tenant vacates the landlord resume possession by

exercising dominion over the premises. *Rooney v. Flynn* (1917), 98 Misc. 610, 163 N. Y. Supp. 200.

A covenant to pay any deficiency, lessor having the right to relet premises for account of tenant, survives dispossession by summary proceedings. *Gulick v. Thompson* (1917), 165 N. Y. Supp. 788.

Rent due under the terms of a lease, at the time the precept was issued in a summary proceeding for the removal of the tenant, may be recovered. *Geizler v. Hirsch* (1915), 156 N. Y. Supp. 670.

Warrant not issued.—This section is inoperative and inapplicable, where the warrant was not issued. *Cornwall v. Sanford* (1918), 222 N. Y. 248.

There is no real conflict between the provisions of this section and of § 2256. *Terwilliger v. Browning, King & Co.* (1917), 222 N. Y. 47.

§ 2254. Warrant, when and how stayed.

Application.—*People ex rel. Kilgallon v. Nuhn* (1915), 92 Misc. 312, 156 N. Y. Supp. 559.

Tenant may deny that rent is due and unpaid and the trial court may determine that question, even if an accounting is required. If the determination is erroneous and the tenant elects to pay the rent after trial, the rights of the landlord are invaded, and the order can be amended on

appeal. *Bliss v. Ruddell* (1918), 171 N. Y. Supp. 387.

Stay upon payment of rent and costs.—A tenant in summary proceedings can only stay the execution of a final order awarding possession of the premises to the landlord, upon payment of the rent due and the costs of the proceeding. *Fifth Ave. Invest. & Im. Co. v. Bounsignore R. Co.* (1912), 75 Misc. 651, 133 N. Y. Supp. 964.

§ 2256. Redemption by lessee.

Application.—*Terwilliger v. Browning, King & Co.* (1917), 222 N. Y. 47; *Dalury v. Rezinas* (1918), 183 App. Div. 456, 170 N. Y. Supp. 1048.

Reinstatement where premises are relet.—Where a tenant has been evicted by summary proceedings in a case where the unexpired term exceeds five years, his ten-

der to the landlord of the rent in arrears with costs and interest, does not of itself reinstate the tenant or impose upon the landlord the duty of actually putting him into possession especially where the landlord has relet the premises. *Terwilliger v. Browning, King & Co.* (1912), 152 App. Div. 552, 137 N. Y. Supp. 572.

§ 2258. The last two sections qualified.

Construction.—*Terwilliger v. Browning, King & Co.* (1917), 222 N. Y. 47.

§ 2263. Appellate court may award restitution; action for damages.

The right to award restitution under this section is discretionary. *Witherbee*

v. Wykes (1913), 159 App. Div. 24, 143 N. Y. Supp. 1067.

§ 2265. How proceedings under this title to be stayed.

Stay of execution of warrant pending appeal.—A motion under subd. 2 for an injunction pending an appeal from a final order of the city court of Buffalo in a summary proceeding will be denied on the ground that the city court act of Buffalo provides a comprehensive plan for stays of executions. *Schutrum v. Buffalo Wholesale Hardware Co.* (1917), 101 Misc. 115, 166 N. Y. Supp. 725.

An injunction to stay execution will not be granted in order to enable the tenants to review in the upper court a finding of the lower court. Fraud, surprise or undue advantage is a necessary condition to the granting such injunction. *Buffalo Wholesale Hardware Co. v. Schutrum* (1917), 166 N. Y. Supp. 726.

§ 2320. Jurisdiction; concurrent jurisdiction.

Incompetency; what constitutes.—One is not incompetent within the meaning of this section to manage one's affairs, because he is lacking in the sagacity that makes for success in business. *Matter of Case* (1915), 214 N. Y. 199.

Appointment not justified.—Although an aged woman may be found incompetent, the appointment of a committee of her person and property is not justified if her present situation and surroundings assure to her security of fortune, health of body, and happiness of mind. Proceeding for the appointment of a committee of the person and property of an aged woman of con-

siderable wealth, brought by a grandson who had no legal interest in her estate, his mother being the apparent sole heir and next of kin. Evidence examined, and held, that as no waste or dissipation of the estate was shown and as the property of the alleged incompetent is being properly devoted to her care and maintenance by her relatives, the petition should be denied. *Matter of Wells* (1917), 177 App. Div. 100, 163 N. Y. Supp. 826.

Section cited.—*People ex rel. Olin v. Warden of District Prison* (1915), 170 App. Div. 289, 155 N. Y. Supp. 905.

§ 2321. Duty of court having jurisdiction.

Payment of judgment by committee.—Where the committee of an incompetent has sufficient funds he will be compelled to pay a judgment obtained against the incompetent, although such judgment was entered more than ten years prior to the date of the application for such payment. *Matter of Drake* (1912), 151 App. Div. 163, 135 N. Y. Supp. 145.

Place of application.—Where a petition to have a person declared incompetent has

been dismissed and leave to renew the application denied, the petitioner, there being no claim of any change in the mental condition of the alleged incompetent, should not be permitted to maintain a proceeding in another county located in another judicial district, where the alleged incompetent formerly lived. *Matter of Clarkson* (1919), 186 App. Div. 575, 174 N. Y. Supp. 616.

§ 2323. Application for committee; by whom made.

Property in possession of resident executor of nonresident testator.—Jurisdiction of the appointment of a committee of the property of an incompetent is in the

supreme court, of this state, where the property is in the possession of a resident executor of a nonresident testator. In re *Dalrymple* (1916), 163 N. Y. Supp. 233.

§ 2325. Contents, etc., of petition; proceedings upon presentation thereof.

Notice dispensed with.—Notice to an alleged incompetent of an application for the appointment of a committee of his

property may be dispensed with where it is impossible to give such notice. In re *Dalrymple* (1916), 163 N. Y. Supp. 233.

§ 2325-a. Notice to be filed, recorded and indexed.

In all proceedings taken under this title, if real property or any interest therein is intended to be affected, the petitioner shall file in the clerk's office of each county where the property is situated, a notice of the pendency of such proceeding, which shall set forth the general nature and object of the proceeding and a brief description of the real property in that county to be affected thereby, and which notice must be filed with the petition or any time thereafter and before any final adjudication in the proceeding. The clerk shall index such notice against the name of the alleged incompetent. The pendency of the proceeding is constructive notice from the time of so filing the notice only to a purchaser or incumbrancer of the property affected thereby from or against the alleged incompetent with respect to whom the notice is directed to be indexed as aforesaid. A person whose conveyance or incumbrance is subsequently executed or subsequently recorded is bound by all proceedings taken after the filing

of the notice to the same extent as if he was a party to the proceeding. But this provision shall not prevent a jury in a proper proceeding, on sufficient proof, from rendering a verdict that shall over-reach any conveyance or incumbrance theretofore executed by the alleged incompetent, so as to make such conveyance or incumbrance prima facie void.

Added by L. 1913, ch. 69, in effect Sept. 1, 1913.

§ 2326. When foreign committee may be appointed.

Foreign committee; discretion of court.—Where a nonresident incompetent is the owner of a large estate and is also interested in the income of a certain trust created in this state, the court should exercise its discretion in favor of appointing the foreign committee as the committee of the property within the state. *Matter of Rollo* (1912), 152 App. Div. 165, 136 N. Y. Supp. 620.

Idem; refusal to act.—A resident committee of the property within this state, of an incompetent judicially declared so without the state, may be appointed where the foreign committee refuses to act; there is no need for an inquisition. *Matter of Ricker* (1915), 89 Misc. 582, 153 N. Y. Supp. 701.

§ 2327. Order for commission, or for trial by jury in courts.

Issuing commission while trial term is in session.—The practice of issuing commission in proceedings for the appointment of an alleged incompetent while a trial term is in session is not approved of by the courts. *Matter of Wills* (1914), 162 App. Div. 775, 147 N. Y. Supp. 930.

No authority for preliminary trial; jury trial.—On the return of an order to show cause in a proceeding for the appointment of a committee of an alleged lunatic the court should not order that the persons who have filed affidavits shall appear before him and be subject to examination and grant permission to interested parties to examine other witnesses, for the stat-

ute requires the issues in such proceeding to be tried before a sheriff's or petit jury and there is no authority for a preliminary trial. On the petition and affidavits the court should determine whether a jury trial should be had. *Matter of Tompkins* (1918), 183 App. Div. 474, 170 N. Y. Supp. 888.

Two things must appear to the satisfaction of the court before it directs a submission to the jury: *First*, that the person proceeded against is incompetent, and *second*, that a committee ought in the exercise of a sound discretion to be appointed. *Matter of Clarkson* (1919), 186 App. Div. 575, 174 N. Y. Supp. 616.

§ 2331. Proceedings upon the hearing.

Sufficiency of finding of insanity.—A committee of the property of an alleged incompetent cannot be appointed where the jury merely finds that she is "incapable of governing and managing her property," but that she is not incapable of managing her person. There must be a finding of some of the forms of incompetency en-

umerated in § 2320 of the code of civil procedure, to wit, lunacy, idiocy, habitual drunkenness, imbecility arising from old age, or loss of memory or understanding. The words "or other cause" relate to the preceding specifications. *Matter of Penfield* (1914), 162 App. Div. 888, 148 N. Y. Supp. 439.

§ 2333. Expenses of commission.

Power to award commissioners more than \$10.00 per day.—The court has no power to award to commissioners in a proceeding for the appointment of the committee of an alleged incompetent person a sum exceeding ten dollars for each day necessarily

employed in taking the inquisition and including services essential to the judicial determination thereof. *Matter of Wills* (1914), 162 App. Div. 775, 147 N. Y. Supp. 930.

§ 2335. Subject of inquiry in cases of lunacy.

Collateral attack.—Proceedings for the appointment of committee of incompetent are not open to collateral attack. *Boschen*

v. Stockwell (1915), 171 App. Div. 34, 156 N. Y. Supp. 799.

The finding of a jury *de lunatico in-*

quirendo is confined to the time of the hearing and is conclusive upon the subject of incompetency thereafter, but creates no presumption as to incompetency prior thereto, though the findings overreach the acts under inquiry in the action. *Schanck v. Hooper* (1916), 100 N. Y. Supp. 627.

Inquiry limited to question of present incompetency.—In a proceeding for the appointment of a commission for an in-

competent by reason of lunacy the inquiry is limited and confined by the statute to the question of incompetency at the time of the inquiry, and, therefore, a finding on an inquisition, that the insanity of the alleged incompetent existed at a date prior to the date of the inquiry, is not presumptive evidence of the fact. *Boschen v. Stockwell* (1918), 224 N. Y. 356.

§ 2336. Proceedings upon verdict or return of commission.

Confirmation where evidence not transcribed.—A motion made pursuant to this section to confirm an inquisition in lunacy, where the petitioner concedes that oral testimony given before the commissioner and jurors was not transcribed, will be denied and a new trial of specific questions of fact arising upon the petition, to be framed and embodied in the order, will be directed before a jury at a trial term. *Matter of Marks* (1914), 84 Misc. 628, 147 N. Y. Supp. 843.

New trial.—The power of court under

this section upon the return of a commission in lunacy with the inquisition taken thereunder, to "direct a new trial or hearing, or make such a final order upon the petition as justice requires," clearly contemplates a judicial determination as to the sufficiency of the evidence taken upon the inquiry. *Matter of Marks* (1914), 84 Misc. 628, 147 N. Y. Supp. 843.

Petition dismissed with costs against petitioner. *Matter of Gibbons* (1918), 183 App. Div. 302, 171 N. Y. Supp. 69.

§ 2337. Security to be given by committee.

The provisions of sections twenty-five hundred and seventy-six, twenty-six hundred and fifty and twenty-six hundred and fifty-two of this act, respecting the security to be given by the guardian of the person or of the property of an infant, appointed by a surrogate's court, except that part thereof authorizing the appointment of an associate with the guardian and the security to be given in such a case, apply to a committee of the person or of the property, appointed as prescribed in this article. A committee of the property cannot enter upon the execution of his duties, until security is given, as prescribed by the court. A committee of the person cannot enter upon the execution of his duties, until security is given, if required by the court.

Amended by L. 1887, ch. 681; L. 1915, ch. 637, in effect May 14, 1915. Prior to the amendment of 1915 the citation in the first sentence was to art. 1, tit. 7 and § 2595, of art. 5, of tit. 2, of ch. 18. That amendment also inserted the words "except that part thereof authorizing the appointment of an associate with the guardian and the security to be given in such case," in lines 4, 5 and 6.

Source.—New.

Liability of sureties for acts prior to execution of bond.—The sureties upon the bond of a committee for an incompetent person are not liable for the conduct of the committee with reference to the estate prior to the execution of the bond. *Thayer v. Erie County Savings Bank* (1914), 160 App. Div. 300, 145 N. Y. Supp. 808.

Right to funds before giving security.—A committee of an incompetent person has no authority to take the custody of any funds or property of the estate until he has qualified by giving the required bond. Hence a bank which pays moneys belonging to the estate of an incompetent person to a committee before the required bond has been executed is liable therefor

unless it is able to show that the committee has since been chargeable as such with the moneys, or that the estate has actually received them. *Thayer v. Erie County Savings Bank* (1914), 160 App. Div. 300, 145 N. Y. Supp. 808.

Effect of bond not retroactive.—Where an order appointing a committee of the person and estate of an incompetent provided that the appointment should become executed or complete when the committee executed and filed the prescribed bond, the bond when filed does not relate back to and qualify the committee as such from the date of the order. *Thayer v. Erie County Savings Bank* (1916), 217 N. Y. 601.

§ 2338. Compensation of committee.

A committee of the property is entitled to the same compensation as an executor, administrator or testamentary trustee. But in a special case, where his services exceed those of an executor or administrator, the supreme court or a county court within the county may allow him such an additional compensation for such additional services, as it deems just. The compensation of a committee of the person must be fixed by the court, and paid by the committee of the property, if any, out of the funds in his hands. The additional compensation authorized by this section may be allowed to the committee upon any judicial settlement made by him, and shall be for such additional services up to and including such settlement.

Amended by L. 1890, ch. 516; L. 1895, ch. 946; L. 1915, ch. 652, in effect Sept. 1, 1915. The amendment of 1915 added the words "or testamentary trustee" in line 2.

Source.—New.

Commissions upon corpus of estate.—The committee of the person and property of an incompetent has no right to commissions upon the corpus of the estate until they are awarded to him on the judicial settlement of his accounts. *Matter of Stratton* (1912), 76 Misc. 584, 137 N. Y. Supp. 311.

Repayment of allowance.—Where pursuant to the provisions of § 2342 the committee of an incompetent has from time to time presented his accounts, he should not on final accounting be compelled to repay to the estate a reasonable monthly payment previously allowed to him. *Matter of Cowen* (1912), 152 App. Div. 108, 136 N. Y. Supp. 480.

Commissions on estate received after incompetent's death.—As the committee of an incompetent ceases to have power to reduce to possession any property of the incompetent after the latter's death, commissions should not be allowed on the corpus of the estate claimed to have been received after the death of the incompetent, especially where there is no proof that the principal or any part of it was at any time received by the committee. *Matter of Wallace* (1916), 172 App. Div. 544, 157 N. Y. Supp. 245.

Advance of moneys in excess of income.

—Although the advance of moneys by a committee for the support of an incompetent in excess of the income received, entitles the committee to reimbursement, they should not be allowed commissions thereon, as they have not received such moneys. *Matter of Wallace* (1916), 172 App. Div. 544, 157 N. Y. Supp. 245.

Double commissions should not be allowed to the committee of an incompetent, where no one of the separate accounts equals \$100,000, although the estate exceeded said amount. *Matter of Wallace* (1916), 172 App. Div. 544, 157 N. Y. Supp. 245.

An extra allowance to the wife of the incompetent who was one of the committee should be disallowed, where what she did both for the incompetent and for the interest of her infant daughter was that which duty and natural love and affection dictated, and where her own personal interests were also affected and served by her vigilance and work. *Matter of Wallace* (1916), 172 App. Div. 544, 157 N. Y. Supp. 245.

Extra allowance to one of the committee of an incompetent reduced. *Matter of Wallace* (1916), 172 App. Div. 544, 157 N. Y. Supp. 245.

§ 2340. Committee of property may maintain actions, etc.

An action to annul the marriage of an incompetent upon the ground that he is a lunatic is statutory and cannot be maintained by the committee of the incompetent. *Walter v. Walter* (1916), 217 N. Y. 439.

§ 2341. Committee of property; to file inventory and account.

The provisions of sections twenty-six hundred and sixty and twenty-six hundred and sixty-one of this act, requiring the general guardian of an infant's property, appointed by a surrogate's court, to file in the month of January in each year an inventory, account and affidavit, and prescribing the form of the papers so to be filed, apply to a committee of the property

appointed, as prescribed in this title. For the purpose of making that application the committee is deemed a general guardian of the property; the person with respect to whom he is appointed, is deemed a ward and the papers must be filed in the office of the clerk of the court by which the committee was appointed, or if he was appointed by the supreme court, in the clerk's office where the order appointing him is entered, and, if the incompetent person for whom such committee is appointed has been committed to a state institution, and is an inmate thereof, a duplicate of such inventory, account, and affidavit, shall be filed also by said committee with the superintendent or officer having special jurisdiction over the institution where the incompetent person is confined. In every case where a committee has used or employed the services of an incompetent person, with respect to whom he has been appointed a committee, or where moneys have been earned by or received on behalf of such incompetent person, the committee must account for any moneys so earned or derived from such services, the same as for other property or assets of the incompetent person.

Amended by L. 1894, ch. 51; L. 1906, ch. 181; L. 1915, ch. 630, in effect May 14, 1915. Prior to the amendment of 1915 the citation in the first sentence was to art. 2, of tit. 7, of ch. 18.

Source.—R. S., pt. 2, ch. 5, tit. 2, §§ 8, 9; L. 1874, ch. 446, tit. 2, § 3.

Commissions for receiving and disbursing entire estate.—Where upon the annual accounting of the committee of the person and property of an incompetent as required by § 2341, an order was made disallowing an item showing that he had deducted an amount claimed to represent commissions for "receiving" the corpus of the estate estimated at what one-half of the full commission for "receiving and disbursing" the entire estate would have amounted to, and said deducted amount was returned to the estate, the petition of the committee on his next annual accounting that he be allowed to deduct one-half commissions for receiving the corpus of the estate must be

denied. *Matter of Stratton* (1912), 76 Misc. 584, 137 N. Y. Supp. 311.

When account should be surcharged.—Where the acts of the committee of an incompetent person who is also trustee under the terms of a will creating a trust for the benefit of himself, the incompetent and others, result in the enrichment of himself at the expense of the incompetent, his account as committee should be surcharged. *Matter of Anderson* (1914), 211 N. Y. 136, rev'g 158 App. Div. 936, 143 N. Y. Supp. 627.

Counsel fees and costs upon settlement of accounts of committee.—*Matter of Maxwell* (1915), 170 App. Div. 138, 155 N. Y. Supp. 792.

§ 2342. Idem; may be compelled to file the same, or render an additional account, etc.

In the month of February of each year, the presiding judge of the court by which the committee of the property was appointed, or if he was appointed by the supreme court, the county judge of the county where the order appointing him is entered, must examine, or cause to be examined, under his direction, all accounts and inventories filed by committees of the person and property, since the first day of February of the preceding year. If it appears, upon the examination, that a committee, appointed as prescribed in this title, has omitted to file his annual inventory or accounting, or the affidavit relating thereto, as prescribed in the last section, or if the judge is of the opinion that the interests of the person, with respect to whom the committee was appointed, requires that he should render a more full or satisfactory inventory or account, the judge must make an order requiring the committee to supply the deficiency, and also, in his discretion, personally to pay the expense of serving the order upon him.

An order so made may be entered and enforced, and the failure to obey it may be punished, as if it were made by the court. Where the committee fails to comply with the order, within three months after it is made, or, where the judge has reason to believe that sufficient cause exists for the removal of the committee, the judge may, in his discretion, appoint a fit person special guardian of the incompetent person, with respect to whom the committee was appointed, for the purpose of filing a petition in his behalf for the removal of the committee and prosecuting the necessary proceedings for that purpose. The committee may be compelled in the discretion of the court to pay personally the costs of the proceedings so instituted. Where the examination of the accounts and inventories of committees of incompetent persons provided for herein is made pursuant to the order or direction of a county judge, the expense of such examination as allowed by the county judge directing the examination shall be payable by the county treasurer of the county out of any court funds in his hands upon the order of the county judge directing such examination. The committee of the property of an incompetent person appointed as prescribed in this title, may apply to the court making the appointment, for an order to permit him to render to such court an intermediate judicial account of all his proceedings affecting the property of the incompetent person to the date of the filing thereof. And the court upon examination may, in its discretion, make an order directing that such account be filed with the clerk of the court where the application is made, on or before the date determined by the order.

The account to be filed pursuant to such order shall be verified and contain a just, true and proper statement of all the acts of the committee, and an itemized statement of the receipts and disbursements of any and all moneys and properties that have come into hand covering the whole of the period for which the accounting is asked. A summary statement shall be included in the account and all vouchers shall be filed therewith. Notice of the filing of such account pursuant to such order and of an application for the judicial settlement thereof shall be given in the manner in which and to the persons to whom notice of application for the appointment of a committee of the person or property of an alleged incompetent person, lunatic, idiot or habitual drunkard is required to be given by title six of chapter seventeen of the code of civil procedure. Upon the return day of the notice of such application the court shall have the power to appoint a referee to take and state such account and to report to the court with his opinion thereon as to all matters embraced in said account. The court shall have power and it shall be its duty to appoint a suitable person as special guardian of the incompetent person for the protection of his rights and interests in said proceeding.

Upon the motion for a confirmation of the report of a referee appointed pursuant to the provisions hereof or if the accounting be had before the court, upon the court's determination, said account shall be then judicially adjusted, determined, fixed and filed.

The compensation of the referee and of the special guardian appointed under the provisions of this chapter shall in every instance be fixed by the court to be paid out of the estate, if any, of the incompetent person. The judicial settlement of the final account of a committee shall be made in

the same manner, so far as may be applicable, as provided in this section for the judicial settlement of an intermediate account.

Amended by L. 1895, chaps. 746, 946; L. 1899, ch. 350; L. 1914, ch. 344; L. 1916, ch. 535, in effect Sept. 1, 1916. The amendment of 1914 inserted the sixth sentence beginning with the words "Where the examination of accounts." The amendment of 1916 added the last sentence of the first paragraph, the first, second and fourth sentences of the second paragraph, the last two paragraphs, and made other slight changes.

Source.—L. 1874, ch. 446, tit. 2, § 4, last sentence.

Disallowance of claim for commissions on corpus of estate.—Where upon the annual accounting of the committee of the person and property of an incompetent as required by § 2341, an order was made disallowing an item showing that he had deducted an amount claimed to represent commissions for "receiving" the corpus of the estate estimated at what one-half of the full commission for "receiving and disbursing" the entire estate would have amounted to, and said deducted amount was returned to the estate, the petition of the committee on his next annual accounting that he be allowed to deduct one-half commissions for receiving the corpus of the estate must be denied. *Matter of Stratton* (1912), 76 Misc. 584, 137 N. Y. Supp. 311.

Repayment of allowances.—Where pursuant to the provisions of § 2342 the committee of an incompetent has from time to time presented his accounts, he should not on final accounting be compelled to repay to the estate a reasonable monthly payment previously allowed to him. *Matter of Cowen* (1912), 152 App. Div. 108, 136 N. Y. Supp. 480.

Intermediate accounting.—Ordinarily proceedings are unnecessary to settle the intermediate account of a committee of the person of an incompetent, as the accounts of such committee are filed yearly. But where such committee has an accumulating surplus consisting of a monthly allowance which has not been expended an accounting should be had. *Matter of Bladen* (1915), 166 App. Div. 748, 152 N. Y. Supp. 382.

§ 2344. *Idem*; disposition in case of death.

Where a person, of whose property a committee has been appointed, as prescribed in this title, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed. The committee may, in such case, render to the court by which he was appointed, a final account of his proceedings, touching the property of the incompetent. Such account shall contain an inventory in the form prescribed by section twenty-six hundred and sixty of this act and a full and true account in form of debtor and creditor of all his receipts and disbursements, and there shall be appended thereto an affidavit of the committee in the form prescribed by section twenty-six hundred and sixty-one of this act. Notice of the application for settlement of such account shall be given in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and, if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. Such account shall be judicially settled, adjusted and determined and, as to the proofs and vouchers in support thereof, shall be subject to the provisions of article one of title five of chapter eighteen of this act with respect to the accounting of executors and administrators.

Amended by L. 1908, ch. 271; L. 1915, ch. 632, in effect May 14, 1915. The amendment of 1915 materially changed this section.

Source.—L. 1874, ch. 446, tit. 2, § 29, in part, and R. S., pt. 2, ch. 5, tit. 2, § 25, as amended by L. 1865, ch. 724.

Jurisdiction of surrogate's court.—Where, prior to a proceeding for the judicial settlement of the account of the executor of a testator who sometime after making his will was duly adjudged an incompetent, the accounts of the committee of his per-

son and property were judicially settled, adjusted and determined, the surrogate's court is without jurisdiction to inquire into any matter involved in said accounting and is bound thereby, and whether the decedent had lucid intervals during the period covered by his committee is wholly immaterial. *Matter of Garlick* (1916), 96 Misc. 653, 161 N. Y. Supp. 1113.

§ 2350. Proceedings for the disposition of real property of infants, etc.; contents of petition.

Petition when not defective.—A petition for leave to sell the undivided interest of an incompetent person in land to avoid an action of partition on the part of cotenants, or for the dower of a widow therein, is not defective because of failure to state the particulars and value of the real and personal property, and the amount of the income of the incompetent person, the disposition made of her personal property and an account of the debts or demands, if any, existing against her es-

tate. When enough is shown in the petition to answer the statutory requirements, the adequacy or inadequacy of the reasons for the sale must be determined by the court that hears the application. *Harri-son v. Higgins* (1916), 218 N. Y. 556.

Petition insufficient.—A petition for the sale of property of an infant, which gives only the assessed value and is silent as to the real or market value, is insufficient. *Title Guarantee & Trust Co. v. Ruder-shausen* (1917), 164 N. Y. Supp. 15.

§ 2351. Bond of committee of lunatic, etc.

An application to sell, mortgage, release, or lease real property, or an interest in real property, of a lunatic, idiot or habitual drunkard, cannot be granted, unless a committee of his property has been appointed. Upon such an application, if it is made by the committee, the court must make an order, directing him to file with the clerk, a bond, with either individual or corporate surety, approved by the court as to form, amount and sufficiency of surety, conditioned for the faithful discharge of his trust; for the paying over and investing of, and accounting for, all moneys received by him in the special proceeding, according to the direction of any court having authority to give directions in the premises; and for the observance of the directions of the court, in relation to the trust. If the application is made by any other person, an order must be made thereupon, requiring the committee to show cause why he should not file such a bond. If, after hearing the committee, the court is of the opinion, that there is a probable cause for granting the application, it may make an order, requiring the committee to file such a bond; or, if the committee so elects, or fails to file the bond as directed in the order, it may appoint a suitable person to be the special guardian of the incompetent person, with respect to the proceedings, who must thereupon file such a bond. Where an application is made to release an inchoate right of dower, application must be made by the husband of the lunatic, idiot or habitual drunkard and may be made before or after a committee has been appointed, except that application may be made by the committee of the property of the lunatic, idiot, or habitual drunkard in any case where, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband and the wife has not joined in the conveyance or otherwise released her inchoate right of dower. When the application is made by the husband, the court may appoint him special guardian, and he must file a bond as herein provided.

Amended by L. 1893, ch. 639; L. 1903, ch. 368; L. 1907, ch. 49; L. 1915, ch. 241, in effect Sept. 1, 1915. The amendment of 1915 substituted the words "with either individual or corporate surety, approved by the court as to form, amount and sufficiency

of surety," in lines 5, 6 and 7, for the words "in such form, in such an amount, and with such sureties," as it directs."

Source.—R. S., pt. 2, ch. 5, tit. 2, § 14; L. 1864, ch. 417, § 2, L. 1874, ch. 446, tit. 2, §§ 7, 20.

§ 2354. Reference to inquire into the application.

Approval of guardian's bond.—The court may, when making an order of reference, also approve the guardian's bond, where the order appointing the special guardian and fixing his bond also appointed the referee. *Title Guarantee & Trust Co. v. Rudershausen* (1917), 164 N. Y. Supp. 15.

§ 2361. Disposition of proceeds; accounting.

The court must, by order, direct the disposition of the proceeds of such a sale, mortgage, release or lease. It must direct the investment of any portion thereof belonging to the infant or incompetent person, which is not needed for the payment of debts, or the safe-keeping, or the immediate maintenance and education, of himself or his family, or for the preservation or improvement of his real property or his interest in real property. It must require a report, under oath, of the disposition and investment thereof, to be made as soon as practicable, and must compel periodical accounts to be rendered thereafter by each person, who is intrusted with the proceeds, or any part thereof. Where an inchoate right of dower is released as prescribed in this title and such release is to accompany a sale by the husband of the property to which the inchoate right of dower attaches, the court shall make an order requiring one-third of the amount realized on the sale of the property to which the inchoate right of dower attached to be invested by the special guardian, or paid into the court to be held for the benefit of the husband during his life and upon his death for the benefit of the wife during her life, or the court may direct said amounts to be paid to the husband upon his giving a bond in the penalty of at least double the amount so received for such release, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the repayment as the court shall direct by his executors or administrators of such amount upon the death of the husband. Where an inchoate right of dower is released as prescribed in this title, and, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband, and the wife has not joined in the conveyance or otherwise released her inchoate right of dower, the court shall make an order that, as the consideration for the release, or as part of the consideration therefor, there be paid to the special guardian or into the court an amount to be fixed by the court as equal to one-third of the fair market value of the property, to be invested by the special guardian or held by the court for the benefit of the person making such payment during the life of the husband, and upon his death for the benefit of the wife during her life, and upon her death to be returned to the person making such payment or to his executors, administrators or assigns; or in lieu of such payment the court may allow a bond to be given in the penalty of at least double the amount so fixed as equal to one-third of the fair market value of the property, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the payment as the court shall direct, upon the death of the husband leaving the wife surviv-

ing, of the said sum so fixed as equal to one-third of the fair value of the property, to be held for the benefit of the wife during her life and upon her death to be returned to the person giving such bond or to his executors, administrators or assigns. In case by any contingency, infants not in being may thereafter become possessed of any interest in said premises so sold, mortgaged or leased, the court, in case of a sale, shall cause the proceeds of the sale, after paying the costs and expenses of the same, to be placed at interest for the benefit of the persons who are, or who may ultimately be entitled to the same, and shall not authorize the distribution of the same in advance of said contingency, except upon a petition of some person entitled thereto, and upon filing a bond in such penalty as the court shall direct, with two or more sureties approved by the court, and conditioned that in case of any contingency by which any infant not then in being shall thereafter become entitled to any of the proceeds of the sale, that said petitioner will pay to said person or persons his or their proportionate share of the money so paid over to said petitioner; and in the case of the mortgaging of said real estate the proceeds of the same, after paying costs and expenses, shall be paid out and disbursed under the direction of the court only for the purpose of paying lawful charges thereon, or repairing, improving, building upon or otherwise enhancing in value any real estate so mortgaged as aforesaid.

In the case of an infant residing without the state, and having in the state or country where he or she resides a general guardian or person duly appointed under the laws of such state or country, to the control and entitled, by the laws of such state or country, to the custody of the money of said infant, the court, upon satisfactory proof of such facts and the sufficiency of the bond or security given by such general guardian or person in such state or country by the certificate of a judge of a court of record of such state or country, or otherwise, may direct that the portion of such infant arising upon such sale shall be paid over to such general guardian or person.

Where the portion of the proceeds arising upon such sale which belongs to an infant, residing within or without the state, does not exceed one hundred and fifty dollars, and the father or mother, or both, of such infant be living, the court may, direct that the same be paid over, for the use and benefit of such infant, to such father or mother.

Amended by L. 1890, ch. 237; L. 1893, ch. 639; L. 1903, ch. 368; L. 1906, ch. 127; L. 1907, ch. 49; L. 1915, ch. 629; L. 1919, ch. 274, in effect Sept. 1, 1919. The amendment of 1915 added next to last paragraph. The amendment of 1919 added the last paragraph.

Source.—R. S., pt. 3, ch. 1, tit. 2, § 179, in part; pt. 2, ch. 5, tit. 2, §§ 14, 17; L. 1864, ch. 417, §§ 2, 9; L. 1874, ch. 446, tit. 2, §§ 7, 13, 20.

§ 2365. When submission to arbitration cannot be made.

Determination of rental values.—Arbitration agreement for determination of rental values of property, see *Mahony v. Mahony* (1913), 158 App. Div. 623, 143 N. Y. Supp. 881.

§ 2366. What controversies may be submitted, and how.

Jurisdiction cannot be conferred on the arbitrators over subject matter not within the written submission. *Matter of Conway* (1917), 179 App. Div. 108, 166 N. Y. Supp. 182. Arbitration upheld.—It is the policy of

the courts to encourage and uphold an arbitration, as it is an inexpensive, simple and expeditious method of adjusting controversies, and tends to prevent litigation.

Welch v. Probst (1912), 151 App. Div. 147, 135 N. Y. Supp. 642.

Submission insufficient.—Buckley v. Lippmann (1915), 167 App. Div. 957, 152 N. Y. Supp. 1101.

§ 2367. Appointment of additional arbitrator, or umpire.

Trade custom.—The decision rendered on an arbitration is binding although the arbitrators, experienced men of business, did not summon the parties or give notice but

made an inspection and examination in a summary way, if that was the trade custom. Welch v. Probst (1912), 151 App. Div. 147, 135 N. Y. Supp. 642.

§ 2369. Arbitrators to be sworn.

The objection that arbitrators were not sworn is fatal to the award if the oaths were not waived in writing. Matter of St. John's Guild (1915), 168 App. Div. 889, 152 N. Y. Supp. 685.

Section cited.—Turner v. New York Central & H. R. R. Co. (1915), 168 App. Div. 359, 153 N. Y. Supp. 281.

§ 2372. Award; to be authenticated.

The form of award and other circumstances relating to it are carefully pre-

scribed. Conway v. Roth (1918), 170 N. Y. Supp. 176.

§ 2373. Motion to confirm award.

Errors.—In the absence of restrictions in the arbitration agreement, arbitrators are not confined either by strict rules of law or evidence and the general rule is that such awards may not be set aside for either error of law or fact not appearing on the face of the award, where the arbitrators have not exceeded their jurisdic-

tion and have not been guilty of fraud, corruption or misconduct. The authority of the court with respect to awards of arbitrators is confined, limited and controlled by the provisions of §§ 2373-2375. Matter of Wheat Export Co., Inc. (1919), 185 App. Div. 723, 173 N. Y. Supp. 679.

§ 2374. Motion; to vacate award.

Where arbitrators have not been sworn or their oaths not waived in writing the case is a proper one in which to direct a rehearing before the same arbitrators; their failure to take the prescribed oaths does not indicate partiality or incompetence. Matter of St. John's Guild (1915), 168 App. Div. 889, 152 N. Y. Supp. 685.

Appeal.—Failure to move to vacate award on ground that arbitrators have exceeded their powers does not deprive party of right to raise objection upon appeal. Matter of Conway (1917), 179 App. Div. 108, 166 N. Y. Supp. 182.

§ 2378. Judgment on award; when and how entered. Costs.

Arbitration is a statutory proceeding and the only thing on which a judgment

can be entered is an award. Conway v. Roth (1918), 170 N. Y. Supp. 176.

§ 2387. When mortgage may be foreclosed.

A mortgage upon real property, situated within the state, containing therein a power to the mortgagee, or any other person, to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed, in the manner prescribed in this title, where the following requisites concur:

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.

2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution, issued upon a judgment rendered therein in favor of the plaintiff has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

4. The first notice required by subdivision one of the next section is published within the time in which an action could be maintained to foreclose such mortgage.

Amended by L. 1913, ch. 486, in effect Sept. 1, 1913. The amendment of 1913 added Source.—R. S., pt. 3, ch. 8, tit. 15, §§ 1, 2.

Provisions of code must be strictly followed or a sale of the property will be void. *Wehrum v. Wehrum* (1917), 179 App. Div. 814, 167 N. Y. Supp. 295.

§ 2388. Notice of sale; how given.

Effect of want of notice.—It is now settled law in this state that the purchaser at a mortgage sale under an attempted statutory foreclosure, void as against the mortgagor for want of notice, becomes assignee of the mortgage, and, of course, each subsequent grantee becomes in turn as-

signee thereof. *Ketcham v. Deutsch* (1914), 211 N. Y. 85, rev'g 152 App. Div. 904, 137 N. Y. Supp. 402.

Failure to give notice invalidates sale. *Wehrum v. Wehrum* (1917), 179 App. Div. 814, 167 N. Y. Supp. 295.

§ 2400. Foreclosure sale; deed not necessary.

Affidavits of publication, etc., as substitute for conveyance.—The affidavits of publication, etc., now take the place of the conveyance formerly executed by the one

having the power of sale. *Ketcham v. Deutsch* (1914), 211 N. Y. 85, rev'g 152 App. Div. 904, 137 N. Y. Supp. 402.

§ 2408. Limitation of last four sections.

The last four sections do not apply to surplus money, arising upon the sale of real property, of which a decedent died seized, where letters testamentary or letters of administration, upon the decedent's estate, were, within two years before the sale, issued from a surrogate's court within the state, having jurisdiction to issue them.

Amended by L. 1915, ch. 626, in effect May 14, 1915. The amendment of 1915 substituted the word "two" in line 4, for the word "four."

Source.—L. 1867, ch. 658, as amended.

§ 2432. Supplementary proceedings; the different remedies under this title.

Commencement of supplementary proceeding is not effected by the mere signing of an order, where no service of the order was made, and when its return has passed, it has no validity. *Matter of Dorfman v. Jacobs* (1917), 100 Misc. 592, 166 N. Y. Supp. 403.

Order affecting person not a party.—In a proceeding supplementary to execution, the court is without jurisdiction to make an order declaring a person not a party to the proceeding and not sworn as a witness therein, to be a receiver for the benefit of creditors of the judgment debtor under the provisions of § 44 of the personal property

law, as amended, which makes the transfer of goods in bulk void as against the creditors of the transferrer under certain circumstances. *Kaphan v. Rogers Bros. Grocery Co., Inc.* (1915), 169 App. Div. 63, 154 N. Y. Supp. 753.

Remedies suspended during imprisonment under execution.—Where a judgment debtor is imprisoned under an execution of the person all other remedies, including supplementary proceedings, are suspended while the imprisonment continues. *Everall v. Stevens* (1913), 158 App. Div. 723, 143 N. Y. Supp. 874.

§ 2433. Nature of the remedies; review of orders.

Who may vacate or modify order.—A motion to vacate or modify an order requiring third persons to turn over to a receiver in proceedings supplementary to execution, certain personal property claimed to belong to the judgment debtor, can properly be made only to the judge who granted the order, or to the court out of which the execution upon the judgment was issued. *Matter of Flynn* (1913), 80 Misc. 79, 140 N. Y. Supp. 799.

A judge presiding at special term has no jurisdiction to vacate the order of another judge of the same court for the examination of a judgment debtor in supplementary proceedings. *Livingston v. Livingston* (1917), 164 N. Y. Supp. 419.

An order for the examination of a judgment debtor in supplementary proceedings may only be vacated by the judge who made it. *Bamberger-Stern Co. v. Paris* (1916), 159 N. Y. Supp. 647.

Review of order; jurisdiction.—This section prescribes the only method for the review of an order adjudging a judgment debtor to be in contempt for disobedience of an order in supplementary proceedings. Such an order is one made in the course of the supplementary proceedings, and the appellate division is without jurisdiction to review it, except upon appeal from an order of the special term. *Matter of Onetto* (1915), 171 App. Div. 211, 157 N. Y. Supp. 170.

§ 2435. Order to examine judgment debtor after return of execution.

Subsequent examination discretionary; what must be shown.—A subsequent examination of a judgment debtor is discretionary, and in an application for the same facts should be set forth as a basis for the exercise of such discretion. It should be made to appear that the judgment debtor has acquired property since his last examination, that it remains in his possession or under his control, and is applicable to the payment of the judgment, and, if several examinations within a short time of one another have recently taken place, then facts should be shown from which it may be inferred that the judgment creditor will obtain useful information, and that the examination is not being used as a club to enforce settlement of claims which the debtor is without property to pay. *Livingston v. Livingston* (1917), 164 N. Y. Supp. 419.

When order becomes nullity.—Where an order for the examination of a judgment debtor in supplementary proceedings is allowed to lapse it falls and becomes a nullity, and no order of discontinuance need be entered as a prerequisite to a new order for his examination concerning his property. *Matter of German Exchange Bank* (1915), 92 Misc. 351, 155 N. Y. Supp. 924.

Affidavit.—Where the affidavit on which an order for the examination of a judgment debtor, though stating that affiant is the attorney for plaintiff, the judgment creditor, does not state that affiant is the attorney for the assignee of the judgment and authorized by him to institute the proceeding, a motion to punish as for contempt the judgment debtor for failure to appear for examination pursuant to the order must be denied. *Kemp v. Gartenberg* (1916), 93 Misc. 313, 156 N. Y. Supp. 883.

Where the assignee of a judgment institutes proceedings supplementary to execution thereon his affidavit to obtain an order for the examination of the judgment debtor must state who owns the judgment, whether it has been transferred, and how the affiant came to own it, to the end that it may appear that the proceedings are in fact brought by the real party in interest. *Kemp v. Gartenberg* (1916), 93 Misc. 313, 156 N. Y. Supp. 883.

Superseding findings of sheriff's jury.—A court of equity will not entertain an action superseding the findings of a sheriff's jury, as to ownership of property since, if the sheriff was guilty of fraud, an action at law may be maintained against him and if the claimants were guilty of fraud, the plaintiff has an ample remedy in proceedings supplementary to execution. *Gilmour Door Co. v. Shea* (1912), 150 App. Div. 239, 134 N. Y. Supp. 919.

Application of limitation.—An order for the examination of a judgment debtor may be granted under § 2436 at any time after the issuing of execution and before the return thereof; the ten-year limitation provided in § 2435 does not apply. *Stevens Co. v. Maus* (1913), 155 App. Div. 249, 139 N. Y. Supp. 1059.

Foreign judgment or judgment in rem.—A proceeding supplementary to execution cannot be sustained upon a foreign judgment or a judgment in rem. It must be a judgment by which the person of the judgment debtor is bound. The order to be obtained in the proceeding is one requiring the debtor to attend and be examined concerning his property, that the

same may be applied in satisfaction of the judgment. *Matter of Maltbie v. Lobnitz Mills Co.* (1918), 223 N. Y. 227.

§ 2436. *Idem*; before return of execution.

Examination at any time before execution.—An order for the examination of a judgment debtor may be granted under § 2436 at any time after the issuing of execution and before the return thereof the ten-year limitation provided in § 2435 does not apply. *Stevens Co. v. Maus* (1913), 155 App. Div. 249, 139 N. Y. Supp. 1059.

Limitation.—Where an order is obtained under this section there is no period of limitation. The only condition is that the order must be maintained before the return of the execution. An order in supplementary proceedings is substituted for a creditor's bill, but an order, under this section, in aid of an execution is not. Such an order can be obtained before the remedies of the judgment creditor at law are exhausted. *Press Pub. Co. v. McGill* (1912), 136 N. Y. Supp. 177.

Petition; allegations based in information and belief.—An affidavit upon an application for an order for the examination of a defendant in a proceeding supplementary to but before the return of execution, which simply contains an allegation that the debtor has property which it unjustly refused to apply to the satisfaction of the judgment based on information and belief, without disclosing the sources thereof, is fatally defective, in that it does not comply with this section. *Matter of Smith v. Haverty's Stables* (1913), 157 App. Div. 777, 142 N. Y. Supp. 764.

Subpoena; when vacated.—Where no proceeding is pending at which the witness can testify, a subpoena requiring him to appear will be vacated. *Matter of Steinman v. Conlon* (1912), 150 App. Div. 708, 135 N. Y. Supp. 740.

§ 2441. Order to examine person having property, etc., of judgment debtor.

Second examination of third party.—A judgment creditor is only entitled, as a matter of right, to one examination in supplementary proceedings of a third party alleged to hold property of the judgment debtor. Hence, on an application for a second order to examine the third party, he should show facts entitling him to a second order which should be limited to the period subsequent to the commencement of the first proceeding. *Matter of Walker* (1913), 157 App. Div. 609, 142 N. Y. Supp. 972.

Examination after appointment of receiver.—Although a receiver of the prop-

erty of a judgment debtor has been appointed and has qualified in proceedings supplementary to execution, the court may still grant an order for the examination of a third party as to property in his hands belonging to the judgment debtor. *Matter of Denison v. Jackson Bros. Realty Co.* (1913), 158 App. Div. 475, 143 N. Y. Supp. 586.

Application to executors and administrators.—Order granted for examination of the executors of the will of the mother of the judgment debtor who has an interest therein. *King v. Burnett* (1918), 102 Misc. 161, 168 N. Y. Supp. 405.

§ 2444. Proceedings upon examination; adjournment.

Adjournment.—Proceedings supplementary to execution are proceedings before a judge and not before the court, and while a proceeding commenced before one judge may be continued before another, yet it is essential to preserve the continuity by adjournment from time to time. *Matter of Wilson v. Bracken* (1912), 150 App. Div. 577, 135 N. Y. Supp. 435.

Witnesses; books and papers.—A witness in supplementary proceedings may be compelled to produce books and papers and the judgment creditor is entitled in a

proper case to have such documents put in evidence and subjected to his inspection. *Steinman v. Conlon* (1913), 79 Misc. 527, 141 N. Y. Supp. 79.

Scope of examination.—The object of supplementary proceedings is to ferret out fraudulent conveyances and concealments of property. The examination is therefore allowed to take a wide and searching range, both as to the parties to the proceedings, and to the witnesses. *People v. Hanbury* (1914), 162 App. Div. 337, 144 N. Y. Supp. 851.

§ 2446. Order permitting person indebted to pay debt to sheriff.

Application.—*Boyd v. Buffalo Steam Roller Co.* (1914), 87 Misc. 20, 149 N. Y. Supp. 1050.

Method of reaching judgment debtor's

bank account. *Berkman v. New York Produce Exchange Bank* (1917), 101 Misc. 282, 167 N. Y. Supp. 441.

§ 2447. Order requiring delivery of money or property to sheriff or receiver.

An order made by the court, instead of by the judge by whom the warrant in supplementary proceedings was granted, is invalid. *Chestnut v. Greenberg* (1916), 162 N. Y. Supp. 137.

Jurisdiction.—The county court of Bronx county, upon the institution therein of proceedings supplementary to an execution issued upon a judgment of the city court of the city of New York, has jurisdiction to order the judgment debtor to turn over his property to the receiver appointed by the said city court. *Clark v. Shaw* (1915), 91 Misc. 245, 154 N. Y. Supp. 1101.

The judgment creditor may make the application for the order. *Clark v. Shaw* (1915), 91 Misc. 245, 154 N. Y. Supp. 1101.

Order requiring delivery to receiver; modification.—A motion to vacate or modify an order requiring third persons to turn over to a receiver in proceedings supplementary to execution, certain personal property claimed to belong to the judgment debtor, can properly be made only to the judge who granted the order, or to the court out of which the execution upon the judgment was issued. *Matter of Flynn* (1913), 80 Misc. 79, 140 N. Y. Supp. 799.

Idem; dispute of right.—A third person having in possession property of a judgment debtor can only be required to turn it over to a receiver in supplementary proceedings, where the debtor's right to the property is not substantially disputed. *Humboldt Exploration Co. v. Fritsch* (1912), 150 App. Div. 90, 134 N. Y. Supp. 747.

Substantial dispute.—Where it clearly appears that the appellants held property which under a restraining order they were not allowed to part with possession of, under the terms of an overdue chattel mortgage from the judgment debtor, it cannot be correctly said that the title to the property in question was not the subject of a substantial dispute. *Maguire v. O. U. Bean & Co.* (1913), 143 N. Y. Supp. 753.

Dispute arising on conceded facts.—Where a dispute as to a judgment debtor's right to possession arose on conceded facts, and is confined to questions of law which have been well settled, a third party, by denying the existence of the legal rules, cannot create a substantial dispute so as to deprive a judge of power to make an order under this section. *Matter of Flynn*

(1913), 157 App. Div. 241, 141 N. Y. Supp. 807.

Life insurance policy.—On a motion for an order requiring a judgment debtor to turn over to his receiver in supplementary proceedings a certain policy of life insurance which, though his wife was named as beneficiary therein, contains a clause reserving to the judgment debtor the right to change the beneficiary, the surrender value of the policy may be applied in payment of his debts under § 52 of the domestic relations law. *Clark v. Shaw* (1915), 91 Misc. 245, 154 N. Y. Supp. 1101.

Money in savings bank.—A court has no authority to issue a mandatory order requiring a savings bank to pay to a sheriff the sum of a deposit of a judgment debtor. *Kantor Bros. v. Wile* (1916), 93 Misc. 438, 158 N. Y. Supp. 115.

Where the property is in the hands of a third party such an order can be made only where the debtor's right to possession is not substantially disputed. However the court may appoint a receiver, leaving the receiver to take such steps as may be necessary to obtain the property. *Harding v. Conlon* (1912), 138 N. Y. Supp. 1014. The proper procedure is to appoint a receiver, who can test the question by action, and not to determine the matter upon motion. *Friedman v. Stein* (1911), 138 N. Y. Supp. 928.

Conveyance of property.—An order providing that the judgment debtor "execute, acknowledge and deliver to such receiver a proper and valid assignment and conveyance of all his property and assets" is not authorized by the Code. The property of the judgment debtor vests in the receiver by operation of law, and no conveyance is necessary. *Rourke v. Turrell* (1912), 138 N. Y. Supp. 648.

Recovery by receiver of judgment debtor of pledged securities, see *Matter of Flynn* (1913), 157 App. Div. 241, 141 N. Y. Supp. 807; see *Bernstein v. Traverso* (1913), 82 Misc. 411, 413, 143 N. Y. Supp. 1091.

Money deposited in lieu of bail, in the hands of the city comptroller, may not be directed to be paid to the receiver where two assignments of such money have been filed with the comptroller; the possession thereof being "substantially disputed." *Burn v. Sandfort* (1918), 172 N. Y. Supp. 820.

§ 2454. How proceedings discontinued or dismissed.

Review of proceedings.—Where proceedings supplementary to execution have lapsed by failure to adjourn, the matter cannot be reviewed without notice to the

judgment debtor. *Matter of Wilson v. Bracken* (1912), 150 App. Div. 577, 135 N. Y. Supp. 435.

§ 2457. Disobedience to order; how punished.

Application.—*Matter of Sackin v. Grossman* (1915), 167 App. Div. 940, 152 N. Y. Supp. 1141.

Contempt.—Proceedings to punish a party for contempt are to be regarded as a step incidental to and taken in a supplementary proceeding and not as an independent special proceeding. *Matter of Steinmann v. Conlon* (1913), 208 N. Y. 198.

An order adjudging a judgment debtor guilty of contempt of court because of certain answers given on his examination in supplementary proceedings and directing his imprisonment if he failed to pay the fine imposed, is fatally defective unless it contains an adjudication as to the specific facts deemed to be a contempt of court. *Matter of Gordon v. Feldberg* (1912), 149 App. Div. 246, 133 N. Y. Supp. 693.

Where the recitals in an order made in supplementary proceedings, adjudging a witness in contempt, are not sustained by the testimony given upon his examination, said order must be reserved. *Matter of Price* (1912), 78 Misc. 42, 137 N. Y. Supp. 732.

Idem; attempt to obtain specific statements.—A judgment creditor should in some manner indicate his dissatisfaction with answers given by a judgment debtor and attempt to obtain more specific statements, before resorting to the remedy of a proceeding to punish for contempt. *Matter of Shorwitz v. Caminez* (1912), 152 App. Div. 758, 137 N. Y. Supp. 545.

Idem; failure to file additional affidavits.—Where a motion to vacate a third party order was denied upon condition that the judgment creditor file additional affidavits, and the same are not filed, the judgment creditor is not entitled to proceed, and the judgment debtor is not guilty of contempt if he fail to obey the original order. *Matter of Stell* (1912), 78 Misc. 40, 137 N. Y. Supp. 703.

Idem; order must be served.—A defendant cannot be adjudged guilty of contempt of court in failing to appear and submit to an examination concerning his property, where the order to show cause was not served upon him personally. *Vingut v. Sire* (1914), 163 App. Div. 529, 148 N. Y. Supp. 533.

Idem; to what notice judgment debtor entitled.—A judgment debtor, on motion to punish him for contempt for failure to appear for examination in supplementary proceedings, is entitled to notice of the precise claim made against him and for what omission or misconduct he should be punished; each fact necessary to sustain the jurisdiction of the court should be made to appear by an affirmative statement. *Aborn v. Herbert, Robertson & Co.* (1916), 94 Misc. 637, 158 N. Y. Supp. 565.

Idem; punishment must be for violation of order.—A defendant in supplementary

proceedings can be punished only for a violation of an order, either oral or in writing, given to him by a judge or referee. He cannot or at least should not be punished as for a contempt of court simply for failing to do as he agreed. A contempt should not be predicated upon any thing except a violation of a specific direction of a judge or referee, delivered personally to the defendant. *Jones v. Rettig* (1917), 98 Misc. 487, 164 N. Y. Supp. 730.

Where a judgment debtor, in obedience to an order in supplementary proceedings, has appeared and answered questions asked, he cannot be adjudged guilty of contempt, because he has not made true answers to the questions put to him. Moreover, an order holding such judgment debtor in contempt must be reversed where it does not contain an adjudication as to the specific facts which the court deemed to be a contempt. *Matter of Silberman Dairy Co. v. Econopouly* (1917), 177 App. Div. 97, 163 N. Y. Supp. 824.

Idem; punishment; what must be shown.—A judgment debtor as a punishment for a contempt in disobeying an order to appear for an examination in supplementary proceedings may be fined in a sum not exceeding \$250, but it must appear that the act of the judgment debtor either did or was calculated to defeat, impair, or impede some right or remedy of the judgment creditor. *Amendola v. Zema* (1916), 93 Misc. 525, 157 N. Y. Supp. 273.

Where a judgment debtor wilfully disregards an order for his examination made in supplementary proceedings on the ground that the original order was void for the reason that the court had no jurisdiction to make it, the court is bound to punish him as for contempt unless the original order was absolutely void. *Groshut v. Kineto-photo Corporation* (1916), 93 Misc. 558, 157 N. Y. Supp. 312.

When witness guilty of criminal contempt.—Where, after a witness in proceedings supplementary to execution refuses to answer material questions the parties appear before a justice of the supreme court, who instructs the witness to give the information asked, and he again refuses to answer, and they again appear before the same justice who again orders the witness to answer and states that he will commit him for not answering, and the witness still refuses to obey the directions of the court, he is properly adjudged guilty of criminal contempt. *People v. Hanbury* (1914), 162 App. Div. 337, 147 N. Y. Supp. 851.

Right of witness not party to proceeding to appear by counsel.—A witness who is not a party to supplementary proceedings is not entitled to appear by counsel therein, or to be heard upon the legality or propriety of the questions addressed to

him, at least when he was not invoking a constitutional privilege. *People v. Hanbury* (1914), 162 App. Div. 337, 144 N. Y. Supp. 851.

Circumstances under which alleged officer of corporation is not in contempt. *Loft Holding Co. v. Eagle Waist Co.* (1917), 167 N. Y. Supp. 567.

§ 2458. Upon what judgment and to what county the execution must have issued.

Sufficiency of affidavit.—An affidavit to obtain an order for the examination of a judgment debtor, a corporation, in supplementary proceedings, which states that an execution was issued to the sheriff of the county where said judgment debtor then maintained an office at the time of the commencement of the proceedings and still maintains an office for the transaction of business, is sufficient to sustain an order granted thereon. *Bradley v. Certigue Mining & Dredging Co.* (1916), 93 Misc. 519, 157 N. Y. Supp. 275.

Residence of domestic corporation.—A domestic corporation resides where its principal place of business is situated, and an allegation that it has its principal place of business in the county of New York is equivalent to an allegation that it resides in that county. *Groshut v. Kinetophote Corporation* (1916), 93 Misc. 558, 157 N. Y. Supp. 212.

Place for regular transaction of business.—A theater at which judgment debtor was playing an engagement as an actor is not a place for the regular transaction of business in person. *De Angelli v. Dixey* (1917), 101 Misc. 606, 167 N. Y. Supp. 663.

Judgment for alimony as basis for order

for examination.—A wife who has obtained a final decree of separation from her husband, awarding her alimony, and has failed to collect the same by contempt proceedings, may docket a judgment for the amount due. After an execution thereon has been returned unsatisfied, she is entitled to an order for the examination of her husband in proceedings supplementary to execution, notwithstanding the fact that the judgment was rendered on motion, for the order made on such a motion is not the rendering of a new judgment but merely a means of putting into practical effect the plaintiff's right to have her judgment in such form that execution can be issued on it. *Matter of Donovan* (1913), 159 App. Div. 228, 144 N. Y. Supp. 280.

Judgment of municipal court.—When a judgment recovered in the borough of Brooklyn in the municipal court of the city of New York is docketed with the county clerk of Kings county, it is deemed a judgment of the supreme court and may be enforced accordingly, and a justice of the supreme court has jurisdiction to make an order for the examination of the judgment debtor in proceedings supplementary to execution. *Matter of Streep* (1918), 181 App. Div. 869, 168 N. Y. Supp. 1026.

§ 2460. No person excused from answering on the ground of fraud.

Supplementary proceedings are eminently inquisitorial; they were meant to be so by the legislature. The examination is therefore allowed to take a wide and

searching range, both as to the parties to the proceedings and as to the witnesses. *People ex rel. Roache v. Hanbury* (1913), 145 N. Y. Supp. 483.

§ 2462. Proceedings commenced before one judge may be continued before another.

Adjournment.—Proceedings supplementary to execution are proceedings before a judge and not before the court, and while a proceeding commenced before one judge may be continued before another, yet it is

essential to preserve the continuity by adjournment from time to time. *Matter of Wilson v. Bracken* (1912), 150 App. Div. 577, 135 N. Y. Supp. 435.

§ 2463. What property cannot be reached.

Payment of debts.—A judgment debtor engaged in conducting a dairy farm who, while an injunction in supplementary proceedings was in force expended the sum of \$130 in payment for groceries, wages of employees and made payment upon a chattel mortgage on a team of horses, is guilty of contempt. *Matter of Teelon* (1914), 87 Misc. 361, 150 N. Y. Supp. 729.

Appointment of receiver.—Although since the amendment of this section by L. 1908, ch. 278, supplementary proceedings may be maintained against domestic corporations by judgment creditors, such right does not authorize the appointment of a receiver, as the amendment simply makes domestic corporations subject to the provisions of the code for the institution and maintenance

of supplementary proceedings, and does not change the law so as to allow preferences to be obtained by creditors of insolvent corporations. *Matter of Boucker Contracting Co.* (1916), 218 N. Y. 321.

§ 2464. When and how receiver may be appointed.

Domestic corporation.—A receiver in domestic corporation. *Boucker Contracting supplementary proceedings may not be appointed where the judgment debtor is a Co. v. Callahan C. Co.* (1915), 92 Misc. 241, 155 N. Y. Supp. 543.

§ 2467. Order and bond to be filed.

An order appointing a receiver, or extending a receivership, and the bond, if any be required, must be filed in the office of the clerk of the county, wherein the judgment-roll in the action is filed; or, if the special proceeding is founded upon an execution issued out of a court, other than that in which the judgment was rendered, in the office of the clerk of the county, wherein the transcript of the judgment is filed.

Amended by L. 1917, ch. 683, in effect Sept. 1, 1917. The amendment of 1917 inserted the words "and the bond, if any be required," in the second line.

Source.—Code of Proc., § 298, in part.

§ 2468. When property is vested in receiver.

Real property not belonging to debtor.—A receiver appointed in supplementary proceedings while entitled to the possession of the property of the judgment debtor is not entitled to hold, as against the true owner, real property which in fact does not belong to the debtor. *Humboldt Exploration Co. v. Fritsch* (1912), 150 App. Div. 90, 134 N. Y. Supp. 747.

Property with which receiver becomes vested.—A receiver appointed in proceedings supplementary to execution becomes vested only with such property as the judgment debtor had at the time the proceedings were commenced. Hence, such receiver is not entitled to a peremptory writ of mandamus requiring a town board to pay over to him sums alleged to be due the judgment debtor by virtue of a resolution adopted by the electorate of the town, if he was appointed receiver prior to said resolution. *People v. Cocks* (1914), 162 App. Div. 453, 147 N. Y. Supp. 829.

Idem; property subsequently acquired.—Although a receiver of a judgment debtor's property has been appointed, he does not take title to property subsequently acquired by the judgment debtor unless his receivership is duly extended thereto. *Matter of Walker* (1913), 157 App. Div. 609, 142 N. Y. Supp. 972.

Idem; property not exempt.—A receiver in supplementary proceedings takes the legal title to all the personal property of the judgment debtor not exempt from execution; but he takes it only for the benefit of the judgment creditors for whom he is appointed receiver, and of other judgment creditors to whose judgment the receivership may be extended, subject, how-

ever, to any rights or defenses existing against the judgment debtor at the time title vests in the receiver. *Steinert v. Van Aken* (1914), 165 App. Div. 206, 209, 150 N. Y. Supp. 525.

Idem; chattels fraudulently conveyed.—A receiver in supplementary proceedings, in addition to the property of the judgment debtor, takes such rights as the creditor at whose suit he was appointed has. As to such creditor, chattels fraudulently conveyed still remain the property of the judgment debtor; but a judgment creditor has no title to the property of the judgment debtor. He has a right only to the satisfaction of his judgment from such property, which he may secure by execution. If, therefore, the mortgage is void as to the creditor, his only remedy is in his execution, or he may appeal to a court of equity to clear away the obstruction of fraudulent conveyances. A judgment creditor cannot sue for conversion of the property of a judgment debtor, neither can he confer that right on a receiver in supplementary proceedings. *Berliner v. Kuttner* (1914), 85 Misc. 461, 147 N. Y. Supp. 308.

Idem; property held under chattel mortgage void as to creditors.—A receiver in supplementary proceedings obtains no greater or other title than the judgment debtor had. It follows that no title to chattels which are mortgaged pass to the receiver from the judgment debtor, who is the mortgagor, although the mortgage is void as to creditors, if, as against him, the mortgage is good; and hence a receiver cannot maintain an action for conversion against the mortgagee who takes the chat-

tel under the mortgage. *Berliner v. Kuttner* (1914), 85 Misc. 461, 147 N. Y. Supp. 308.

Effect of appointment of receiver of property of one partner.—An order appointing a receiver of the property of a judgment debtor operates to transfer to the receiver the legal title to the judgment debtor's interest in a partnership; and as the receiver cannot become a member of the partnership, the effect of his appointment and the resulting transfer of the judgment debtor's interest is a dissolution of the partnership. *Lovins v. Laub* (1914), 85 Misc. 336, 147 N. Y. Supp. 304.

Receiver's failure to file bond.—A receiver in supplementary proceedings who has failed to duly file his bond, takes no title to the property of the judgment debtor, since such property vests only in the receiver who has duly qualified. *Mulstein Co. v. City of New York* (1915), 213 N. Y. 308.

A receiver has not qualified where his order of appointment is still on file with the clerk of the court, instead of being filed with the county clerk. *Klatzkie v. Kimpel* (1918), 172 N. Y. Supp. 711.

§ 2469. How receiver's title to personal property extended by relation.

The receiver's title now extends back to the date of the service of the order for the debtor's examination. *Ward v. Baker*

(1919), 186 App. Div. 652, 175 N. Y. Supp. 66.

§ 2471. Receiver and his accounts are subject to the control of the court.

A receiver, appointed as prescribed in this article, is subject to the direction and control of the court out of which the execution was issued, except where a receiver is appointed by the city court of the city of New York or by a county court, or a justice of said courts, he is subject to the direction and control of the said court or justice. Where an order has been made, extending a receivership to a special proceeding founded upon a subsequent judgment, the control over, and direction of, the receiver, with respect to that judgment, remain in the court or justice to whose control and direction he was originally subject. He shall keep accounts of his receivership and vouchers for all moneys paid out. An interested party may appear by serving upon the receiver and filing in the court a written notice.

The receiver may file his account and thereupon move for either an intermediate or final judicial settlement thereof. Should the receiver fail to file an account and apply for the above relief within a reasonable time, an interested party may apply for an order directed to the receiver. The account must contain a full and true statement as to all property and the disposition thereof. It must be verified to the effect, that it is true to the knowledge of the receiver, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true, that the sources of his information and grounds of his belief are as therein set forth, and he knows of no error or omission to the prejudice of the judgment debtor, creditor, surety, or other person interested. All vouchers must be numbered and classified and a summary of the totals, together with the total payment made or due to each person shall be made part of and accompany the account. The court may direct the receiver to attend and be examined under oath as to the account, the discharge of his duties, or any other matter relating to the administration thereof. He may be allowed without a voucher, any proper item of expenditure for postage, affidavits or acknowledgments, or other item, not exceeding five dollars, for which a voucher is not customarily given or obtainable, upon specifying in his account when, to whom and for what the

payment was made; but all the items so allowed shall not exceed one hundred dollars. An interested party may contest the account after appearing by filing written objections thereto and serving a copy thereof upon the receiver or his attorney either before or after service upon him of a written notice of the filing of said account. The time within which to contest the account may be limited by the court. The contest shall be confined to the items or matters thus objected to. A settlement of the account may be ordered subject to said objections. The court may allow or disallow any item of the account and decree either an intermediate or final settlement, conclusive upon all parties, appearing therein or who have been served with notice of filing of said account.

Amended by L. 1913, ch. 840; L. 1915, chaps. 255, 634, in effect Sept. 1, 1915. The amendment of 1913 inserted the words "except where a receiver is appointed by the city court of the city of New York or a justice thereof, he is subject to the direction and control of the city court or a justice thereof," at the end of the first sentence; and added the second sentence. The amendment of 1915 (ch. 255) changed the section heading from "Receiver to be subject to control of court." to read as here given; and added all after the second sentence. The amendment of 1915 (ch. 634) changed the first sentence after the word New York in line 4, from "a justice thereof, he is subject to the direction and control of the said city court or justice thereof," to read as here given.

Source.—Partly new, and partly from Code of Proc., § 298.

SURROGATES' CODE.

(L. 1914, ch. 443.)

General note of revisers.—The commission to revise the statutes in relation to practice in Surrogates' Courts derived its existence and authority from chapter 547 of the Laws of 1912. The act provided for the consolidation, codification and revision of laws relating to the estates of deceased persons and the procedure and practice in Surrogates' Courts, under the supervision of the revision committee of the New York State Surrogates' Association, which committee was by said act constituted a commission for such purpose. The undersigned are the commissioners designated by the New York State Surrogates' Association.

The report now presented embraces almost entirely the practice and procedure in Surrogates' Courts now contained in chapter 18 of the Code of Civil Procedure and does not contain any revision of the Decedent Estate Law authorized by the statute which created the commission.

In the work of consolidation, eighty-nine of the four hundred sections in chapter 18 of the Code have been eliminated. Whatever was of service in those sections has been distributed in other sections.

Some of the important changes suggested are as follows:

The jurisdiction of the Surrogates' Court is enlarged, so that a final determination may be made in that court of all matters relating to the affairs of a decedent.

Provision is made for trial by jury of any controverted question of fact in the adjudication of which any party has a constitutional right to such trial. This will prevent the multiplicity of trials which may now be had in probate proceedings and permit the surrogate to determine finally all the issues in respect to the validity of a will.

The need of modernizing the practice of allowing statutory double trials was pointed out by Justice Follett, in delivering the opinion of the court in *Bowen v. Sweeney* (89 Hun, 359, 366-7; *aff'd.*, 154 N. Y. 780).

"It is apparent that under our boasted reform procedure a will relating to realty and personalty may be declared void because of the insanity of the testator, or for any other cause, in respect to one species of property and valid in respect to the other kind of property, upon the ground that the testator was sane, and so there may be two final adjudications, both supposed to be verities, one affirming a will to be valid and the other affirming it to be void. And in case a will relating to realty and personalty is admitted to probate in the Surrogate's Court, and the decision is reversed by the Supreme Court and the issues are tried before a jury, which are found in favor of the validity of the will, upon which an adjudication is entered by the Surrogate's Court decreeing the will to be valid, the heir may, notwithstanding, retry the question as to the realty, and possibly, as in the case at bar, obtain a verdict and a judgment that the will is invalid. But the remedy for this incongruous and absurd procedure by which judgments diametrically opposed to each other may be recovered in respect to the same will, does not lie with the courts, but with the legislature."

When a testator dies, leaving mortgaged real estate only, his heirs or devisees ought to be able to sell that realty immediately upon the probate of the will. But the possibility that some dissatisfied heir of the family may bring an action under section 2653-a within two years of the probate (and protract the action for several years) acts as a cloud on the alienability of the property by the heirs or devisees at the very time when liquid assets are most necessary to pay the decedent's debts.

The proceeding to sell the real estate of a decedent to pay debts has been very much simplified and made less expensive and cumbersome.

The priority of right to letters of administration has been changed so as to place creditors after the public administrator.

The section containing exemptions for widow and minor children has been modernized by eliminating "spinning-wheels, weaving-looms, knitting machine," etc.

The process and petitions are definitely described and the time in which notices shall be given shortened.

The time in which a representative may account and distribute an estate has been shortened to six months.

The testimony of a subscribing witness to an uncontested will may be taken before the surrogate of any county where the witness may be, or before the clerk of the Surrogate's Court.

Bonds are required of trustees and of executors directed to withhold payments of any fund, unless contrary to the express terms of the will.

The suggestions here presented have been submitted to all the surrogates and many members of the bar of this State for criticisms and suggestions. It has been our effort from the views thus obtained, aided by our own experience, to draft a law in such form as will be satisfactory to the courts, as well as to the profession.

NEWTON B. VAN DERZEE,

Chairman.

J. BENNETT SOUTHARD,
WILLIAM S. OSTRANDEE,
GEORGE F. ANDREWS,
HERBERT T. KETCHAM,
WALTER E. WOODIN,
GEORGE MCCANN,
LOUIS B. HAET,
FRANK V. MILLARD.

WILLIS E. HEATON,
Counsel.

L. 1914, CH. 413.—AN ACT TO AMEND THE CODE OF CIVIL PROCEDURE, IN RELATION TO SURROGATES AND THE PRACTICE AND PROCEDURE IN SURROGATES' COURTS.
(In effect Sept. 1, 1914.)

**CHAPTER XVIII OF THE CODE OF CIVIL PROCEDURE.
SURROGATES' COURTS, AND PROCEEDINGS THEREIN.**

- TITLE I.** The surrogate and acting surrogate, and their powers and duties. The surrogate's court, its officers and their powers and duties; the surrogate's court and its general jurisdiction.
- II.** Special proceedings; pleadings, process and its service; appearance; trial by court or jury; taking and preserving testimony; orders and decrees, their effect and enforcement. Letters, their requisites, effect, issue and revocation. Bonds and undertakings, their requisites, approval, prosecution and discharge. Sureties, their rights and obligations.
- III.** Granting letters of administration, probating and construing wills. Issuing letters testamentary, and ancillary letters testamentary and of administration. Appointment and qualification of testamentary trustee. Appointment and qualification of general, ancillary and testamentary guardians, and guardian by deed. Annual accounts by such guardians.
- III-A.** Funds of estates to be kept separate.
- IV.** Ascertaining assets and debts. Payment of debts and legacies. Powers and duties of executors and administrators. Mortgage, lease or sale of real property for payment of debts, funeral expenses, expenses of administration and to satisfy charges thereon, and for distribution.
- V.** Accounting and judicial settlement. Effect and contents of decree on judicial settlement. Costs, their amount, allowance and payment. Fees of appraisers, referees, jurors and witnesses. Commissions and allowances. Appeals, how and to what court taken; undertakings and stay of execution. Probate of heirship. Definitions and application of other sections.

TITLE I.

The surrogate and acting surrogate, and their powers and duties; the surrogate's court, its officers and their powers and duties; the surrogate's court and its general jurisdiction.

- ARTICLE 1.** The surrogate and acting surrogate; their powers and duties; when disqualified and how office filled.
2. The officers of the surrogate's court; their appointment, powers, duties, salaries and fees.
3. The surrogate's court and its general jurisdiction.

ARTICLE 1.

THE SURROGATE AND ACTING SURROGATE; THEIR POWERS AND DUTIES; WHEN DISQUALIFIED AND HOW OFFICE FILLED.

- | | |
|--|--|
| <p>§ 2472. Surrogate and acting surrogate; their official designations.</p> <p>2473. Seal of the surrogate and surrogate's court.</p> <p>2474. Surrogate, when not to be counsel.</p> <p>2475. Surrogate liable for clerk's acts.</p> <p>2476. Surrogate, when disqualified.</p> <p>2477. Disqualification; when objection must be taken.</p> <p>2478. Vacancy or disability; who to act as surrogate.</p> <p>2479. If surrogate disqualified, who to act.</p> <p>2480. Idem, in New York county.</p> <p>2481. Proof of authority.</p> <p>2482. Idem; when and how made.</p> | <p>§ 2483. How authority superseded.</p> <p>2484. Temporary surrogate; when board of supervisors may appoint.</p> <p>2485. Compensation of person acting as surrogate in case of vacancy, disability or disqualification.</p> <p>2486. Books to be kept by surrogate.</p> <p>2487. Books to be indexed; notation on margin as to certain decrees.</p> <p>2488. Papers and books to be preserved and bonds filed.</p> <p>2489. What papers to be transmitted to secretary of state or state comptroller; expenses thereof.</p> <p>2490. Incidental powers of the surrogate.</p> |
|--|--|

§ 2472. Surrogate and acting surrogate; their official designations.

Where the county judge is also surrogate, he may be designated, in any paper or proceeding relating to the office of surrogate, as the surrogate of the county, without any addition referring to his office as county judge. A local officer elected, as prescribed in the constitution, to discharge the duties of surrogate, or of county judge and surrogate, is designated in this act, and, when acting as surrogate, may be designated as the "special surrogate" of his county. Where an officer, other than the surrogate, or special surrogate, acts as surrogate in a case prescribed by law, he must be designated by his official title with the addition of the words, "and acting surrogate."

Source.—Former § 2483; originally revised from L. 1853, ch. 648.

Revisers' note.—No change in this section, except to insert "special surrogate" as being an officer who need not add to his official signature "and acting surrogate."

§ 2473. Seal of the surrogate and surrogate's court.

The seal of the surrogate of each county shall continue to be the seal of the surrogate's court of that county, and must be used as such by an officer who discharges the duties of the surrogate. A description of each of such seals must be deposited and recorded in the office of the secretary of state, unless it has already been done; and must remain of record.

Source.—Former § 2507, as amended by L. 1909, ch. 65; originally revised from R. S., pt. 3, ch. 2, tit. 1, §§ 3, 4, and 5.

§ 2474. Surrogate, when not to be counsel.

A surrogate shall not be counsel, solicitor or attorney in a civil action or special proceeding for or against any executor, administrator, temporary administrator, testamentary trustee, guardian or infant, over whom, or whose estate or accounts, he could have any jurisdiction by law.

Source.—Former § 2495, as amended by L. 1893, ch. 686; originally revised from R. S., pt. 3, ch. 2, tit. 1, § 13.

Revisers' note.—Monroe county has a population of more than 120,000, and therefore under § 20, art. VI, State Constitution, the last sentence [of the former section] is no longer necessary.

Disqualification of surrogate by acting as attorney and counsel, see <i>Darling v. Pierce</i>, 15 Hun 542. As to authority to pass accounts of an executor for whom he had been counsel before his election and for whom he continued to act in other counties, see <i>Wigand v. Dejonge</i>, 8 Abb. N. C. 260.	be returned.—Where a surrogate, in direct violation of this section acts as counsel in the prosecution of a claim for an estate upon which he has granted letters and receives \$600 for such services, he will be required to return the amount to the estate. <i>Matter of Merrill</i> (1912), 151 App. Div. 785, 136 N. Y. Supp. 884.
---	--

Compensation for services as counsel to

§ 2475. Surrogate liable for clerk's acts.

A surrogate hereafter elected or appointed, and the sureties on his official bond, are liable for any act of the clerk or deputy clerk of the surrogate's court in the discharge of his official duties, during the surrogate's term of office, as if the act were performed by the surrogate. The surro-

gate may take security from the clerk or deputy clerk, or either of them, to indemnify him against the liability created by this section.

Source.—Former § 2510, as renumbered § 2511 by L. 1893, ch. 686, and amended by L. 1907, ch. 209; originally revised from L. 1857, ch. 789.

§ 2476. Surrogate, when disqualified.

In addition to his general disqualifications as a judicial officer, a surrogate is disqualified from acting upon an application for probate of a will, where he is a subscribing witness, or is necessarily examined or to be examined as a witness.

A surrogate is also disqualified in any matter in his court where he files a certificate that his relations to the parties or the subject matter are such that it is improper for him to act.

Source.—Former § 2496; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 48; L. 1847, ch. 470, § 32, in part; L. 1871, ch. 859, § 8, in part.

Revisers' note.—In the third line after "will" insert part of old subdivision 2, making a continuous sentence. Repeal the remainder of the section, as the same is covered by the Judiciary Law.

The new matter is added because the relation of the surrogate to persons doing business in his court, and to the subject matter, especially, where he is allowed to practice, is often such that he ought not to be obliged to act.

Surrogate not disqualified because he took funds of the estate into his custody. *N. Y. Supp. 661. Surrogate not disqualified from acting by reason of his having been attorney for the testator, nor because he may be called as a witness by the contestants.* *People v. Weiant, 30 Hun 475.* *Matter of Hancock, 91 N. Y. 284. Where a will gave a legacy to the church of which the surrogate was vestryman, held not disqualified.* *Hopkins v. Lane, 6 Dem. 13, 3*

§ 2477. Disqualification; when objection must be taken.

An objection to the power of a surrogate to act, based upon a disqualification, is waived by an adult party to a special proceeding unless it is taken at or before the joinder of issue by that party, or, where an issue is not framed, at or before the submission of the matter or question to the surrogate.

Source.—Former § 2497; originally revised from R. S., pt. 3, ch. 3, tit. 1, § 14, as added by L. 1844, ch. 300, § 6.

Revisers' note.—Change puts all disqualifications that can be waived on the same footing, leaving no useless exceptions to be hunted out.

§ 2478. Vacancy or disability; who to act as surrogate.

Where in any county, except New York, the office of surrogate is vacant; or the surrogate is disabled by reason of sickness, absence or lunacy, or is disqualified in a particular matter, and special provision is not made by law for the discharge of the duties of his office in that contingency; the duties of his office must be discharged, until the vacancy is filled or the disability ceases, as follows:

1. By the special surrogate.
2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.
3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge.
4. If there is no county judge, or he is in like manner disabled, or is precluded or disqualified, by the district attorney.

But before an officer is entitled to act as prescribed in this section, proof of his authority to act as prescribed in section 2481 of this chapter must be made. In any proceeding in the surrogate's court of the county of Kings, before either of the officers authorized in this section to discharge the duties of the office of surrogate of such county for the time being, if an issue is joined or a contest arises either on the facts or the law, such officer, in his discretion, may, by order, transfer such cases to the supreme court to be heard and decided at a special term thereof, held in such county, which order shall be recorded in the surrogate's office. A certified copy of such order, together with the appropriate certificate or certificates of the authority of the officer to act as surrogate, shall be sufficient and conclusive evidence of the jurisdiction and authority of the supreme court in such matter or cause. After a final order or decree is made in the matter or cause so transferred to the supreme court, the court shall direct the papers to be returned and filed, and transcripts of all orders and decrees made therein to be recorded in the surrogate's office of such county; and when so filed and recorded, they shall have the same effect as if they were filed and recorded in a case pending in the surrogate's court of such county.

Source.—Former § 2484, as amended by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 49-54; L. 1847, ch. 470, § 32; L. 1871, ch. 859, § 8.

Chapter 525, laws 1892, which permits the surrogate to sign decrees, etc., while away on his vacation, is permissive merely and does not prevent the appointment of a provisional surrogate in a proper case. In *re Frye's Estate*, 20 N. Y. Supp. 588.

This section held not to apply where the acting surrogate's authority was derived under a special act. *Matter of Tyler*, 60 Hun 566, 15 N. Y. Supp. 386; *People ex rel. Sholes v. Supervisors*, 82 Hun 105, 31 N. Y. Supp. 63.

§ 2479. If surrogate disqualified, who to act.

Where the surrogate of any county, except New York, is precluded or disqualified from acting with respect to any particular matter, his powers with respect to that matter, or if he be temporarily absent, his powers with respect to all matters, shall be discharged by the several officers designated in the last section, in the order therein provided. If there is no such officer qualified to act therein, the surrogate may file in his office a certificate, stating that fact; specifying the reason why he is disqualified or precluded; and designating the surrogate of any county, other than New York, to act in his place in the particular matter or during his absence. The surrogate so designated has, with respect to that matter, or generally when the designation is made on account of absence of the surrogate, all the powers of the surrogate making the designation, and may exercise the same in either county.

Source.—Former § 2485, as amended by L. 1893, ch. 686; originally revised from L. 1877, ch. 285; L. 1879, ch. 311.

Revisers' note.—The changes in this section with others following are intended to enable the surrogate where he is disqualified in a particular matter or is to be absent, to make a certificate of the fact, and thus obviate application to the supreme court.

Constitutionality.—Authorizing the district attorney to act as surrogate in case of the disability or incapacity of the surrogate and county judge held constitutional and valid. *People ex rel. Oakley v. Petty*, 32 Hun 443.

Disqualification.—Surrogate not held interested because by consent pending a

contest as to probate of a will the property of the estate was placed in his hands. *Matter of Hancock*, 91 N. Y. 284. Surrogate held not disqualified who had been the attorney of the testator, but had ceased to be so and did not draw or witness the will. *People v. Weiant*, 30 Hun 475.

§ 2480. *Idem*, in New York county.

In the county of New York the supreme court, at a special term thereof, on the presentation of proof of its authority, as prescribed in the next section, must exercise all the powers and jurisdiction of the surrogate's court, as follows:

1. Where the surrogate is precluded or disqualified from acting with respect to a particular matter, it must exercise all the powers and jurisdiction of that court with respect to that matter.

2. Where the office of surrogate of the county is vacant, or the surrogate is disabled by reason of sickness, absence or lunacy, it must exercise all the powers and jurisdiction of that court, until the vacancy is filled or the disability ceases, as the case may be.

Source.—Former § 2486, as amended by L. 1881, ch. 535, L. 1893, ch. 686 and L. 1895, ch. 946.

§ 2481. Proof of authority.

The authority of another officer, or, in the county of New York, of the supreme court, to act as prescribed in the last three sections, must be proved in one of the following modes:

1. Where the surrogate is disqualified or precluded from acting in a particular matter, that fact may be proved by the surrogate's certificate thereof. Where the surrogate is temporarily absent, that fact may be proved by the certificate of the surrogate, or of the clerk of the surrogate's court, or of the county clerk.

2. The fact that the surrogate is disabled by reason of sickness, or lunacy, or that the office is vacant, and also the authority of the officer, or of the court, as the case may be, to act in his place, may be proved and are deemed conclusively established by an order of a justice of the supreme court of the judicial district embracing the county.

Source.—Former § 2487, as amended by L. 1895, ch. 946; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 49-54; L. 1847, ch. 470, § 32; L. 1871, ch. 859, § 8.

Revisers' note.—The certificate shall be the necessary and only requisite. If the surrogate refuses to make it, an appeal lies. Where the surrogate is disabled or the office is vacant let the supreme court give direction.

Certificate of the surrogate and county authority to act as special surrogate, see Matter of Tyler, 60 Hun 566, 15 N. Y. Supp. 366. People ex rel. Oakley v. Petty, 32 Hun 443. As to necessity of proving au-

§ 2482. *Idem*, when and how made.

An order may be made as prescribed in subdivision second of the last section upon or without notice, as a justice of the supreme court of the judicial district embracing the county thinks proper. It must recite the cause of the making thereof, and must designate the officer or court empowered to discharge the duties of the office of surrogate. It may, in the discretion of the justice, require an officer to give security for the due discharge of the duties therein. Where the office of surrogate is vacant, or the surrogate is disabled by reason of lunacy, the attorney-general, if directed by the governor must, or the district attorney upon his own motion may,

apply for the order, and a justice of the supreme court of the judicial district embracing the county must grant it upon his application. A justice of the supreme court of the judicial district embracing the county may also grant the order upon the application of a party or a person about to become a party to any special proceeding in the surrogate's court. Where the surrogate is sick, the granting of an order rests in the discretion of the justice, and its effect may be qualified as the justice thinks proper.

Source.—Former § 2488; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 49-54; L. 1847, ch. 470, § 32; L. 1871, ch. 859, § 8.

Revisers' note.—By amending the prior section making the certificate sufficient, this section now applies only in cases of vacancy, sickness or lunacy.

§ 2483. How authority superseded.

Where an order is made by a justice of the supreme court of the judicial district embracing the county, as prescribed in the last two sections, or an appointment is made as prescribed in section 2484 of this chapter for any cause except a vacancy in the office of surrogate, it may be revoked, without prejudice to any proceeding theretofore taken by virtue thereof, by a justice of the supreme court of the judicial district embracing the surrogate's county, upon proof that it was improvidently made, or that the cause of making it has become inoperative. Such an order or appointment, made upon the ground that the surrogate's office is vacant, is superseded without any formal revocation, by the filling of the vacancy. After the order of appointment is revoked, or the vacancy is filled, as the case may be, the unfinished business, in any proceeding taken by virtue of the order or appointment, must be transferred to, and may be completed by, the surrogate, in the same manner and with like effect as where a new surrogate completes the unfinished business of his predecessor.

Source.—Former § 2489; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 49-54; L. 1847, ch. 470, § 32; L. 1871, ch. 859, § 8.

Revisers' note.—The use of numerals when sections are referred to will make the number more easily distinguished and read. Reference to "supervisors" omitted here. See next section and note.

§ 2484. Temporary surrogate; when board of supervisors may appoint.

In any county, except New York, if the surrogate is disabled by reason of sickness, and there is no special surrogate, or special county judge of the county, the board of supervisors, or in the counties embraced within the city of New York, the board of aldermen, may, in its discretion, appoint a suitable person to act as surrogate until the surrogate's disability ceases, or until a special surrogate or a special county judge is elected or appointed. A person so appointed must, before entering on the execution of the duties of his office, take and file an oath of office and give an official bond as prescribed by law with respect to a person elected to the office of surrogate.

Source.—Former § 2492, as amended by L. 1893, ch. 686; substitute for R. S., pt. 2, ch. 6, tit. 2, § 54.

Revisers' note.—Change in this and several other places to meet the conditions in Greater New York.

§ 2485. Compensation of person acting as surrogate in case of vacancy, disability or disqualification.

An officer, or a person appointed by the board of supervisors, or board of aldermen, who acts as surrogate of any county during a vacancy in the office, or in consequence of disability, as prescribed in this title must be paid, for the time during which he so acts, a compensation equal pro rata to the salary of the surrogate; or, in a county where the county judge is also surrogate, to the salary of the county judge. The amount of his compensation must be audited and paid in like manner as the salary of the surrogate, or of the county judge, as the case may be. Where an officer of the county performs the duties of the surrogate with respect to a particular matter wherein the surrogate is disqualified or precluded from acting, the supervisors of the county, or board of aldermen, must allow him a compensation equal pro rata to the salary of the surrogate to be audited and collected in the same manner.

Source.—Former § 2493; originally revised from L. 1871, ch. 859, § 8.

Revisers' note.—The person performing the duties of the surrogate should have the same compensation. This is the practice now.

Section not applicable where special surrogate was elected under a special act, passed in pursuance of § 16 of article 6 of the constitution. <i>People ex rel. Sholes v. Supervisors</i>, 82 Hun 105, 31 N. Y. Supp. 63.	This section entitles special surrogate to compensation only for the time when actually engaged. <i>Matter of Tyler</i>, 60 Hun 566, 15 N. Y. Supp. 366.
--	---

§ 2486. Books to be kept by surrogate.

Each surrogate must provide and keep the following books:

1. A record-book of wills, in which must be recorded, at length, every will required by law to be recorded in his office and the decree admitting it to probate.

2. A record-book of letters testamentary, letters of administration and letters of guardianship, in which must be recorded all such letters issued out of his court.

3. A record-book in which must be recorded every decree whereby the account of an executor, administrator, testamentary trustee, or guardian is settled.

4. A book containing a minute of every paper filed, or other proceeding taken, relating to the disposition of the real property of a decedent, and a record of every order or decree made thereupon; with a memorandum of every report made, and other proceeding taken, founded upon a decree for such a disposition.

5. A book containing a minute or record of every decree or order, the record of which is not required by this section to be kept elsewhere; together with a memorandum of each execution issued, and of the satisfaction of each decree recorded therein.

6. A book in which must be recorded, upon the application of any person, all instruments acknowledged, or proved, and duly certified, settling estates or accounts or assigning, mortgaging, charging or releasing any interest in any estate or fund.

7. A book known as the Court and Trust Fund Register.

8. A book in which all bonds and undertakings filed in his court must be recorded.

The expense of providing the books required by law to be kept and used by the surrogate is a county charge, and such books must be open at all reasonable times to the inspection of any person.

Source.—Former §§ 2498 and 2502; § 2498 originally revised from R. S., pt. 3, ch. 2, tit. 1, § 7; pt. 2, ch. 6, tit. 4, § 60; tit. 2, § 57, and L. 1837, ch. 460, §§ 2, 3; § 2502, as added by L. 1906, ch. 350.

Revisers' note.—Scattered provisions requiring books to be kept put into one section. As to subd. 6 see [former] § 2502; § 32, Personal Property Law; § 274, Real Property Law. Subd. 7 from former § 2509. Subd. 8 from County Law; § 247.

As an incident to his duty to keep a book in which wills admitted to probate in this court must be recorded, the surrogate may under subdivision 11 of § 2490, grant an order directing the correction of the record of a will *nunc pro tunc* as of the date of record, although the original will appears to be lost. *Matter of Davis* (1917), 99 Misc. 447, 164 N. Y. Supp. 143.

§ 2487. Books to be indexed; notation on margin as to certain decrees.

To each of the books kept as prescribed in the last section must be attached an alphabetical index referring to the page of the book where each subject may be found. The surrogate may keep two or more books for a further division of the subjects specified in either subdivision of the last section; in which case he must keep a separate index to each set of books. Each decree or judgment affecting a will, its probate or construction, or revoking or otherwise affecting letters testamentary, letters of administration, or letters of guardianship, or suspending or removing a testamentary trustee, or modifying or otherwise affecting any other decree, must be plainly noted at the end or in the margin of the record of the will, letters, or original decree, with a reference to the book and page where the subsequent decree is recorded.

Source.—Former § 2499; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 57; tit. 3, § 60; pt. 3, ch. 2, tit. 1, § 7, and L. 1837, ch. 460, §§ 2 and 3.

Revisers' note.—Reference to revoking probate in this and several other sections omitted as the surrogate has had no such power in several years. Last sentence inserted at end of prior section.

§ 2488. Papers and books to be preserved; and bonds filed.

The surrogate must carefully file and preserve in his office every deposition, affidavit, petition, report, account, voucher, or other paper relating to any proceeding in his court and deliver to his successor all the papers and books kept by him, except that vouchers may be returned to the accounting party after two years, or destroyed after five years from the date of the decree which allowed the payments represented by them.

Source.—Former § 2500, as amended by L. 1893, ch. 686; originally revised from R. S., pt. 3, ch. 2, tit. 1, § 8; pt. 2, ch. 6, tit. 4, § 13, last clause.

Revisers' note.—It has been thought unnecessary to retain vouchers. The decree establishes the payments, and after a reasonable time they can safely be returned or destroyed.

§ 2489. What papers to be transmitted to secretary of state or state comptroller; expenses thereof.

A surrogate who admits to probate the will of a person who was not a resident of the state at the time of his death, or grants original or ancillary

letters testamentary upon such a will, or original or ancillary letters of administration upon the estate of such a person, must, within ten days thereafter, transmit to the secretary of state, to be filed in his office, a certified copy of the will or letters.

The surrogate must, within ten days after granting letters of administration to a county treasurer, transmit to the state comptroller a certified copy of such letters.

Source.—Former §§ 2503 and 2667; § 2503 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 59; § 2667, as amended by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 6, §§ 66-68.

§ 2490. *Incidental powers of the surrogate.*

A surrogate, in or out of court, as the case requires, has power:

1. To issue citations and other process authorized by law to parties, in any matter within the jurisdiction of his court; and, in a case prescribed by law, to compel the attendance of a party.

2. To adjourn, from time to time, a hearing or other proceeding in his court; and where all persons who are necessary parties have not been cited or notified, and citation or notice has not been waived by appearance or otherwise, it is his duty, before proceeding further, so to adjourn the same, and to issue a supplemental citation, or require the petitioner to give an additional notice, as may be necessary.

3. To issue, under the seal of the court, a subpoena requiring the attendance of a witness, or of a person, residing or being in any part of the state, for examination as to any matter or subject about which it is necessary or proper for the surrogate to inquire in order that he may properly perform any duty imposed upon him by law; or a subpoena duces tecum requiring such attendance and the production of a book or paper material to an inquiry pending in the court.

4. To enjoin by order, an executor, administrator, testamentary trustee or guardian, to whom a citation or other process has been duly issued from his court, from acting as such until the further order of the court.

5. To require, by order, an executor, administrator, testamentary trustee, or guardian subject to the jurisdiction of his court, to perform any duty imposed upon him by statute, or by the surrogate's court, under authority of a statute.

6. To open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers.

7. To punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner.

8. Subject to the provisions of law relating to the disqualification of a judge in certain cases, to complete any unfinished business pending before his predecessor in the office, including proofs, accountings and examinations.

9. To complete and certify and sign in his own name, adding to his signature the date of so doing, all records or papers left uncompleted or unsigned by any of his predecessors.

10. To exemplify and certify transcripts of all records of his court, or other papers remaining therein.

11. With respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common law jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred.

12. A surrogate has power to administer oaths, to take affidavits and the proof and acknowledgment of deeds and all other instruments in writing, and certify the same with the same force and effect as if taken and certified by a county judge; and in any proceeding of which he has jurisdiction, he may administer oaths, take affidavits, testimony and depositions, and certify the same at any place within the state of New York, with the same force and effect as if taken in his county.

Source.—Former §§ 2481, 2518 and 2662. § 2481, as amended by L. 1909, ch. 65; originally revised from R. S., pt. 3, ch. 2, tit. 1, §§ 6, 11; L. 1837, ch. 460, § 9, in part, and § 61; L. 1870, ch. 74, § 2; L. 1871, ch. 424, § 2; L. 1874, ch. 9. Subd. 12 derived from L. 1884, ch. 309, § 1, as amended by L. 1900, ch. 510, § 1. § 2518 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 26. § 2662, as amended by L. 1893, ch. 686; L. 1909, ch. 184; consolidated from former §§ 2660, 2661, the former new when originally inserted in Code of Civ. Proc. and the latter originally revised from R. S., pt. 2, ch. 6, tit. 2, § 26.

Revisers' note.—New matter in last subdivision added so that the plan of allowing surrogates to take depositions on proof of will out of the county may be carried out. New matter in subd. 3 inserted so that authority to examine persons repeated in many sections may be eliminated.

Enjoining executors, etc.—As to power to enjoin an executor because of a disagreement between executors, see *Brennen v. Lane*, 4 Dem. 322. As to power to enjoin after letters have been revoked, see *Breslin v. Smyth*, 3 Dem. 251.

As to limitation of authority under subdivisions 5 and 11, see *Matter of Van Dermoor*, 42 Hun 326; *Matter of Woodward*, 28 Misc. 602, 59 N. Y. Supp. 1080; *Wolfe v. Lynch*, 2 Dem. 610.

Subdivision 6 was framed mainly to expressly confer powers which it had already been held that surrogates incidentally possessed. *Farmers' L. & T. Co. v. Hill*, 4 Dem. 41. See *Supperly v. Baucus*, 24 N. Y. 46.

Opening, vacating, etc., decree.—(a) **In general.**—Power of surrogate distinguished from that of supreme court. *Matter of Henderson*, 157 N. Y. 423. See also *Matter of Regan*, 167 N. Y. 338.

The practice of initiating proceedings to vacate decrees of the surrogate's court by order to show cause or notice of motion has been recognized for many years. *Matter of Waters* (1918), 183 App. Div. 840, 171 N. Y. Supp. 897.

Contains the only authority possessed by surrogates to open, vacate or set aside a decree granted and entered in their courts and to grant a new trial or hear-

ing. The exercise of such power must be based upon the existence of fraud, newly discovered evidence, clerical error "or other sufficient cause." *Matter of Hermann* (1917), 178 App. Div. 182, 165 N. Y. Supp. 298.

Powers conferred must be exercised only in a like case and in the same manner as a court of record and of general jurisdiction exercises the same powers. *Matter of Robertson*, 51 App. Div. 117, 64 N. Y. Supp. 385, aff'd 165 N. Y. 675; *Matter of Kranz*, 41 Hun 403. And the exercise of this power is not subject to the limitations of time prescribed by Code, §§ 1288, 1290. *Matter of Flynn*, 136 N. Y. 287. Power given under this subdivision compared with power given under § 724. *Matter of Assignment of Wiltse & Fromer*, 5 Misc. 105, 25 N. Y. Supp. 733.

A surrogate cannot open, modify, vacate, or set aside his decree, pursuant to this section, unless the moving papers show that there has been fraud, or evidence newly discovered, or that a clerical error, as distinguished from a judicial error, has been committed, or that other sufficient cause exists. *Matter of Peck*, 131 App. Div. 81, 115 N. Y. Supp. 239.

Jurisdiction of surrogate to vacate or modify decrees settling the accounts of an executor who has been awarded excessive

commissions and allowances, see *Spallholz v. Sheldon* (1913), 158 App. Div. 367, 371, 143 N. Y. Supp. 417.

The jurisdiction of the surrogate to vacate a decree admitting a will to probate is limited to those cases where the moving papers show fraud in the probate proceeding or the existence of such newly-discovered evidence as would probably change the result if a new trial were granted. It must appear, however, that such evidence has been discovered since the trial and could not have been discovered before the trial by the exercise of due diligence; that it is material to the issues, and that it is not merely cumulative or impeaching or contradicting former evidence. *Matter of Clapp* (1916), 97 Misc. 576, 163 N. Y. Supp. 456.

While a surrogate's court has the power to modify its decree, it must be exercised in the same manner as a court of general jurisdiction exercises the same power. Section 1283 provides that a judgment of a court of record may be set aside for error of fact not arising on the trial. Such a judgment may also be modified so as to correct a clerical error. Where the petitioner does not allege that his coexecutor was guilty of any fraud in connection with the entry of the decree, or that there was any irregularity, or that it contains a clerical error, or error in fact not arising on the trial, nor does he allege the existence of any facts extrinsic of the record which would render it just and equitable that the decree should be opened, a motion therefor will be denied. *Matter of Graham* (1917), 98 Misc. 518, 162 N. Y. Supp. 861.

The surrogate's court has power under § 2490, subd. 6, to set aside a decree of that court, upon motion made by the attorney-general on behalf of the state as trustee for unknown next of kin, where claims have been allowed which are unfounded and allowances which are excessive. *Matter of Malone* (1912), 150 App. Div. 31, 134 N. Y. Supp. 496.

A court of equity should not intervene in a case where the surrogate has full power to open, vacate or modify his decree upon application. *Costello v. Costello* (1912), 152 App. Div. 280, 137 N. Y. Supp. 132.

(b) **Exercise of power.**—Surrogate may, after the time to appeal has expired, modify his decree. *Morgan v. Cowie*, 49 App. Div. 612, 63 N. Y. Supp. 608; *Matter of Dey Ermand*, 24 Hun 4. As to setting aside a decree affecting the title to real estate, see *Matter of Wood*, 70 App. Div. 321, 75 N. Y. Supp. 272. As to power to expunge from records decrees placed there without authority, see *Matter of Armstrong*, 72 App. Div. 286, 76 N. Y. Supp. 37. As to what circumstances do not justify the surrogate in setting aside a decree, see *Matter of White*, 52 App. Div. 225, 65 N. Y. Supp. 168; *Matter of Campbell*, 55 Misc. 469, 106 N. Y. Supp. 677. As to opening or

vacating decree, see also *Caulfield v. Sullivan*, 85 N. Y. 153.

Remedy of administrators after a decree is made directing payment of a disputed claim. *Ashley v. Lamb*, 50 Hun 568, 3 N. Y. Supp. 715; *Matter of Fuller*, 86 Hun 47, 33 N. Y. Supp. 194.

Power to open or modify decree entered on a final accounting must be exercised with great care. *Matter of O'Neil*, 46 Hun 500.

Surrogate may, as a condition of denying an application to revoke letters testamentary, require an executor to give a bond, who, when appointed, was not required to give a bond. *Matter of Wischmann*, Nos. 1 and 2, 80 App. Div. 520, 80 N. Y. Supp. 789.

Where a surrogate granted ancillary administration on the probate of a will in a foreign country, when decedent was not a resident of such country but was of the county where ancillary administration was granted, the surrogate may vacate the decree where it is shown that heirs of the decedent were not parties to the foreign proceeding. In re *Connell's Will* (1911), 138 N. Y. Supp. 389.

Idem; probate of will.—A decree setting aside the probate of a will may be denied even though one of the witnesses as to the testator's mental capacity was also a legatee under the will. *Matter of Wickwire* (1913), 80 Misc. 137, 141 N. Y. Supp. 783; opening of decree of probate, see *Matter of Lord* (1915), 90 Misc. 222, 154 N. Y. Supp. 302.

Idem; adoption.—Under § 2490 (6), the surrogate may vacate and set aside an order of adoption made by him without jurisdiction. *Matter of Johnston* (1912), 76 Misc. 374, 137 N. Y. Supp. 92.

Decisions which hold that the surrogate has jurisdiction to vacate an order approving and confirming an adoption disapproved. *Stevens v. Halstead* (1917), 181 App. Div. 198, 168 N. Y. Supp. 142.

Idem; new trial, when granted.—A new trial may not be granted by the surrogate where the motion was not made on a case containing the evidence and the affidavits did not show the nature of the administrator's claim or that the additional evidence was not known at the time of the previous trial. *Matter of Rose* (1912), 153 App. Div. 263, 137 N. Y. Supp. 1079.

(c) **Procedure.**—Power exercised in same manner as setting aside or opening a judgment and proceedings may be begun by notice of motion or by order to show cause. *Cluff v. Tower*, 3 Dem. 253. Method of procedure where application to vacate a decree admitting a will to probate is made upon the ground of discovery of a later will. *Matter of Hamilton*, 2 Connolly, 268, 20 N. Y. Supp. 73. As to reargument of a motion upon additional facts, made without obtaining leave, see *Matter of Hayward*, 44 App. Div. 265, 60 N. Y. Supp. 636.

(d) **Fraud.**—As to what is sufficient to authorize a finding of fraud, see *Martin v. Hann*, 32 App. Div. 602, 53 N. Y. Supp. 186; *Matter of Baity*, 2 Connolly, 485, 20 N. Y. Supp. 70. Fraud should be clearly established. *Matter of Richardson*, 81 Hun 425, 30 N. Y. Supp. 1008.

When surrogate cannot set aside agreement procured by fraud. *Matter of Waters*, (1918), 183 App. Div. 840, 171 N. Y. Supp. 897.

(e) **Proof or allegation of fraud, etc.**—Necessity of proof or allegation of fraud, newly-discovered evidence, clerical error, or other similar cause of complaint. *Matter of Hawley*, 100 N. Y. 206, s. c. 104 N. Y. 250, 259.

(f) **Newly-discovered evidence** must be so clear and positive as to satisfy the mind of the court that, if offered originally, it would have changed the result. *Olmstead v. Long*, 4 Dem. 44; *Crossman v. Crossman*, 2 Dem. 69. New hearing can only be granted where it appears that the new evidence could not with reasonable diligence have been obtained upon the original hearing. *Matter of McManus*, 66 App. Div. 53, 73 N. Y. Supp. 88.

(g) **Errors.**—Power restricted to clerical errors which do not involve questions of law. *Matter of Connolly*, 38 Misc. 466, 77 N. Y. Supp. 1033; *Matter of Monteith*, 27 Misc. 163, 58 N. Y. Supp. 379; *Matter of Tilden*, 5 Dem. 230; *Matter of Watts*, 2 Connolly, 415, 20 N. Y. Supp. 63. Decree not opened to correct errors of substance. *Matter of Walrath*, 37 Misc. 696, 76 N. Y. Supp. 448. As to an arithmetical error, see *Matter of Henderson*, 33 App. Div. 545, 53 N. Y. Supp. 957, aff'd 157 N. Y. 423.

Unlimited examination of a party not a witness upon the probate of a will and who has not been called or offered as a witness, may not be granted by a surrogate. *Matter of Briggs* (1917), 180 App. Div. 843, 168 N. Y. Supp. 382.

Idem; elimination of untrue statement.—A decree entered on the judicial settlement of the accounts of an administratrix will be modified by striking therefrom a statement which is not true whether it was made intentionally or otherwise. *Matter of Henry* (1912), 78 Misc. 319, 139 N. Y. Supp. 690.

(h) **Defect or misjoinder of parties.**—As to power to open decree to bring in parties who should have been cited to appear, see *Matter of Gall*, 42 App. Div. 255, 59 N. Y. Supp. 254; *Matter of Odell*, 1 Misc. 390, 23 N. Y. Supp. 143; *Matter of Killan*, 172 N. Y. 547. Power to open not exercised on application of person not a party to the proceeding. *Matter of Tilden*, 56 App. Div. 277, 67 N. Y. Supp. 879.

A creditor, not being a proper party to proceedings for the probate of a will, cannot invoke the authority of the surrogate to vacate the decree admitting the will. *Heilman v. Jones*, 5 Redf. 398.

(i) **Transfer tax.**—Decree opened where

legatee, exempt from taxation, had never been notified by the surrogate of his determination to tax its legacy. *Matter of Daly*, 34 Misc. 148, 69 N. Y. Supp. 494. Surrogate has power to modify order as to such tax, although time to appeal from order has expired. *Matter of Coogan*, 27 Misc. 563, 59 N. Y. Supp. 111, aff'd 160 N. Y. 613; *Matter of Mather*, 41 Misc. 414, 84 N. Y. Supp. 1105.

When transfer tax is imposed under an unconstitutional statute, surrogate may vacate the decree assessing it. *Matter of Scringour*, 80 App. Div. 388, 80 N. Y. Supp. 636. As to when a decree fixing the value of decedent's real property for the purposes of transfer tax may not be modified because it subsequently sells for a less sum at auction, see *Matter of Lowey*, 89 App. Div. 226, 85 N. Y. Supp. 924.

Idem; review of action of transfer tax appraiser.—A transfer tax appraiser has jurisdiction in the first instance to determine whether certain corporate stock constitutes a part of the estate to be appraised, and such determination must necessarily precede the valuation of said stock for the purposes of the transfer tax. The jurisdiction of the appraiser is not, however, exclusive and on appeal from the order entered on his report the surrogate has power to decide every question that may be raised in a proceeding under the statute. *Matter of Barnes* (1913), 83 Misc. 272, 144 N. Y. Supp. 794.

Idem; modification of appraisal.—The surrogate has power to modify an order fixing a transfer tax so as to relieve a charitable institution from the payment of such transfer tax upon an exempt legacy, although the time to appeal from the order has expired. *Matter of Townsend* (1912), 153 App. Div. 85, 138 N. Y. Supp. 191.

The surrogate may modify a decree based on such appraisal by reducing the tax to the proper amount, and may order the excess refunded. *Matter of Campbell*, 50 Misc. 485, 100 N. Y. Supp. 637. As to when order fixing tax may not be vacated, see *Matter of Barnum*, 129 App. Div. 418, 114 N. Y. Supp. 33.

Idem; modification of order where questions are litigated.—Where in a transfer tax proceeding a question is litigated before the appraiser, or when conflicting contentions are presented to him for determination, his finding and the order of the surrogate's court entered thereon constitute a determination on such questions which can only be reviewed by appeal. If, however, a question is not litigated before the appraiser, or if his finding is the result of a mutual mistake of fact or of law, then, under this section the surrogate's court may vacate or modify its order although no appeal was taken therefrom. *Matter of Morgan* (1914), 85 Misc. 682, 147 N. Y. Supp. 685.

Idem; improper inclusion of property in

taxable assets.—The inclusion of property in the taxable assets of a decedent's estate which did not belong to him is a mistake of fact which can be corrected by the surrogate, although no appeal has been taken from the order and the time to appeal has expired. *Matter of Morgan* (1914), 85 Misc. 682, 147 N. Y. Supp. 685.

Idem; newly discovered evidence.—Application to vacate an order assessing a transfer tax on the ground of alleged newly discovered evidence, denied. *Matter of Gates* (1918), 103 Misc. 465, 170 N. Y. Supp. 299.

Idem; correction of mistake.—The surrogate has the power under subdivision six of this section to correct an order in a transfer tax proceeding based on a mistake of fact, although more than two years have elapsed since the entry of the order. *Matter of Morgan* (1914), 85 Misc. 682, 147 N. Y. Supp. 685.

Modifying order concerning corporate transfer tax.—A petition by a corporation to modify a prior order by striking therefrom a transfer tax assessment made against it, which fails to allege fraud, newly discovered evidence or clerical error, but bases its ground for relief upon exemption, and alleges that because of an oversight, no appearance was entered or affidavit of exemption filed on appraisal of the estate, is addressed to the sound discretion of the surrogate and his decision will not be disturbed on appeal. *Matter of Townsend* (1915), 215 N. Y. 442.

(j) **Other sufficient cause.**—As to meaning of "other sufficient cause," see *Singer v. Hawley*, 3 Dem. 571; *Matter of Hodgman*, 82 Hun 419, 31 N. Y. Supp. 263; *Matter of Soule*, 72 Hun 594, 25 N. Y. Supp. 270. Must be causes of a like nature with fraud, newly-discovered evidence, or clerical error. *Matter of Beach*, 3 Misc. 393, 24 N. Y. Supp. 717. As to failure to introduce important testimony owing to inattention of counsel, see *Matter of Quinn*, 1 Connolly 381, 5 N. Y. Supp. 261.

Where party who was served with citation but who was sick and unable to transact business at the time, and probably had no knowledge of the hearing, held sufficient. *Matter of Traver*, 9 Misc. 621, 30 N. Y. Supp. 851.

Service of citation upon a person *non compos mentis*, for whom no next friend had been appointed, held sufficient. *Matter of Donlon*, 66 Hun 199, 21 N. Y. Supp. 114.

As to power to open decree of a former surrogate on the ground of disqualification of such surrogate by reason of interest, see *Matter of Hancock*, 91 N. Y. 284. Failure to file vouchers for items of the account, held ground for vacating. *Matter of Wicke*, 74 App Div. 221, 77 N. Y. Supp. 558. To allow the filing of supplemental account. *People ex rel. Stevens v. Lott*, 42 Hun 408. Upon proof of defective service of citation. *Matter of Harlow*, 73 Hun 433, 26 N. Y. Supp. 469.

The surrogate is confined to the grounds enumerated for the granting of a rehearing. The power to open "for other sufficient cause" does not mean at the will of the surrogate, or *ex gratia*, but for causes pursuant to established precedent. *In re Van Ness' Will* (1913), 140 N. Y. Supp. 576.

Correction of record of will.—As an incident to the duty of the surrogate under § 2486 to keep a book in which wills admitted to probate in his court must be recorded, he may, under subdivision 11, grant an order directing the correction of the record of a will *nunc pro tunc* as of the date of record although the original will appears to be lost. *Matter of Davis* (1917), 99 Misc. 447, 164 N. Y. Supp. 143.

Discretion as to grant of temporary administration.—Where for any cause delay necessarily occurs in presenting a last will for probate, or in the grant of letters testamentary upon probate, or letters of administration upon due application, the surrogate has jurisdiction, in his discretion, to grant letters of temporary administration upon the petition of a creditor or a person interested in the estate and no one is entitled to notice of the application. *Matter of Chittenden* (1912), 76 Misc. 92, 136 N. Y. Supp. 953.

Regulation of sale.—Where, after a sale of decedent's real estate for payment of debts, the administrator refuses to convey, the surrogate has no jurisdiction to entertain a motion by the purchaser to be relieved from her purchase and that the administrator pay to her the amount paid upon the purchase price, with interest, the amount of the auctioneer's fees paid by her, and the amounts incurred for counsel fee and for examining the title. It could only be as a power incidental to the duty of regulating the sale, that the surrogate could order the sale abandoned or could prescribe the terms upon which relief could be had by a purchaser, and such primary duty does not appear. *Matter of Bridgeport Brass Co.* (1912), 77 Misc. 69, 137 N. Y. Supp. 418.

Powers over executors and administrators.—The surrogate under the provisions of subd. 5 may by order require executors and administrators subject to the jurisdiction of his court to perform any duty imposed upon them *by statute* or by the surrogate's court under authority of a *statute*. *McQuaide v. Perot* (1918), 223 N. Y. 75.

Executors; sale of testator's real estate.—Where a will giving the executor power to sell testator's real estate contains legacies in excess of the gross personal estate, the surrogate is without jurisdiction to declare that the legacies were by the testator charged upon the real estate. Until the executor has brought the proceeds of a sale of the real estate into court for distribution, no adjudication can determine whether lands authorized to be sold by the executor under the will are to be resorted

to for the payment of legacies. *Matter of Day* (1912), 75 Misc. 597, 136 N. Y. Supp. 172.

Contempt.—As to power of appellate division to review an order of a surrogate's court denying a motion to vacate an order punishing a person for contempt, see *Matter of Pye*, 23 App. Div. 206, 48 N. Y. Supp. 865. As to punishment for contempt, see *Matter of Pye*, No. 1, 18 App. Div. 306, 46 N. Y. Supp. 350, aff'd 154 N. Y. 773.

Unfinished business.—Surrogate may, in admitting a will to probate, act upon testimony taken in the proceeding by his predecessor in office. *Matter of Carey*, 24 App. Div. 531, 49 N. Y. Supp. 32.

New surrogate should take up an accounting where it was left by his predecessor, and upon the evidence previously taken and any additional proofs that may be offered, make the proper decision. *Matter of Winslow*, 12 Misc. 254, 34 N. Y. Supp. 637.

Incidental powers.—In order to make distribution to the legatees, surrogate has the incidental power to compel the executor to account for the land in which he has invested the money of the estate. *Kager v. Brennehan*, 47 App. Div. 63, 62 N. Y. Supp. 339.

Surrogate may entertain a petition to set aside a sale of real estate sold under an order of his court to pay debts. *Matter of Lynch*, 33 Hun 309.

Surrogate has power to order a discontinuance of proceedings to sell the real property of decedent for the payment of debts upon payment by the owner of the claims established and the costs incurred. *Kowing v. Moran*, 5 Dem. 56.

Jurisdiction of the surrogate to order an accounting is not affected by the filing of an answer denying the alleged relationship of the petitioners to the decedent; but such relationship may be determined upon the accounting. *Matter of Kipp*, 17 Misc. 491, 41 N. Y. Supp. 259, aff'd 5 App. Div. 625, 39 N. Y. Supp. 1126.

As to power to compel executors to bring action to set aside fraudulent conveyances for the benefit of the creditors of the estate, see *Lichtenberg v. Herdtfelder*, 103 N. Y. 302, 307. As to power to try a claim disputed by the administrator, see *Matter of Strickland*, 1 Con-

noly 435, 5 N. Y. Supp. 815. As to power to recognize and enforce the liens of attorneys in proper cases, see *Matter of Regan*, 29 Misc. 527, 61 N. Y. Supp. 1074, aff'd 167 N. Y. 338.

As to power to hear and determine a claim for an allowance for maintenance of an infant, see *Matter of Estate of Haslehurst*, 4 Misc. 366, 25 N. Y. Supp. 827.

As to power to allow, upon an accounting, advances made by administratrix necessary to pay for proceedings preliminary to the confinement of an insane daughter of herself and decedent in an asylum, see *Matter of Morris*, 2 Connoly 372, 11 N. Y. Supp. 201. As to power to set aside, on an accounting, an assignment of a distributive share of an estate, see *Matter of Randall*, 152 N. Y. 508.

As to power to dismiss a proceeding for the wilful failure of the petitioner to serve the citation upon certain persons, see *Matter of Friedell*, 20 App. Div. 382, 46 N. Y. Supp. 787.

As to incidental powers generally, see also *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795, *Borrowe v. Corbin*, 31 App. Div. 172, 52 N. Y. Supp. 741, aff'd 165 N. Y. 634.

Power to construe will.—Surrogate may construe a will in any proceeding where it became necessary in order to carry out the powers expressly conferred upon it. *Kelsey v. Van Camp*, 3 Dem. 530. Power to construe will in order to determine to whom legacies shall be paid, see *Matter of Verplanck*, 91 N. Y. 439; *Board of Missions v. Scovell*, 3 Dem. 518. As to power to construe a will upon an accounting of executor, see *Matter of Havens*, 8 Misc. 574, 29 N. Y. Supp. 1085. As to power to determine the meaning of a clause of a will creating a trust, see *Matter of Raymond*, 73 App. Div. 11, 76 N. Y. Supp. 355. As to power to construe a will of real estate when necessary to determine liability to collateral inheritance tax, see *Matter of Ullmann*, 137 N. Y. 403. As to power to construe a will generally, see also *Matter of Thompson*, 5 Dem. 117.

Proceeding under subdivision 6 is not a proper method to attack the probate of a will, on the ground of errors of judgment as to questions of law and fact. *Matter of Gaffney*, 116 App. Div. 583, 101 N. Y. Supp. 882, aff'd 189 N. Y. 503.

ARTICLE 2.

THE OFFICERS OF THE SURROGATE'S COURT; THEIR APPOINTMENT, POWERS, DUTIES, SALARIES AND FEES.

- | | |
|--|---|
| <p>§ 2491. Clerk and deputy clerk of surrogate's court, and clerks in surrogate's office; appointment; salary.</p> <p>2492. Chief clerk of surrogate's court of King's county; compensation of clerks and officers.</p> <p>2493. Appointment of court officers and attendants.</p> <p>2494. Interpreters in surrogate's court of Kings county.</p> <p>2495. Stenographer for surrogate's courts in New York, Kings, Erie, Westchester and Queens counties.</p> | <p>§ 2496. Id.; in other counties.</p> <p>2497. Duty of stenographer.</p> <p>2498. How minutes of testimony authenticated and bound.</p> <p>2499. Fees for copying or recording papers.</p> <p>2500. Fees of stenographer acting or taking testimony in surrogate's court.</p> <p>2501. Expenses of surrogate or clerk.</p> <p>2502. Clerk of surrogate's court; deputy clerk of surrogate's court; their powers.</p> <p>2503. Clerk to keep court and trust fund register.</p> |
|--|---|

§ 2491. Clerk and deputy clerk of surrogate's court, and clerks in surrogate's office; appointment; salary.

By a written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court, and in any county containing a city of the second class, and in the counties of Monroe and Erie the surrogate may also appoint a deputy clerk of said court and in the counties of Chautauqua and Cattaraugus, the surrogate may designate one of his clerks to act as deputy clerk of said court.

Each surrogate may appoint, and at pleasure remove, as many other clerks for his office, to be paid by the county, as the board of supervisors of his county, or in the city of New York the board of aldermen, authorize him so to appoint.

The board of supervisors or, in the counties embraced within the city of New York, the board of aldermen, as the case requires, must fix the compensation of the clerk or clerks appointed under this section; and may authorize them, or either of them, to receive, for their or his own use, any legal fees permitted to be charged by law. A surrogate may appoint, and at pleasure remove, as many additional clerks to be paid by him as he thinks proper.

Amended by L. 117, ch. 47; L. 1918, ch. 310, in effect Sept. 1, 1918. The amendment of 1917 added the last three lines of the first paragraph beginning with the words "and in the." The amendment of 1918 inserted the provision relative to Cattaraugus county.

Source.—Former §§ 2508 and 2509. § 2508 originally revised from L. 1869, ch. 246, § 2; L. 1870, ch. 467, § 4; L. 1874, ch. 304, § 2509, as amended by L. 1893, ch. 686; L. 1907, ch. 209; L. 1908, ch. 103; originally revised from L. 1863, ch. 362, § 9; L. 1874, ch. 465; L. 1877, ch. 206, § 3; L. 1877, ch. 274, §§ 1-3; L. 1878, ch. 3.

Revisers' note.—Provisions regarding appointment of clerks in sections twenty-five hundred and eight and twenty-five hundred and nine consolidated.

§ 2492. Chief clerk of surrogate's court of Kings county; compensation of clerks and officers.

The surrogate of the county of Kings may appoint a chief clerk of the court and office of such surrogate, who shall hold office for five years, un-

less sooner removed by the surrogate for cause, after trial, upon charges duly served upon him and an opportunity to be heard and defend. Whenever a vacancy exists for any cause in such office, the surrogate shall appoint a person to fill such office for the full term of five years. Such chief clerk shall, before entering upon the performance of his duties, take the constitutional oath of office and shall file the same with the county clerk of Kings county, together with a bond in the sum of ten thousand dollars, with sureties approved by the surrogate, conditioned for the faithful performance of his duties as such chief clerk. Such chief clerk shall perform such duties as now pertain to the office of chief clerk and clerk of the surrogate's court in such county, and such other duties as the surrogate may from time to time by rule of the court or otherwise impose upon him. The compensation of such chief clerk and of the other clerks and officers of the court and office of such surrogate shall, notwithstanding any other provision of law, be fixed by the said surrogate, and the same shall be a county charge. The compensation of the chief clerk shall not be decreased during his term of office.

Source.—Former § 2509-a as added by L. 1911, ch. 686.

Revisers' note.—No change made in this section. Conditions are so much different in the very large counties that there seems to be a necessity of giving those counties some special laws.

§ 2493. Appointment of court officers and attendants.

The surrogate of Kings county may appoint, and at pleasure remove, all attendants, messengers and court officers in his court, who must attend, from day to day, the terms and sittings of the court to preserve order, and to perform whatever services may be required of him by the surrogate.

The surrogates of Erie, Bronx, Queens and Richmond counties may severally appoint, and at pleasure remove, as many attendants, messengers and court officers in their courts, to be paid by the county, as the board of supervisors, of Erie county or the board of estimate and apportionment of the city of New York, respectively, authorize them so to appoint. The court officer or officers so appointed shall possess all the powers of officers designated by sheriffs to attend upon courts, and shall perform whatever services may be required by the surrogate.

The surrogate of any other county may appoint, and at pleasure remove, one or more court officers to attend his court and to perform such duties in respect thereto as the said surrogate may prescribe, who shall be paid by the county treasurer upon the certificate of the surrogate, such compensation as may be fixed and determined by the board of supervisors of said county. Such officers shall also have all the powers of officers designated by sheriffs to attend upon courts of record.

Amended by L. 1915, ch. 546, and L. 1917, ch. 679, in effect Sept. 1, 1917.

Source.—Derived in part from former § 2512, as amended by L. 1909, ch. 65, which transferred to § 2512 parts of §§ 95-97.

Revisers' note.—There appears to be a need for some officer in surrogate's court in the nature of an attendant to preserve order, look after books and papers, and in some counties to look after fires and lights and to open and close the room. The first part of the section is taken from former § 2512.

§ 2494. Interpreters in surrogate's court of Kings county.

The surrogate of Kings county must from time to time appoint and may at pleasure remove an interpreter to be attached to the surrogate's court of said county. Such interpreter shall receive a salary of eighteen hundred dollars per annum to be paid by the comptroller of the city of New York, in monthly instalments, and shall, before entering upon his duties, file in the office of the clerk of the county of Kings the constitutional oath of office in which there shall also be incorporated language to the effect that he will fully and correctly interpret and translate each question propounded through him to a witness and each answer thereto in said courts. The compensation for the above interpreter to be taken out of the amount appropriated for the support of the said surrogate's court, or from any other contingent city fund.

Source.—Former § 2513-a, as added by L. 1909, ch. 65; revised from Code Civ. Pro., § 360.

§ 2495. Stenographer for surrogate's courts in New York, Kings, Erie, Albany, Westchester and Queens counties.

The surrogate of each of the counties of New York, Kings, Queens, Erie, Albany and Westchester must appoint, and may, for cause, remove, a stenographer for his court.

In the counties of New York and Kings such stenographers shall receive a salary fixed by law, to be paid as the salaries of clerks in the surrogate's office are paid.

In the counties of Erie, Albany, Westchester and Queens the salary of said stenographers shall be fixed by the board of supervisors, or by the board of estimate and apportionment, as the case may be, and the payment of such salary shall be provided for by such board in the same manner as other county salaries are paid.

Source.—Derived in part from former § 2512, as amended by L. 1909, ch. 65; L. 1910, ch. 705; originally revised from Code Proc., § 256.

Revisers' note.—Remainder of § 2512 put into new § 2493. Westchester, Albany and Queens counties added. Former § 2512 covered two matters, stenographers and attendants. These have been separated. New §§ 2493, 2495.

§ 2496. Idem. In other counties.

The surrogate of each county, except New York, Kings, Bronx, Albany, Westchester, Hamilton, Queens, Richmond, Monroe, and Erie may, in his discretion, appoint, and at pleasure remove, a stenographer for his court, who, except in Sullivan county, shall receive a salary to be fixed by such surrogate, not exceeding in counties having a population less than thirty thousand, eight hundred dollars per annum; in counties having a population of thirty thousand or more, not exceeding twelve hundred dollars per annum, except that in Madison county or in counties in which are located cities of the second class, or in counties in which are located three cities of the third class, such salary shall not exceed eighteen hundred dollars per annum; and in any county wholly containing a city of the first class, such salaries shall not exceed two thousand dollars per annum. The population of the several counties shall be determined by the last preceding census. If a regular stenographer is appointed in Sullivan county, his salary shall be five hundred dollars per annum. The board of supervisors shall provide for the payment

of such salary in the same manner as other county salaries are paid. When not actually engaged in the discharge of his duties as stenographer, he shall perform such clerical duties in connection with the surrogate's court as the surrogate directs. In counties wherein the surrogate is also county judge, the stenographer so appointed shall be the stenographer of the county court, and shall perform the duties pertaining to a stenographer of the county court without additional compensation. In counties where, for any cause, a regular stenographer for his court has not been appointed, as provided by this section, the surrogate may, in individual proceedings requiring the services of a stenographer, appoint a stenographer who shall be paid a reasonable compensation, certified by the surrogate in every case in which he takes notes of testimony, from the estate or matter in which such services are rendered.

When the regular stenographer appointed under this or the last section is sick, absent, on his vacation, or unable to act for other good cause, the surrogate may designate a stenographer to act temporarily in his place, who shall be paid by the county a reasonable compensation certified by the surrogate.

Amended by L. 1915, ch. 221; L. 1918, ch. 171; L. 1919, ch. 82, in effect Sept. 1, 1919. The amendment of 1918 inserted the provision relative to Madison county. The amendment of 1919 inserted the provision relative to Monroe county; inserted the words "or more" in line 7; and omitted the words "and not more than fifty thousand, not exceeding one thousand dollars per annum, and in counties having a population exceeding fifty thousand" in lines 7-8.

Source.—Former § 2513, as amended by L. 1893, ch. 686; L. 1896, ch. 248; L. 1902, ch. 265; L. 1903, ch. 470; L. 1904, ch. 59; L. 1905, ch. 570; L. 1906, ch. 226; L. 1909, ch. 270; L. 1910, ch. 705; first two sentences originally revised from L. 1871, ch. 874, §§ 1, 2.

Revisers' note.—The last sentence is added because there has been no provision for procuring a stenographer during the vacation or sickness of the regular stenographer.

§ 2497. Duty of stenographer.

The stenographer of a surrogate's court must, under the direction of the surrogate, take full stenographic notes of all proceedings, in which oral proofs are given, except where the surrogate otherwise directs. The testimony must be legibly written out at length by him, from his notes when required by the surrogate; and the minutes thereof as so written out, must, after being authenticated, as prescribed in the next section, be filed in the surrogate's office, and in all cases his stenographic books must be so filed and remain in the surrogate's office five years.

Source.—Former § 2541; originally revised from L. 1871, ch. 874, § 1, in part; Code of Proc., § 256.

Revisers' note.—The surrogate may use his discretion about requiring all notes to be written out, but the note books must be kept for reference.

§ 2498. How minutes of testimony authenticated and bound.

The minutes of testimony written out as prescribed in the last section, or taken by the surrogate, or under his direction, while the witness is testifying, must, before being filed, be authenticated by the signature of the stenographer, referee, the surrogate or the clerk of the surrogate's court, as the case may be, to the effect that they are correct.

The minutes of testimony written out by the stenographer must be

bound, at the expense of the county, in volumes of convenient size and shape, indorsed "Stenographic minutes," and numbered consecutively.

Source.—Former §§ 2542 and 2543. § 2542, as amended by L. 1881, ch. 535. § 2543, originally revised from L. 1877, ch. 206, §§ 1, 3, in part, and part of § 2; Code of Proc., § 256.

Revisers' note.—Sections 2542 and 2543 consolidated. Requirement for making minute on decree eliminated as serving no useful purpose.

§ 2499. Fees for copying or recording papers.

The clerk of the surrogate's court may charge and receive to the use of the county the following fees, except that where the board of supervisors or board of aldermen have allowed him to receive fees for his own use the same may be received and retained by said clerk:

1. For furnishing a transcript of a decree to be filed in the county clerk's office, fifty cents.

2. For making a copy of the proceedings and evidence in any matter, six cents per folio.

3. For recording agreements settling estates or accounts, releases, assignments, or mortgages of, or liens upon any interest in an estate or fund; wills probated in another county or state, and the papers required to be recorded therewith, ten cents for each folio.

4. For a certificate, other than a certificate that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

5. For making and certifying a copy of a will, or paper on file or recorded in such office, ten cents for each folio.

6. For comparing and certifying that a paper is a copy of a record or paper on file, twenty-five cents and five cents for each folio; and for comparing and certifying a case on appeal where printed copies thereof are presented by any party to any proceeding, one cent for each folio.

7. For recording the official bond or undertaking of an executor, administrator, guardian or trustee, ten cents a folio, except that where the clerk receives a salary as full compensation for his services no fee shall be charged for such recording.

The board of supervisors, or board of aldermen, may fix a different rate of compensation, and may require the clerk to keep an account of all such fees and make report thereof whenever requested by such board.

On the appointment of a guardian, if it appears that the application is made for the purpose of enabling the minor to receive bounty, arrears of pay or prize money, or pension due, or other dues or gratuity from the federal or state government, for the services of the parents or brother of such minor in the military or naval service of the United States, no fees shall be charged or received.

Source.—New.

Revisers' note.—The many provisions for charging fees scattered through this chapter combined in one section.

Subdivision 1. See former § 2553.

2. Usual fee, 10 cents per folio changed to six.

3. See former § 2502.

4. No fee heretofore fixed.

5. See former §§ 2503, 2567.

6. See former § 2567.

7. See county law, § 247.

Last paragraph from former § 2501.

§ 2500. Fees of stenographer acting or taking testimony in surrogate's court.

A stenographer, appointed or acting pursuant to sections 2496 and 2497 of this act, may charge and receive a sum not exceeding six cents per folio for furnishing a copy of the minutes, proceedings and testimony taken in surrogate's court to any person who applies for the same.

Source.—New.

Revisers' note.—This is to make the fee the same in all counties. Taken from former section 2513.

§ 2501. Expenses of surrogate or clerk.

Where, upon the application of any party, the surrogate, or the clerk of the surrogate's court, goes to a place other than the surrogate's office, or the court room where surrogate's court is regularly held, in order to take testimony, he shall be paid by such party his actual and necessary expenses.

Source.—New.

Revisers' note.—Taken from former § 2567. Provision is now made for a surrogate or his clerk to take depositions in another county, and this provides for payment of his actual expenses.

§ 2502. Clerk of surrogate's court; deputy clerk of surrogate's court; their powers.

The clerk and deputy clerk of the surrogate's court may severally exercise, concurrently with the surrogate, the following powers of the surrogate:

1. He may certify and sign as clerk of the court, or as deputy clerk of the court, as the case may be, any of the records of the court, and the records and papers specified in subdivision nine of section twenty-four hundred and ninety of this chapter.

2. He may issue any citation, subpoena or other mandate to which a party is entitled as of course, either unconditionally or on the filing of any paper; and may sign, as clerk of the court, or as deputy clerk of the court, as the case may be, and affix the seal of the court to any letters or mandate issued from the court.

3. He may certify in the manner prescribed by chapter nine of this act, a copy of any paper, required or permitted by law to be filed or recorded in the surrogate's office.

4. He may adjourn to a definite time, not exceeding thirty days, any matter, when the surrogate is absent from his office or unable, by reason of other engagements, to attend to the same.

5. He may administer oaths, take affidavits and the proof and acknowledgment of deeds and all other instruments in writing and certify the same with the same force and effect as if taken and certified by the county judge; and in any proceeding of which the court has jurisdiction, he may administer oaths, take affidavits, testimony and depositions, and certify the same at any place within the state of New York, with the same force and effect as if taken in his county.

6. The clerk of the surrogate's court of each of the counties of Kings,

Bronx, Queens and New York may, with the approval of the surrogate or surrogates of his county, authorize or deputize one or more of the other clerks, employed in the surrogate's office of his county, to sign his name, and exercise such of the other powers conferred upon him by this section, as he shall designate. The surrogate may prohibit the clerk and deputy clerk, or either of them, from exercising any powers specified in this subdivision, but the prohibition does not affect the validity of any act of the clerk or deputy clerk done in disregard of the prohibition.

7. The clerk or deputy clerk or other person employed in any capacity in a surrogate's office, shall not act as appraiser, as attorney or counsel, or as referee, or special guardian, in any matter before the surrogate.

8. The clerk and deputy clerk of the surrogate's court, and in the county of Kings two other clerks and in the counties of Bronx, Queens and Westchester one other clerk, to be designated by the surrogate, in addition to the powers above enumerated may exercise, concurrently with the surrogate of the county, the power to take the proof of a will, unless demand be made for an oral examination or cross-examination of the subscribing witnesses, or objections to such probate are pending.

Amended by L. 1915, ch. 61. Subd. 8 amended by L. 1917, ch. 10, in effect Sept. 1, 1917.

Source.—Former §§ 2509 and 2510, as amended by L. 1893, ch. 686; L. 1894, ch. 211; L. 1900, ch. 651; L. 1903, ch. 42; L. 1905, ch. 615; L. 1906, ch. 95; L. 1907, ch. 209; L. 1908, ch. 103; L. 1913, ch. 439. The amendment of 1893 consolidated former §§ 2509 and 2511. Section 2509 was originally revised from L. 1863, ch. 362, § 9; L. 1873, ch. 3; L. 1874, ch. 456; L. 1877, ch. 206, § 3; L. 1877, ch. 274, §§ 1, 2, 3. Section 2511 was originally revised from L. 1873, ch. 225, last clause of § 1, subd. 7, added by the amendment of 1899 was originally revised from L. 1889, ch. 330, § 3, as amended by L. 1895, ch. 544, § 3, and L. 1908, ch. 185, § 2. Former § 2510 was substituted for former § 2510 by the amendment of 1893, in conformity with L. 1885, ch. 367.

Revisers' note.—Subd. 7. Marked for repeal has been made new § 2493 [2503] because it is not in the nature of a power but of a duty.

Power to take deposition where probate is not contested definitely given in the new matter inserted. Section 2510 consolidated with § 2509.

Part of subd. 1 repealed is already contained in former § 2629.

Powers of clerk.—Clerk can issue letters testamentary, etc., when founded upon a proper order signed and sealed by the surrogate. *Matter of Atwood*, 10 Misc. 480, 32 N. Y. Supp. 115.

A citation issued in a discovery proceeding under § 2706 is not a mandate "to

which a party is entitled as of course," and cannot, therefore, be issued by the clerk. *Mauran v. Hawley*, 2 Dem. 396. As to power of the clerk to issue a citation under this subdivision, see *Matter of Hurlburt*, 43 Hun 311.

§ 2503. Clerk to keep court and trust fund register.

Whenever there shall be filed in the office of the surrogate any decree or order of the surrogate or of the surrogate's court directing the deposit of money, either actually in the hands of some person or persons or thereafter arising from the sale of real estate described in any such decree or order, with the county treasurer of his county, or with the chamberlain of the city of New York, or upon the filing in the said surrogate's office of any treasurer's or chamberlain's receipt stating that a sum of money has been deposited with such treasurer or chamberlain, in accordance with a decree or order of any such surrogate's court the clerk of the surrogate's court shall enter in the court and trust fund register, the title of the proceeding, or the name of the estate in which such decree or order was made, together with a statement of the amount so deposited, or ordered to be deposited, if

said decree or order contains the amount of same, and the name of the person or persons, if any, to whom said money is ordered to be paid, and the date of the filing of the same or of such receipt as herein mentioned.

Source.—Former § 2509, subd. 7, as added by L. 1909, ch. 65; originally revised from L. 1889, ch. 330, § 3, as amended by L. 1895, ch. 544, § 3; L. 1908, ch. 185, § 2.

Revisers' note.—This part of § 2509 being a duty and not a power is taken out of that section and made a new one, and re-written.

ARTICLE 3.

THE SURROGATE'S COURT AND ITS GENERAL JURISDICTION.

- | | |
|--|---|
| <p>§ 2504. Surrogate's court; when to be open; times and places of holding court.</p> <p>2505. When and where court held by county judge; proceedings where county judge is also surrogate.</p> <p>2506. Terms of surrogate's courts in New York county and powers of surrogates.</p> <p>2507. Proceedings in supreme court regulated.</p> <p>2508. Idem; transfer of proceedings to surrogate's court.</p> <p>2509. Proceedings, et cetera, of acting</p> | <p>surrogates, where and how recorded.</p> <p>§ 2510. General jurisdiction of surrogate's court.</p> <p>2511. Jurisdiction of persons; when and how obtained.</p> <p>2512. Jurisdiction of subject matter, objection to defect in record.</p> <p>2513. Presumption of jurisdiction.</p> <p>2514. Effect of exercise of jurisdiction.</p> <p>2515. Exclusive jurisdiction.</p> <p>2516. Concurrent jurisdiction of two or more surrogates.</p> <p>2517. Jurisdiction, how affected by locality of debts.</p> |
|--|---|

§ 2504. Surrogate's court; when to be opened; times and places of holding court.

The surrogate's court is always open for the transaction of any business within its powers and jurisdiction.

The surrogate may, from time to time, appoint, and may alter, the times and places of holding said court for the transaction of any business which may come before it. The surrogate may sign orders, decrees, letters testamentary, of administration and of guardianship, and approve bonds whenever he may be at any time.

Source.—Former §§ 2504 and 2505, in part; § 2504, as amended by L. 1893, ch. 9; L. 1899, ch. 605; first sentence originally revised from R. S., pt. 3, ch. 2, tit. 1, § 12; § 2505, as amended by L. 1881, ch. 535; L. 1892, ch. 525; originally revised from R. S., pt. 3, ch. 2, tit. 1, § 2.

Revisers' note.—Parts of §§ 2504, 2505 combined and rewritten. Section 2505 to be repealed. The remainder of § 2504 goes into a section by itself (new § 2506). The useless provisions of § 2505 relating to holding court on Monday and filing notice of vacations are omitted. The right ought to be given to affix official signature any time at any place in the state.

Motion at chambers.—A motion made at a contested probate proceeding will be de-chambers for an order regulating the pro-nied as premature. *Matter of Martin* cedure and order of proof on the trial of (1913), 80 Misc. 17, 141 N. Y. Supp. 784.

§ 2505. When and where court held by county judge. Proceedings where county judge is also surrogate.

The surrogate's court, in a county where the county judge is also surrogate, may be held at the time and place at which the county court is held; and the jury in attendance may constitute the jury for the trial of any issue arising in the surrogate's court.

Source.—Former § 2506; originally revised from L. 1847, ch. 280, § 3, in part.

Revisers' note.—The new matter provides for the jury in cases where the surrogate is county judge and desires to hold the trial at a term of the county court. Where the surrogate is not county judge, or being such does not desire to hold the trial at a term of the county court, see new §§ 2538, 2542.

§ 2506. Terms of surrogate's courts in New York county and powers of surrogates.

The surrogates of the county of New York, from time to time must appoint and may alter the times of holding terms of that court for the trial of probate proceedings and for the hearing of motions and other chamber business. They must prescribe the duration of such terms, and assign the surrogate to preside and attend at the terms so appointed. In case of the inability of a surrogate of that county to preside or attend, the other surrogate may preside or attend in his place. Two or more terms of the surrogate's court may be appointed to be held at the same time. The term of that court held at the chambers shall dispose of all business except contested probate proceedings; all contested probate proceedings shall be disposed of at the trial term. An appointment must be published in two newspapers published in the city of New York during or before the first week in January in each year. All the powers conferred by law upon the surrogate of the county of New York may be exercised by either of the surrogates of the said county. There shall be published in the official law paper published in said county, upon Monday of every week, under the name of the surrogate making the several appointments, a full and true list of the names of all appraisers, transfer tax appraisers, special guardians, referees and temporary administrators, which either surrogate shall have designated or appointed during the preceding week together with the names of the proceedings in which they were appointed and the dates of said appointments.

Source.—Former § 2504, in part, as amended by L. 1893, ch. 9; L. 1899, ch. 605; first sentence was originally revised from R. S., pt. 3, ch. 2, tit. 1, § 12, in part.

Motions in contested proceedings.—Motion directly affecting contested proceedings on the calendar for trial should be made exclusively in the trial term. *Matter of Holme* (1915), 167 App. Div. 237, 152 N. Y. Supp. 822.

Validity of order granted by one surrogate in violation of stipulation made before the other surrogate, see *Matter of Holme* (1915), 167 App. Div. 237, 152 N. Y. Supp. 822.

§ 2507. Proceedings in supreme court regulated.

In a special proceeding cognizable before a surrogate, taken in the supreme court, as prescribed in section 2480 of this chapter, the seal of the court in which it is taken, must be used, where a seal is necessary. The special proceeding must be entitled in that court; and the papers therein must be filed or recorded, as the case may be, and issues therein must be tried, as in an action brought in that court. The clerk of that court must sign each record, which is required to be signed by the surrogate or the clerk of the surrogate's court. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made by a judge of the court.

Source.—Former § 2490, as amended by L. 1895, ch. 946; this section was mostly new. But see references cited in note to § 2478, ante.

§ 2508. Id.; transfer of proceedings to surrogate's court.

The court may, at any time, in its discretion, upon being satisfied that the reason for the exercise of its powers and jurisdiction has ceased to operate, make an order to transfer to the surrogate's court any matter then pending before it. Such an order operates to transfer the same accordingly. Immediately after such a transfer, or after the revocation of the order of the justice of the supreme court as prescribed in section 2483, the surrogate must cause entries to be made in the proper book in his office referring to all the papers filed, and orders entered, or other proceedings taken in the supreme court; and he may cause copies of any of the orders or papers to be made, and recorded or filed in his office, at the expense of the county.

Source.—Former § 2491, as amended by L. 1895, ch. 946; this section was mostly new. But see references cited in note to § 2478, ante.

Revisers' note.—No change except to omit references to general term.

Discretion of supreme court as to retention of jurisdiction.—The supreme court, under ordinary circumstances, will refuse to entertain jurisdiction of an action seeking relief which can be fully administered on an accounting in a surrogate's court. But the question whether it will thus refuse to entertain jurisdiction is one resting largely in its discretion, and, therefore, should be addressed to it certainly in the first instance. *Lawrence v. Littlefield* (1915), 215 N. Y. 561.

§ 2509. Proceedings, etc., of acting surrogates, where and how recorded.

Where an act is done, or a proceeding is taken by, before, or by authority of, an officer, or a person appointed by the board of supervisors, or by the board of aldermen, temporarily acting as surrogate of any county as prescribed in this chapter, the same must be recorded, or the proper minutes thereof must be entered, in the books of the surrogate's court, in like manner as if the same were done or taken by, before, or by authority of the surrogate of the county; and the officer or person so acting, or the clerk of the surrogate's court, must sign the certificate of probate and any letters so issued, and must certify the record thereof in the book.

Source.—Former § 2494; this section was mostly new. But see R. S., pt. 2, ch. 6, tit. 2, § 53.

Revisers' note.—No change except to bring in reference to board of aldermen.

§ 2510. General jurisdiction of surrogate's court.

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

And in the cases and in the manner prescribed by statute:

1. To take the proof of wills; to admit wills to probate; and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee.

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate or fund.

5. To direct the disposition of real property, and interests in real property of decedents, and the disposition of the proceeds thereof.

6. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; to direct and control their conduct, and settle their accounts.

7. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

8. To determine the validity, construction or effect of any disposition of property contained in any will proved in his court, whenever a special proceeding is brought for that purpose, or whenever it is necessary to make such determination as to any will in a proceeding pending before him, or whenever any party to a proceeding for the probate of any will, who is interested thereunder, demands such determination in such proceeding.

Source.—Former §§ 2472, 2472-a and 2726. Section 2472, as amended by L. 1903, ch. 407; originally revised from R. S., pt. 3, ch. 2, tit. 1, § 1; pt. 2, ch. 6, tit. 3, art. 3, § 66, as amended by L. 1866, ch. 115, L. 1867, ch. 782; L. 1871, ch. 482; L. 1874, ch. 267. Section 2472-a, as added by L. 1910, ch. 576. Section 2726, as amended by L. 1893, ch. 686; the amendment of 1893 consolidated former §§ 2724 and 2725; § 2724 was originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 52, 68 and tit. 4, §§ 35, 57; L. 1837, ch. 460, § 36, first clause; L. 1865, ch. 733, § 1. Section 2725 was originally revised from R. S., pt. 2, ch. 6, tit. 4, § 24, last clause.

Revisers' note.—Subd. 1. Reference to revoking probate omitted as that proceeding has been repealed several years, but reference to it has never been taken out of the code.

Former subd. 6. Inserted in first part of section as general jurisdiction.

First part of section covers § 2472-a and is intended to enlarge jurisdiction so that every question arising may be tried.

Heretofore there has been no definite jurisdiction to construe wills, except where necessary to the determination of a pending issue. Therefore, it was necessary to resort to a supreme court action. Now such a proceeding may be instituted in surrogate's court. See new § 2587.

Constitutionality.—The jurisdiction conferred upon a surrogate to determine all questions legal or equitable "arising between any and all of the parties * * * as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires," must be legally assumed. The surrogates' court will not question the constitutionality of this section. *Matter of Brewster* (1915), 92 Misc. 339, 156 N. Y. Supp. 588.

Jurisdiction in general.—The code contemplates an expansion rather than a contraction of the jurisdiction which surrogate's courts had before its enactment.

Matter of Delaplaine, 45 Hun 225. Jurisdiction cannot be conferred by assent or submission of the parties. *Dakin v. Demming*, 6 Paige 95. Inferred from the general language of the statute. *Dubois v. Sands*, 43 Barb. 412.

The surrogate's court is only empowered to deal with matters relating to the estate of the decedent. The amendment of 1914 did not transform it into a court of general jurisdiction in law and equity. It has no power over a controversy between the representative of an estate and a third person who seeks to intervene. *Matter of Heinze* (1917), 179 App. Div. 453, 165 N. Y. Supp. 1017.

While surrogate's courts possess and ex-

ercise the power to construe testamentary dispositions of personal estate as a necessary incident to accountings and distribution, yet they possess no general jurisdiction to construe the provisions of wills. *Matter of Wilcox*, 55 Misc. 170, 107 N. Y. Supp. 468.

Surrogate has ample jurisdiction to determine the meaning of a will of real estate where such determination is essential to the settlement of accounts or in the consideration of the conduct of executors. *Matter of Welch*, 61 Misc. 5, 114 N. Y. Supp. 720. He has no inherent power to construe the provisions of a will, except as a necessary incident to his general powers to control executors or testamentary trustees and to direct the payment or charging of legacies and the like. *Kirk v. McCann*, 117 App. Div. 56, 101 N. Y. Supp. 1093.

Jurisdiction over what persons. *Matter of Gall*, 40 App. Div. 114, 57 N. Y. Supp. 835; *Matter of Bellesheim*, 6 Dem. 60. As to realty, see *Matter of McKay*, 37 Misc. 590, 75 N. Y. Supp. 1069; *Matter of Spears*, 89 Hun 49, 35 N. Y. Supp. 35; *Norris v. Norris*, 32 Hun 175. As to compelling production of books and documents for inspection. *Dale v. Stokes*, 5 Redf. 586; *Thompson v. Mott*, 5 Redf. 574. To declare a trust and enforce it by decree. *Matter of Monroe*, 142 N. Y. 484. See also *Matter of Grant*, 37 Misc. 151, 74 N. Y. Supp. 958; *Matter of Haughian*, 37 Misc. 457, 75 N. Y. Supp. 932; *Matter of Scott*, 34 Misc. 446, 70 N. Y. Supp. 425; *Matter of Schmidt*, 58 N. Y. Supp. 595; *Matter of Gedney*, 30 Misc. 18, 62 N. Y. Supp. 1023; *Matter of Keef*, 43 Hun 98.

The surrogate has no jurisdiction to enforce a creditor's lien against insurance moneys, under § 22 of the domestic relations law. *Matter of Thompson*, 184 N. Y. 36.

The surrogate's court has jurisdiction of a proceeding to abrogate an adoption. *Matter of Ziegler* (1913), 82 Misc. 346, 143 N. Y. Supp. 562.

Separate trial of issues may be authorized under § 973 of the code of civil procedure. *Matter of Fox* (1915), 166 App. Div. 718, 152 N. Y. Supp. 431.

Idem; before amendment of 1914.—*Matter of Waters* (1918), 183 App. Div. 840, 171 N. Y. Supp. 897.

Idem; necessity that jurisdiction be conferred by statute.—A surrogate can exercise only such jurisdiction as has been specially conferred by statute, together with those incidental powers which may be requisite to effectually carry out the jurisdiction actually granted. Those claiming under the order or decree of a surrogate must show affirmatively his authority to make it, and the facts which give him jurisdiction. *Matter of Martin* (1914), 211 N. Y. 328, rev'g 159 App. Div. 926, 144 N. Y. Supp. 306.

Surrogates' courts are courts of statutory

creation and limited jurisdiction. They have only such powers as are expressly conferred upon them by law or by necessary implication from the language of the law. *Matter of McDonald* (1914), 211 N. Y. 272, aff'd 160 App. Div. 86, 145 N. Y. Supp. 267.

Idem; validity of agreement.—The surrogate has jurisdiction to determine the validity of agreement between legatees providing for a voluntary division and distribution of the assets of an estate. *Matter of Cary* (1912), 77 Misc. 602, 138 N. Y. Supp. 602.

Limited jurisdiction.—Surrogate has only such jurisdiction as has been conferred upon him by statute. *Bevan v. Cooper*, 72 N. Y. 317; *Seaman v. Whitehead*, 78 N. Y. 306; *Riggs v. Cragg*, 89 N. Y. 479; *Guion v. Underhill*, 1 Dem. 302; *Bennett v. Crain*, 41 Hun 183; *Matter of Stein*, 33 Misc. 542, 68 N. Y. Supp. 933; *Cocks v. Haviland*, 5 Dem. 11; *Matter of Woodworth*, 5 Dem. 156; *Matter of Briggs* (1917), 180 App. Div. 843, 168 N. Y. Supp. 382.

It would seem that §§ 2490, 2510 intend to make the jurisdiction of the surrogate effectual to the full, equitable and complete disposition of all matters relating to the affairs of the dead where the will is probated or administration granted in his county. The jurisdiction must yield, however, in any particular special proceeding to the special limitation of the statute relating to that proceeding. *Matter of Davis* (1917), 99 Misc. 447, 164 N. Y. Supp. 143.

Equity powers.—The general powers of a court of equity do not belong to a surrogate's court. *Matter of Randall*, 152 N. Y. 508; *Matter of Widmayer*, 28 Misc. 362, 59 N. Y. Supp. 980; *Matter of Hamilton*, 76 Hun 200, 27 N. Y. Supp. 813; *In re Hearne's Estate* (1918), 171 N. Y. Supp. 984.

A surrogate, having no general equity jurisdiction, cannot set aside a conveyance made by an intestate during his lifetime upon the ground that it was fraudulent and void. *Matter of Schnabel*, 136 App. Div. 522, 121 N. Y. Supp. 54.

The surrogate's court is a court of limited jurisdiction and although the surrogate has such legal and equitable powers as are necessary for the discharge of his statutory duties, he has no general equitable jurisdiction. *Matter of Hasbrouck* (1912), 153 App. Div. 394, 138 N. Y. Supp. 620.

The surrogates have jurisdiction to determine intestacy in the first instance in so far as the factum of a will of personalty is concerned. *Matter of Connell* (1912), 75 Misc. 574, 136 N. Y. Supp. 166.

That a surrogate's court does not possess general equitable jurisdiction does not imply that, where it has jurisdiction of the subject-matter, as between parties properly before it, it cannot apply equitable principles. *Matter of Archer* (1912), 77 Misc. 288, 137 N. Y. Supp. 770.

The general phrases of this section by which equitable jurisdiction is given to surrogates, are limited to its exercise in cases; (1) when the question acted upon is "necessary to be determined in order to make a full, equitable and complete disposition of the matter" being considered and upon which they are called to act in determining the presented questions, and (2) in the manner prescribed by statute. *Matter of Hermann* (1917), 178 App. Div. 182, 165 N. Y. Supp. 298.

The surrogate's court has no jurisdiction to set aside a general release under seal by the administratrix of a decedent upon the ground of fraud. The mere submission to a trial of such an issue before the surrogate is of no importance because the question of jurisdiction may be raised at any time and jurisdiction cannot be conferred by consent. *Matter of Mondshain* (1919), 186 App. Div. 528, 174 N. Y. Supp. 599.

Equitable jurisdiction under this section cannot be exercised if the facts bring the matter within § 2554. *Matter of Isaacs* (1918), 103 Misc. 184, 169 N. Y. Supp. 1066.

Idem; must yield to statutory restriction.—Although this section gives full equity jurisdiction to the surrogate's court in every proceeding that comes before it in the manner prescribed by statute, it has equitable jurisdiction only as regards the matters specified in the succeeding subdivisions of said section, that is to say, its general equitable powers must yield to the statutory restrictions placed upon it. *Matter of Holzworth* (1915), 166 App. Div. 150, 151 N. Y. Supp. 1072.

Proof of will.—Supreme court will not entertain action to provide a will where surrogate's court has jurisdiction. *Delabarre v. McApine*, 71 App. Div. 591, 76 N. Y. Supp. 301. Surrogate to determine the facts upon which his jurisdiction depends. *People ex rel. James v. Surrogate's Court*, 36 Hun 218.

Power to take proof of the execution and determine the validity of wills. *Smith v. Hilton*, 60 Hun 236, 2 N. Y. Supp. 820. As to power to construe a will, see *Washbon v. Cope*, 140 N. Y. 287; *Estate of Ullman*, 137 N. Y. 403.

The powers of the surrogate as a court of probate are due primarily to the statute. Such powers are referable to the jurisprudence established in this state by the decisions of the courts and by the constitution. In *re Swartz's Will* (1913), 79 Misc. 388, 139 N. Y. Supp. 1105.

The surrogate has authority to construe a will in an accounting proceeding only when it is necessary to make such determination. In *re Hilliard's Estate* (1916), 160 N. Y. Supp. 514.

Idem; nature of jurisdiction over probate.—The supreme court has no general jurisdiction over the probate of a last will relating to personal property, the juris-

diction of the surrogate being exclusive. *Sherwood v. Sherwood* (1914), 85 Misc. 99, 147 N. Y. Supp. 205.

Idem; construction of disposition of real property.—A surrogate in a proceeding brought for the construction of a will, pursuant to subdivision 8, ought not to pass upon the validity of any disposition of real property where a trial by jury is a matter of right and is not waived. *Matter of Harden* (1914), 86 Misc. 420, 150 N. Y. Supp. 743.

The jurisdiction of the surrogate to construe a will cannot be enlarged so as to enable it to determine the title of the testator to the property disposed of, unless such an adjudication necessarily follows from a proper act of construction of the will. In *re Farmer* (1917), 99 Misc. 437, 163 N. Y. Supp. 1089.

Prior joint will or contract; jurisdiction of surrogate to consider or act upon. *Matter of Hermann* (1917), 178 App. Div. 182, 165 N. Y. Supp. 298.

Unlimited examination of a party not a witness upon the probate of a will and who has not been called or offered as a witness, may not be granted by a surrogate. *Matter of Briggs* (1917), 180 App. Div. 843, 168 N. Y. Supp. 382.

Idem; when reference should not be ordered by surrogate.—Where, upon a voluntary proceeding by an administrator for an accounting and for the construction of the will and the appointment of a trustee to administer trusts therein provided for, it is stated in the petition that it is uncertain whether upon the death of the life beneficiary of the residuary estate her niece takes the remainder or whether it passes as intestate property to the widow, brother and sister of the testator, and the brother appears and claims that said remainder is not disposed of by the will, the surrogate should construe the will, and should not subject the estate to unnecessary expense by ordering a reference. *Matter of Goldmark* (1919), 186 App. Div. 447, 174 N. Y. Supp. 595.

Issue and revocation of letters.—Power to construe will in order to ascertain to whom to issue letters. *Matter of Owens*, 33 N. Y. Supp. 422, 24 Civ. Pro. Rep. 256. Power to issue limited letters of administration. *Martin v. Dry Dock, E. B. & B. R. Co.*, 92 N. Y. 70.

As to revocation of letters of administration. *Matter of Patterson*, 79 Hun 371, 29 N. Y. Supp. 451, aff'd 146 N. Y. 327.

Power of surrogate to require a bond of an executor on denying an application to revoke his letters. *Matter of Wischmann*, 80 App. Div. 520, 80 N. Y. Supp. 789.

Idem; discretion as to temporary administrator.—Where for any cause delay necessarily occurs in presenting a last will for probate, or in the grant of letters testamentary upon probate, or letters of administration upon due application, the sur-

rogate has jurisdiction, in his discretion, to grant letters of temporary administration upon the petition of a creditor or a person interested in the estate and no one is entitled to notice of the application. *Matter of Chittenden* (1912), 76 Misc. 92, 136 N. Y. Supp. 953.

Executors, administrators, and testamentary trustees.—Authorities defining power of the courts to control the conduct of executors, etc., reviewed. *Brennan v. Lane*, 4 Dem. 322. Power to direct and control. *Matter of Gilman*, 41 Hun 561; *Matter of Wallace*, 28 Misc. 603, 59 N. Y. Supp. 1084; *Matter of Huntington*, 39 Misc. 477, 80 N. Y. Supp. 220; *Matter of Nesmith*, 140 N. Y. 609; *Matter of Te Culver*, 22 Misc. 217, 49 N. Y. Supp. 820. Appointment and removal of trustees. *Conant v. Wright*, 19 Misc. 321, 44 N. Y. Supp. 727. See also *Matter of Gilman*, 41 Hun 561; *Matter of Whitbeck*, 22 Misc. 494, 50 N. Y. Supp. 932. Power to disapprove investments of executors and testamentary trustees. *Jones v. Hooper*, 2 Dem. 14.

As to power of surrogate to authorize an executor or administrator to compromise a claim against the estate, see *Matter of Gilman*, 92 App. Div. 462, 87 N. Y. Supp. 128.

The surrogate's court has no jurisdiction to require an administrator upon a summary application to deliver money or securities, which have come into his hands as part of the assets of the decedent's estate, to a person who claimed that such money and securities were deposited by him with the decedent for safe-keeping. *Matter of Case v. Spencer*, 86 App. Div. 454, 83 N. Y. Supp. 697.

The power to control does not extend to property which, as executors, etc., they had no right to take possession of. *Calyer v. Calyer*, 4 Redf. 305. See also *Matter of Hobson*, 61 Hun 504, 16 N. Y. Supp. 371, *aff'd* 131 N. Y. 575; *Matter of Blow*, 2 Conolly 360. No jurisdiction over trustees under a policy of insurance. *Matter of Van Dermoore*, 42 Hun 326. Not empowered to interfere with orderly discharge by an administrator of ordinary administrative functions. *Estate of Brennan*, 4 Dem. 322.

In cases of doubt it is the right, if not the duty, of executor to seek instruction from the court. *Matter of Huntley*, 13 Misc. 375, 35 N. Y. Supp. 113.

Personal representatives or others interested may resort to the surrogate's court for direction, but the power to direct does not connote the duty to seek such direction. *McQuaide v. Perot* (1918), 223 N. Y. 75.

In discretion of surrogate to refuse to discharge an administrator. *Matter of Cornell*, 137 N. Y. 600. May order the payment of fees of referee by the executor. *Matter of Hurd*, 6 Misc. 171, 26 N. Y. Supp. 893.

Jurisdiction of surrogate to determine question of executor's care and diligence in selling property, see *Matter of Weed* (1913), 81 Misc. 386, 143 N. Y. Supp. 349.

Idem; determination as to persons entitled to letters.—The general grant of jurisdiction to issue letters testamentary necessarily carries with it the power to determine the better title to letters and the power to construe the wills probated in this jurisdiction if such construction is necessary to determine the better title to letters testamentary. When the surrogate is required to do an act the legal requirement carries with it all the powers necessary to the fulfillment and execution of the act. *Matter of Mayer* (1914), 84 Misc. 9, 145 N. Y. Supp. 665.

Idem; powers as to sale by executor.—Where a will giving the executor power to sell testator's real estate contains legacies in excess of the gross personal estate, the surrogate is without jurisdiction to declare that the legacies were by the testator charged upon the real estate. Until the executor has brought the proceeds of a sale of the real estate into court for distribution, no adjudication can determine whether lands authorized to be sold by the executor under the will are to be resorted to for the payment of legacies. *Matter of Day* (1912), 75 Misc. 597, 136 N. Y. Supp. 172.

Idem; collateral attack of adjudication by surrogate that decedent was resident of county.—Where a surrogate of a county has determined that a decedent was a resident of that county at the time of his death, and has granted letters testamentary on probate of such decedent's will, such an adjudication cannot be attacked collaterally in an action in the supreme court. *Flatauer v. Loser* (1914), 211 N. Y. 15, *rev'g* 156 App. Div. 591, 146 N. Y. Supp. 957.

Settlement of accounts.—Relative jurisdiction of supreme court and surrogate's court. *Meeks v. Meeks*, 79 App. Div. 49, 79 N. Y. Supp. 718. Except under special circumstances, surrogate's court has exclusive jurisdiction. *Van Camp v. Searle*, 79 Hun 134, 29 N. Y. Supp. 757. Power to compel the administrator of a deceased trustee, appointed by the supreme court, to account. *Matter of Hazard*, 51 Hun 201, 4 N. Y. Supp. 701. Rule in second judicial department. *Ludwig v. Bungart*, 48 App. Div. 613, 63 N. Y. Supp. 91; *Haughian v. Conlon*, 39 Misc. 584, 80 N. Y. Supp. 586. As to accounting to coexecutors, see *Wood v. Brown*, 34 N. Y. 337.

The surrogate may stay a proceeding for the judicial settlement of the accounts of executors when justice so requires. *Matter of Sherwood* (1918), 105 Misc. 183, 173 N. Y. Supp. 639.

Surrogate not ousted of jurisdiction by reason of the filing of an answer. *Matter of Kipp*, 17 Misc. 491, 41 N. Y. Supp. 259, *aff'd* 5 App. Div. 625, 39 N. Y. Supp. 1126;

Matter of Riley, 4 Misc. 338, 24 N. Y. Supp. 309.

Jurisdiction where trust property in hands of administrator has the character of personality. *Matter of Gilbert*, 39 Hun 61, aff'd 104 N. Y. 200; *Borrowe v. Corbin*, 31 App. Div. 172, 52 N. Y. Supp. 741, aff'd 165 N. Y. 634; *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795.

As to power of surrogate to direct an accounting executor to communicate to his coexecutors certain knowledge in relation to the assets of the estate, see *Matter of Freligh*, 42 Misc. 11, 85 N. Y. Supp. 830. Upon the final judicial settlement of an administrator the surrogate has jurisdiction and must inquire into allegations of payments made by the administrator. *Matter of Robinson*, 42 Misc. 169, 85 N. Y. Supp. 1087.

Discretionary to allow a party to file an amended account. *Matter of Hodgman*, 11 App. Div. 344, 42 N. S. Supp. 1004, aff'd 161 N. Y. 627.

Jurisdiction of surrogate upon intermediate accounting of testamentary trustees, see *Matter of Higgins* (1913), 81 Misc. 579, 143 N. Y. Supp. 552; jurisdiction to determine issues raised on a petition by a beneficiary of a testamentary trust for an accounting. *Matter of Fox* (1915), 166 App. Div. 718, 152 N. Y. Supp. 431.

Upon a voluntary accounting of trustees, the court has jurisdiction to determine the respective rights of life tenants and remaindermen, and the validity and effect of the instrument creating the trust. *Matter of Bishop* (1915), 89 Misc. 355, 151 N. Y. Supp. 768.

A proceeding for the judicial settlement of the accounts of an executor or a proceeding begun in the surrogate's court solely for the construction of a will cannot be converted into one to quiet the title to real estate. *Matter of Irwin* (1916), 100 Misc. 348, 165 N. Y. Supp. 697.

Upon the judicial settlement of the accounts of an executor, the plaintiff, having been made a party thereto, is at liberty to file objections to the account presented by the executor and contest the validity of any payments made by him under or by reason of the assignment in question and to assert title in himself to the legacy and to have the question of title to the same determined in that proceeding, and where he omits to assert his legal rights upon such settlement, the decree of the surrogate's court thereon is conclusive evidence against him that the items allowed to the executor for moneys paid to legatees were correct and a defense setting up the decree made on the judicial settlement is sufficient to constitute a bar to the maintenance of this action. A demurrer to such defense, therefore, is properly overruled, but as the complaint states a cause of action on contract against the executor, the plaintiff should be permitted to with-

draw his demurrer. *Hull v. Hull* (1919), 225 N. Y. 342.

Idem; parties.—The class of persons who may be parties to a proceeding for the judicial settlement of the accounts of an executor as provided by § 2730, was not intended to be enlarged. *Matter of Kenny* (1915), 92 Misc. 330, 156 N. Y. Supp. 827.

Idem; property claimed by executor.—A surrogate has jurisdiction to determine an issue raised by objections to executors' accounts, that they had failed to account for certain personal property alleged to have belonged to the testatrix at the time of her death, ownership of which was claimed by one of said executors. The fact that there are two accounting executors, only one of whom lays claim to the property in dispute, should not deprive the court of jurisdiction which it would possess in case that one were the only executor. *Matter of Watson* (1915), 215 N. Y. 209.

Power to construe will on executor's accounting.—Surrogate's court has concurrent jurisdiction with supreme court. *Garlock v. Vandevort*, 128 N. Y. 374; *Matter of Verplanck*, 91 N. Y. 439; *Matter of Raymond*, 73 App. Div. 11, 76 N. Y. Supp. 355; *Conant v. Wright*, 22 App. Div. 216, 48 N. Y. Supp. 422, aff'd 162 N. Y. 635; *Matter of Young*, 17 Misc. 680, 41 N. Y. Supp. 539; *Matter of McClough*, 9 Misc. 385, 30 N. Y. Supp. 274; *Matter of Havens*, 8 Misc. 574, 29 N. Y. Supp. 1085; *Matter of Thompson*, 5 Dem. 117; *Simpson v. French*, 6 Dem. 108; *Board of Missions v. Scovell*, 3 Dem. 516; *Matter of Metcalf*, 6 Misc. 524, 27 N. Y. Supp. 879; *Matter of Ryalls*, 80 Hun 459, 30 N. Y. Supp. 455; *Matter of McCahill*, 29 Misc. 450, 6 N. Y. Supp. 1071.

Idem; does include power to construe another will.—The jurisdiction of the surrogate, upon the judicial settlement of the accounts of an executor, to construe the will, does not include the power to construe any other will though on file in the surrogate's court, a construction of which may possibly affect the ultimate title to property accounted for by the executor of the estate involved in the accounting. *Matter of Irwin* (1916), 100 Misc. 348, 165 N. Y. Supp. 697.

Antenuptial agreement.—May enforce on an accounting. *Re Young v. Hicks*, 92 N. Y. 235; *Matter of Jones*, 3 Misc. 586, 24 N. Y. Supp. 706.

Determination of validity of antenuptial agreement.—Where a woman marries on the faith of her husband's oral antenuptial agreement to make a will in her favor, which promise he subsequently fulfilled, but afterwards made other testamentary disposition of his property, the surrogate's court has no jurisdiction to determine the validity of the antenuptial agreement or to enforce its provisions. *Adams v. Swift* (1915), 169 App. Div. 802, 155 N. Y. Supp. 873.

Attorney's lien.—Surrogate has jurisdiction to enforce an attorney's claim for services rendered to executors, by way of lien. *Matter of Crouch*, 41 Misc. 349, 84 N. Y. Supp. 936.

Debts.—As to collection of, see *Collins v. Beebe*, 54 Hun 318, 7 N. Y. Supp. 442. As to power to decide disputed claims against the estate, see *Matter of Clark v. Hyland*, 88 App. Div. 392, 84 N. Y. Supp. 640. As to jurisdiction of surrogate to enforce the payment of debts and legacies by proceedings for contempt, see *Matter of Mahoney*, 88 App. Div. 140, 84 N. Y. Supp. 329.

Compelling part payment of conceded debts, although the estate is insolvent and there has been no judicial settlement. *Matter of Miner*, 39 Misc. 605, 80 N. Y. Supp. 643.

Legacies.—As to disputed legacies, see *Riggs v. Cragg*, 89 N. Y. 479. No jurisdiction to decide as to a charge of legacies on real estate. *Bevan v. Cooper*, 72 N. Y. 317.

As to recovery by executor from a legatee of the amount of an excess paid to him by such executor, see *Matter of Underhill*, 117 N. Y. 471; also *Johnson v. Weir*, 34 Misc. 683, 70 N. Y. Supp. 1020. See also *Matter of Perry*, 5 Misc. 149, 25 N. Y. Supp. 716.

Idem; payment.—Where by reason of a promise to pay to another certain moneys the decedent made a will wherein the executrix was named as sole legatee, the surrogate may compel the payment thereof. *Matter of Delgado* (1913), 79 Misc. 590, 141 N. Y. Supp. 198.

Claim.—A surrogate has jurisdiction under §§ 2510, 2681, upon the judicial settlement of an estate, to hear and determine a rejected claim which is in effect that the testator at his death had or should have had property which he was obligated to transmit by his will to the claimant. *Matter of Coombs* (1918), 185 App. Div. 312, 173 N. Y. Supp. 58.

Determination of title to property on motion.—The surrogate's court has no jurisdiction, on motion, to decide whether money deposited in a savings bank in the joint names of decedent and another is the property of the survivor, where the form of the deposit itself does not as a matter of law vest the ownership of such money in the survivor; for what the intent was when deposit was made is a question of fact to be decided in an action. *Matter of Hess* (1914), 85 Misc. 659, 148 N. Y. Supp. 1054.

The jurisdiction of the surrogate's court to distribute the estate of a decedent and to determine contested claims, does not include the power to try the question of title to personal property not in the possession of the testatrix at the time of her death. *Matter of Watson* (1914), 165 App. Div. 252, 150 N. Y. Supp. 776.

Controverted claim to decedent's property.—The jurisdiction of the surrogate to

determine controverted claims to property formerly of a decedent is purely statutory. *Matter of Watson* (1914), 86 Misc. 588, 148 N. Y. Supp. 902.

Determination of ownership of bank account.—Where the daughter of a decedent presented a claim for services against the estate, and appeared generally upon the accounting of the administrator, the surrogate had jurisdiction to determine her claim to a savings bank account standing in her name and in the name of the decedent, according to equitable principles. *Matter of Mount Vernon Trust Co.* (1916), 175 App. Div. 353, 161 N. Y. Supp. 1060.

Conflicting claims to savings bank deposit.—The surrogate's court has no jurisdiction to determine whether a savings bank deposit formerly owned by a decedent belongs to his estate or to a claimant to whom it is alleged he assigned it during his lifetime. Hence, although the representative of the deceased included the amount of said deposit in her accounts which were judicially settled and allowed by the surrogate, such decree is not a bar to an action brought by the other claimant against the savings bank to recover the amount of the deposit. *Fribourg v. Emigrants Industrial Savings Bank* (1915), 168 App. Div. 816, 154 N. Y. Supp. 532.

Disposition of realty to pay debts, etc.—Surrogate may entertain a petition to set aside a sale. *Matter of Lynch*, 33 Hun 309. See also *Garlock v. Vandevort*, 128 N. Y. 374, given under subdivision 3.

Provision for sale of real property to pay debts of decedent mandatory notwithstanding this section conferring equitable jurisdiction. *Matter of Doyle* (1917), 180 App. Div. 398, 167 N. Y. Supp. 827.

Guardians for infants.—No general jurisdiction over a guardian. *Matter of Camp*, 126 N. Y. 377. See also *Matter of Bolton*, 159 N. Y. 129. No power to authorize guardian to invest money in realty. *Matter of Bolton*, 20 Misc. 532, 46 N. Y. Supp. 908.

General guardian.—Where, upon the application of a father to be appointed guardian of his five-year old daughter who is maintained and wholly supported by him, it appears that petitioner while a naturalized citizen of the United States was married to the mother of said infant; that, by decree of divorce granted by a court of competent jurisdiction in the German Empire for the mutual adultery of the parties no formal award of the custody of said infant was made; and that the mother is now the wife of an alien, the surrogate, in the exercise of the discretion vested in him to act for the best interest of the infant, will appoint the father alone as guardian, the order to provide for some access to the infant on the part of the mother. *Matter of Wagner* (1912), 75 Misc. 419, 135 N. Y. Supp. 678.

Removal of guardians.—Only in a case where there is a statutory warrant therefor. *Mackay v. Fullerton*, 4 Dem. 153.

Claims against guardian.—Jurisdiction of surrogate upon an application for the payment of the board of infants, contested by guardian. *Matter of Kerwin*, 59 Hun 589, 14 N. Y. Supp. 353. See also *Browne v. Bedford*, 4 Dem. 304. No jurisdiction to determine disputed claim against guardian. *Weich v. Gallagher*, 2 Dem. 40. See also *Long v. Long*, 142 N. Y. 545.

Trusts.—Jurisdiction of surrogate to probate the will of a nonresident does not include the taking charge of the testamentary trusts created. *Matter of Hoyt* (1918), 103 Misc. 614, 170 N. Y. Supp. 846.

Section cited.—*Matter of Kent* (1915), 92 Misc. 113, 155 N. Y. Supp. 383; *Matter of Durban* (1917), 177 App. Div. 898, 163 N. Y. Supp. 1115; *Matter of Briggs* (1917), 101 Misc. 191, 167 N. Y. Supp. 632.

§ 2511. Jurisdiction of persons; when and how obtained.

The surrogate's court, in any proceeding before it, shall have jurisdiction of the following described persons:

1. The petitioner.

2. Parties who have been duly cited, including all those described as being persons belonging to a class, or connected with the decedent, or as interested in the property or matter in question, whether designated by their full and correct names or not.

3. Persons of full age who have not been judicially declared to be incompetent to manage their affairs.

a. Who shall, either before or after the filing of the petition, waive the issue or service, or both, of the citation by an instrument in writing signed, acknowledged, or proved and duly certified.

b. Who, whether named in the petition or citation or not, shall appear personally in court and file written signed notice of appearance acknowledged, or proved, and duly certified.

c. Who, whether named in the petition or citation or not, shall appear by attorney whose authority in writing to appear, so signed, acknowledged, or proved, and duly certified, shall be filed.

Source.—Former §§ 2518, 2528 and 2617. Section 2518, originally revised from R. S., pt. 2, ch. 6, tit. 2, § 26. Section 2528, as amended by L. 1896, ch. 570; L. 1911, ch. 330; originally revised from L. 1870, ch. 359, § 2. Section 2617, as amended by L. 1894, ch. 118, section new as originally inserted in Code of Civ. Proc.

Revisers' note.—This section is rewritten from § 2528, and embodies provisions found in other sections concerning obtaining jurisdiction of the person.

By making this general section we fix jurisdiction of the person and avoid much repetition in other sections.

Subd. c. Most surrogates now refuse to allow an attorney to appear for a person not cited without written authority. Any other practice would be dangerous especially in the cities.

Appearance by attorney.—As to appearance by attorney in surrogate's court and lien of such attorney for services rendered, see *Matter of Regan*, 167 N. Y. 338. As to power of surrogate to direct substitution of attorneys in proceedings before him, see *Chatfield v. Hewlett*, 2 Dem. 191; *Hoes v. Halsey*, 2 Dem. 577.

Waiver.—Jurisdiction is not conferred on surrogate by a waiver of the issue of a citation, executed before any proceeding has been taken. *Matter of Graham*, 39 Misc. 226, 79 N. Y. Supp. 573; *Matter of Gregory*, 13 Misc. 363, 35 N. Y. Supp. 105.

As to rule in regard to waiver of the issue and service of a citation before 1896, see *Matter of Post*, 30 Misc. 551, 64 N. Y. Supp. 369.

Nonresidents.—Where a nonresident appears by attorney and the latter is not in fact or in law empowered to act, the surrogate's court has no jurisdiction of the nonresident. Such attorney should present an authorization from his client empowering him to appear, initiate and prosecute the proceeding. *Matter of Ford* (1916), 98 Misc. 100, 163 N. Y. Supp. 960.

§ 2512. Jurisdiction of subject matter; objection to defect in record.

The surrogate's court obtains jurisdiction in every case to make a decree or other determination by the existence of the jurisdictional facts prescribed by statute. When the decree or other determination fails to recite the existence or proof of a jurisdictional fact, and such fact actually existed; or when any party has failed to take any intermediate proceeding required by law to be taken, an objection to such decree or determination based thereon is available only upon appeal, and the surrogate's court may, in its discretion, allow such a defect to be supplied by amendment.

Source.—Former § 2474; originally revised from L. 1868, ch. 260, § 1; L. 1870, ch. 359, § 1; L. 1872, ch. 92.

Revisers' note.—As this section (former § 2474) is drawn it would seem that the court had no jurisdiction to make a decree at all unless all necessary parties were cited. Repeal and substitute new section following (new § 2512).

§ 2513. Presumption of jurisdiction.

Where the jurisdiction of a surrogate's court to make, a decree or other determination, is drawn in question collaterally, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the surrogate's court. The fact that jurisdiction of the parties was obtained is presumptively proved, by a recital to that effect in the decree.

Source.—Former § 2473, as amended by L. 1910, ch. 576; originally revised from L. 1870, ch. 359.

Revisers' note.—This section made more definite and inclusive.

This section overrules *Sibley v. Waffle*, 16 N. Y. 180.

Fraud and collusion.—Decree may be attacked where assets of deceased non-resident are brought into the state to procure letters of administration. *Hoes v. N. H. & H. R. Co.*, 173 N. Y. 435. Where fraud or collusion would be necessary in order to impeach decree, see *Matter of Tilden*, 98 N. Y. 434.

Residence of testator.—Order upheld where deceased was not a resident of the county where will was proved, although the surrogate, upon some evidence, erroneously decided that he was. *Bolton v. Schriever*, 135 N. Y. 65; *Bumsted v. Read*, 31 Barb. 661; *Kelly v. Jay*, 79 Hun 535, 29 N. Y. Supp. 933; *Van Gaasbeek v. Staples*, 85 App. Div. 271, 83 N. Y. Supp. 225.

Parties.—To be bound, must be cited or appear. *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93; *Matter of Killan*, 172 N. Y. 547. Effect of absence of proof of service of citation upon. *Sisco v. Martin*, 61 App. Div. 502, 70 N. Y. Supp. 597; *Mott v. Fort Edward Water Works Co.*, 79 App. Div. 179, 79 N. Y. Supp.

1100. As to irregularity in service of citation upon, see *Wetmore v. Parker*, 52 N. Y. 450; *Hood v. Hood*, 85 N. Y. 561.

Order upheld where there was no citation to the widow and no renunciation. *Kelly v. West*, 80 N. Y. 139; *Leonard v. Columbia Steam Navigation Co.*, 84 N. Y. 48. Where there was a previous appointment of the public administrator. *Power v. Speckman*, 126 N. Y. 354. Appointment of temporary administrator upon slight proof, raising presumption of death of intestate. *Czech v. Bean*, 35 Misc. 729, 72 N. Y. Supp. 402.

Irregularities, which can be rectified by amendment, cannot be attacked collaterally. *Conant v. Wright*, 19 Misc. 321, 44 N. Y. Supp. 727.

As to administration on the estate of a living person, see *Roderigas v. East River Sav. Inst.*, 76 N. Y. 316; s. c. 63 N. Y. 460. See also *O'Connor v. Higgins*, 113 N. Y. 511. As to necessity that jurisdictional facts should be alleged in a petition or answer, see *Murzynowski v. Del., L. & W. R. Co.*, 15 N. Y. Supp. 481; *Beers v. Shan-non*, 12 Hun 161; s. c. 73 N. Y. 292.

§ 2514. Effect of exercise of jurisdiction.

Jurisdiction, once duly exercised over any matter by a surrogate's court, excludes the subsequent exercise of jurisdiction by another surrogate's

court, over the same matter, and all its incidents, except as otherwise specially prescribed by law. Where a guardian has been duly appointed by, or letters testamentary or of administration have been duly issued from or any other special proceeding has been duly commenced in, a surrogate's court having jurisdiction, all further proceedings to be taken in a surrogate's court, with respect to the same estate or matter, must be taken in the same court.

Source.—Former § 2475; originally revised from R. S., pt. 3, ch. 2, tit. 1, § 12; pt. 2, ch. 6, tit. 1, § 28 and tit. 5, § 24.

Application.—*Matter of Drake* (1916), 94 Misc. 70, 157 N. Y. Supp. 270.

Duty of surrogate of one county to decline jurisdiction when probate of will is pending in another county, see *Matter of Buckley*, 41 Hun 106; *Matter of Harvey*, 3 Redf. 214. Effect of absence of surrogate, see *Matter of Zerega*, 58 Hun 505, 12 N. Y. Supp. 497.

Where surrogate has acquired jurisdiction, effect of omission to bring in heirs, etc., of a deceased party, see *Brick v. Brick*, 66 N. Y. 144.

Denial of jurisdiction.—A contestant cannot, by denying the jurisdiction of the surrogate, upon the ground that the testator did not reside in that county, procure a writ restraining the further prosecution of the proceeding in that court. *People ex rel. James v. Surrogate's Court*, 36 Hun 218.

Jurisdiction of appointment of guardian.—An application for the appointment of a guardian of the person and estate of an infant, as the successor of a guardian theretofore appointed, should be made to the surrogate's court which exercised jurisdiction originally on the appointment and subsequently on the removal of the guar-

dian. *Matter of Stein* (1915), 98 Misc. 493, 164 N. Y. Supp. 930.

Application for the appointment of a guardian in place of a deceased guardian should be made to the surrogate's court which made the first appointment. In *re Henry's Guardianship* (1914), 164 N. Y. Supp. 929; In *re Doblin's Guardianship* (1914), 164 N. Y. Supp. 929.

Jurisdiction of appointment of testamentary guardian.—There is no direct provision that a testamentary guardian must be appointed by the surrogate's court which enters the decree of probate of the will in which such guardian is nominated; § 2657 is not to be construed to that effect, but in compliance with § 2514 an application for the appointment of such a guardian should be made to the surrogate's court of the county by which decedent was appointed the general guardian of the infant's person and estate. *Matter of Majilton* (1917), 98 Misc. 490, 164 N. Y. Supp. 745.

Trusts.—Management, control and disposition of a testamentary trust is no part of the administration of the estate within the meaning of this section. *Matter of Hoyt* (1918), 103 Misc. 614, 170 N. Y. Supp. 846.

§ 2515. Exclusive jurisdiction.

The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has, since his death, come into the state, and remains unadministered.

3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered.

4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of letters of administration, under subdivision second or third of this section, has not

been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under title fourth of this chapter, is situated within that county, and no other.

Source.—Former § 2476; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 23; pt. 3, ch. 2, tit. 1, § 1; L. 1837, ch. 460, § 1.

Application of subd. 2. In re Ranger's Estate (1918), 169 N. Y. Supp. 1075.

Construction of section in connection with act relating to public administrator in county of New York. Hoes v. N. Y., N. H. & H. R. Co., 173 N. Y. 435. As to payment of a decedent's savings bank account to a foreign administrator, after letters of administration have been issued in this state, see Maas v. German Sav. Bank, 73 App. Div. 524, 77 N. Y. Supp. 256, aff'd 176 N. Y. 377. A surrogate cannot grant principal letters testamentary or of administration with the will annexed, unless the will is proved before the said surrogate. Spratt v. Syms, 104 App. Div. 232, 93 N. Y. Supp. 728.

As to action by administrator *de bonis non* in this state to recover for services performed by intestate in Paris under contract with a domestic corporation, see Homans v. New York Life Insurance Co., 55 Misc. 574, 106 N. Y. Supp. 929.

The words "no other" relate to exclusive jurisdiction and do not affect the concurrent jurisdiction conferred by § 2516. Matter of Arnold, 114 App. Div. 244, 99 N. Y. Supp. 740.

Resident decedent.—The word "resident" as used in subdivision 1 has been construed to mean "inhabitant." Matter of Walker, 54 Misc. 177, 105 N. Y. Supp. 890. As to residence of decedent, see Kennedy v. Ryall, 67 N. Y. 397; Caulfield v. Sullivan, 85 N. Y. 153; Matter of Brant, 30 Misc. 14, 62 N. Y. Supp. 997; Matter of Jones, 19 Misc. 80, 43 N. Y. Supp. 965; Matter of Hyland, 24 Misc. 357, 53 N. Y. Supp. 717; Matter of Buckley, 41 Hun 106; Hill v. Horton, 4 Dem. 88; Matter of Taylor, 6 Dem. 158; Oviedo v. Duffie, 5 Redf. 137.

Where the domicile of a married woman

at the time of her death in California, was in this state, county of New York, which was her domicile of origin and matrimonial domicile, the surrogate of said county has jurisdiction. Matter of McElwaine (1912), 77 Misc. 317, 137 N. Y. Supp. 681.

Residence question of fact.—The question of residence of a decedent conferring jurisdiction upon the surrogate's court to issue letters of administration is one of fact. Webster v. Kellogg Co. (1915), 168 App. Div. 443, 153 N. Y. Supp. 800.

Nonresident decedent dying within the county.—Necessity of showing that decedent left assets in this state. Evans v. Schoonmaker, 2 Dem. 249.

Nonresident dying without the state.—As to what personal property is sufficient to confer jurisdiction, see White v. Nelson, 2 Dem. 265. See also Van Giessen v. Bridford, 83 N. Y. 348; Accounting of Hughes, 95 N. Y. 55; Matter of Fitch, 160 N. Y. 87; Hoes v. N. Y. & H. R. Co., 73 App. Div. 363, 77 N. Y. Supp. 117; Matter of McCabe, 84 App. Div. 145, 82 N. Y. Supp. 180.

Surrogate of the county where assets are may take proof of will of nonresident testator although the original will is in the possession of the court of another county. Russell v. Hartt, 87 N. Y. 19; Matter of Delaplaine, 45 Hun 225.

Real property of nonresident decedent.—As to what must be set up in the petition, in order to confer jurisdiction under subdivision 3, see Matter of Gennert, 96 App. Div. 8, 89 N. Y. Supp. 37.

A nonresident dying owning stock of a domestic corporation, such stock is, within the meaning of subdivision 3, property within that county where the corporation has its principal place of business. Matter of Arnold, 114 App. Div. 244, 99 N. Y. Supp. 740.

§ 2516. Concurrent jurisdiction of two or more surrogates.

Where personal property of the decedent is within, or comes into, two or more counties, under the circumstances specified in subdivision third of the last section; or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision fourth of the last section; the surrogates' courts of those counties have concurrent jurisdiction, exclusive of every other surrogate's court, to take the proof of the will and grant letters testamentary thereupon, or to grant letters of administration, as the case requires. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other.

Source.—Former § 2477; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 24.

§ 2517. Jurisdiction, how affected by locality of debts.

For the purpose of conferring jurisdiction upon a surrogate's court, a debt owing to a decedent by a resident of the state is regarded as personal property situated within the county where the debtor, or either of two or more joint debtors, resides; and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office of the corporation is situated. But the foregoing provision does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable, or payable to the bearer or holder. Such a debt, whether the debtor is a resident or a non-resident of the state, or a foreign or a domestic government, state, county, public officer, association, or corporation, is, for the purpose of so conferring jurisdiction, regarded as personal property at the place where the bond, note or other instrument is, either within or without the state.

Source.—Former § 2478; section new as originally inserted in Code Civ. Proc.

Nature of debt.—Jurisdiction as to a bond owned by a nonresident decedent. <i>Beers v. Shannon</i>, 73 N. Y. 292. As to a mortgage debt, see <i>Czech v. Bean</i>, 35 Misc. 729, 72 N. Y. Supp. 402. As to a promissory note, see <i>Matter of Hopper</i>, 5 Dem. 242. As to a claim, touching which an	action is pending. <i>Hayward v. Place</i>, 4 Dem. 487. A policy of insurance upon the life of nonresident decedent held an asset under this section. <i>Matter of Miller</i>, 5 Dem. 381; <i>Johnson v. Smith</i>, 25 Hun 171.
---	--

TITLE II.

Special proceedings; pleadings, process and its service; appearance; trial by court or jury; taking and preserving testimony; orders and decrees, their effect and enforcement. Letters, their requisites, effect, issue and revocation. Bonds, their requisites, approval, prosecution and discharge. Sureties, their rights and obligations.

- ARTICLE 1. Special proceedings, how begun; pleadings and process; service of citation and other process, and proof thereof.
2. Appearance, appointment of special guardian: consolidation of proceedings. Reference, trial, decision, exceptions and testimony. Orders and decrees, effect and enforcement; docketing, discharging and staying.
 3. Letters, their requisites, priority and authority; how, when and to whom granted; revocation. Removal of trustee.
 4. Bonds and undertakings, approval, recording, prosecution and discharge; sureties, their release, rights and obligations.

ARTICLE 1.

SPECIAL PROCEEDINGS, HOW BEGUN; PLEADINGS AND PROCESS; SERVICE OF CITATION AND OTHER PROCESS, AND PROOF THEREOF.

- | | |
|---|---|
| <p>§ 2518. Proceeding commenced by petition; statute of limitations</p> <p>2519. Written pleadings required.</p> <p>2520. Verification thereof.</p> <p>2521. General contents of petition.</p> <p>2522. Process; how executed and returnable.</p> <p>2523. General contents of citation.</p> <p>2524. General contents of citation; persons constituting a class; persons unknown or whose names or parts of names are unknown.</p> <p>2525. Citation; how served within state.</p> <p>2526. Service personally without the state, or by publication; when ordered.</p> | <p>§ 2527. Application for order permitting service by publication; or personally without the state.</p> <p>2528. Order, when and how made; contents thereof.</p> <p>2529. When service of citation shall be made; manner of service without the state or by publication.</p> <p>2530. Id.; upon infant, et cetera; additional requirement in certain cases.</p> <p>2531. Proof of service of citation, subpoena, et cetera.</p> <p>2532. Publication of citation, et cetera.</p> |
|---|---|

§ 2518. Proceeding commenced by petition; statute of limitations.

Every proceeding in surrogate's court shall be commenced by the filing of a petition. In any case where the time in which to begin such proceeding is limited, a citation or an order to show cause, on such petition must, within sixty days thereafter, be issued and be served, as prescribed in this chapter upon the adverse party, or upon one or two or more adverse parties who are jointly liable, or otherwise united in interest; or within the same time, the first publication thereof must be made pursuant to an order made as prescribed in this chapter.

Source.—Former §§ 2516 and 2517; sections new as originally inserted in Code of Civ. Proc.

Revisers' note.—Repeal § 2516. Under that section it was a question whether a proceeding without citation was ever commenced. Necessary part of § 2516 embodied above.

Jurisdiction.—Where an action was commenced in the supreme court prior to the service of the citation in the surrogate's court, the jurisdiction of the former was retained to the exclusion of the latter, and proceeding in the surrogate's court will be stayed until the action in the supreme court has been tried and a decision rendered. *Matter of Cary* (1912), 77 Misc. 602, 138 N. Y. Supp. 682.

Application.—The provision of this section requiring the service of a citation

upon the adverse parties within sixty days after the presentation of a petition is applicable to a proceeding under former sections 2647 et seq. (now repealed), for the revocation of the probate of a will. *Matter of Bonnett*, 1 Connolly 294, 9 N. Y. Supp. 459.

Service of citation.—If there are two or more adverse parties, service upon one of them alone will never be sufficient, save in cases where the rest are jointly liable with him or are otherwise united in in-

terest. *Fountain v. Carter*, 2 Dem. 313.

As to jurisdiction being lost by the failure to serve the citation on one of the adverse parties within sixty days after the presentation of the petition, see *Fryer v. Clapp*, 1 Dem. 387.

Citation not required to be served within sixty days after the presentation of the petition, but must be served within sixty days after the citation is issued by the surrogate's court. *Matter of Bradley*, 70 Hun 104, 23 N. Y. Supp. 1127.

§ 2519. Written pleadings required.

All petitions, answers, and objections shall contain a plain and concise statement of the facts constituting the claim, objection or defense, and a demand for the decree, order, or other relief, to which the party supposes himself to be entitled, and shall be duly verified. The surrogate may require that a copy thereof be served upon any person interested in such manner as he may direct. A party who fails to comply with such requirement may be treated as a party in default.

Source.—Former § 2533; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—For a history of oral and written pleadings in surrogate's court, see *Matter of Work*, 76 Misc. 403.

The change requires all pleadings to be in writing and verified. This makes a more definite and orderly procedure. Under this section "written" and "duly verified" which occurs in many sections are eliminated. This section was a relic of the time when the surrogate's court was not a court of record.

Pleadings.—As to requirements of a petition for the revocation of probate of a will, see *Henry v. Henry*, 3 Dem. 322. Statement of facts which was held not to constitute an "objection" under this section. *Robert v. Morgan*, 4 Dem. 148.

It seems that under this section the surrogate may require the verification of objections to an account filed with him. *Thompson v. Mott*, 2 Dem. 154.

Sufficiency of petition.—Ordinarily, an objection to the sufficiency of a petition for a citation, for want of jurisdiction should be taken by answer, unless the jurisdiction invoked is wholly statutory when the objection may be taken orally, at any stage, if entered on the record. *Matter of Work* (1912), 76 Misc. 403, 137 N. Y. Supp. 97.

Prior to the surrogate's code of 1914,

pleadings in surrogate's court were oral, except when required to be in writing by the surrogate. *Matter of Sheldon* (1913), 158 App. Div. 843, 144 N. Y. Supp. 94.

Objection to the account of an administratrix showing omissions, being material, are absolutely privileged. *Gallagher v. Surplus* (1917), 163 N. Y. Supp. 551.

Accounting proceeding.—The form of denial provided by the code for actions in other courts does not apply to an accounting proceeding in this court, because, in the first place, an accounting proceeding is not an action, and, in the second, the sections of the code in relation to the surrogate's court prescribe a definite procedure and provide sufficient remedies for those who desire to file objections to an account. *Matter of Brommer* (1918), 103 Misc. 336, 173 N. Y. Supp. 200.

§ 2520. Verification thereof.

The provisions of sections 523, 524, 525 and 526 of this act apply to a verification made pursuant to this chapter, and to the petition or other paper so verified, where they can be so applied in substance, without regard to the form of the proceeding.

Source.—Former § 2534; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—Change to numerals makes the numbers more easily read.

§ 2521. General contents of petition.

A petition must substantially set forth:

1. The title of the proceeding, the name and residence of the person to whose estate or fund the proceeding relates, and the name and residence of the petitioner.

2. The facts upon which the jurisdiction of the court depends to entertain the application and grant the relief asked for.

3. So far as they can be ascertained with due diligence, the names and post-office addresses of all the persons interested in the proceeding who are required to be cited upon the application, or concerning whom the court is required to have information; and if the name or post-office address of any of such persons is unknown, the facts which show what effort has been made to ascertain the same.

4. That there are no other persons than those mentioned interested in the application or proceeding.

5. A request for the relief or action of the court to which the petitioner deems himself entitled.

Before any process shall be issued on a petition the petitioner may be required to show by his petition or otherwise the following matters:

If any person named be an infant there shall be set forth:

a. His age, and whether or not he has a general or testamentary guardian.

b. Whether or not his father, or if he be dead, his mother is living, giving the name and post-office address of such person.

c. The person with whom such infant resides and his post-office address.

If any person named be an adjudged, or an alleged, incompetent there shall be set forth:

a. The name and post-office address of the committee, if any, and the name and post-office address of the person or institution having the care or custody of such incompetent.

b. The facts regarding his incompetency, and the name and post-office address of a relative or friend having an interest in his welfare.

If any of such persons be included in a class, and his name be unknown there shall be set forth:

The names and post-office addresses of those persons of the class who are known, and a general description of all other persons belonging to such class, showing their connection with the decedent or fund and their interest in the property or matter in question.

If any of such persons be unknown or his name be unknown there shall be set forth:

A general description of such person showing his connection with the decedent or fund, and his interest in the property or matter in question.

Source.—Former § 2662, in part, as amended by L. 1893, ch. 686; L. 1904, ch. 184; consolidated from former §§ 2660, 2661; the former new when originally inserted in Code Civ. Proc. and the latter originally revised from R. S., pt. 2, ch. 6, tit. 2, § 26.

Revisers' note.—This general section has been drawn to put into one section the general requirements of a petition which are repeated in many sections. It will be noticed that only the first 5 are jurisdictional. The remainder of the section shows what should be in a petition to enable the surrogate to act intelligently.

§ 2522. Process; how executed and returnable.

The process of the surrogate's court shall be a citation to show cause, an order to show cause, and such other process and mandate as the surrogate is or shall be authorized by law to issue and employ in the performance of the duties imposed on him and in the enforcing of his orders and decrees.

A citation or other mandate of a surrogate's court must, except where it is otherwise specially prescribed by law, be made returnable before the surrogate's court from which it was issued, and may be served or executed in any county. A warrant of attachment must be directed to the sheriff of the surrogate's county, who may execute it in any county, and must convey the person arrested to the place where it is returnable.

Source.—Former § 2515; originally revised from L. 1837, ch. 460, §§ 66, 67.

Revisers' note.—There has been no section specifying the "process" in surrogate's court.

It is intended to do away with citation "to attend" which causes many people useless expense, and substitute citation "to show cause."

§ 2523. General contents of citation.

A citation must substantially set forth:

1. The name and residence of the petitioner, and of the person to whose estate or fund the proceeding relates.
2. The names of all the persons to be cited who have not waived its issue and service, or have not appeared, so far as the same can be ascertained.
3. The time and place when the citation is returnable, which time must not be more than four months after the date thereof.
4. The object of the proceeding in regard to which the persons cited are required to show cause.
5. The date when the citation issues.
6. It must be attested in the name of the surrogate, and by the seal of his court.

Source.—New. See former §§ 2519, 2616 and 2655. Section 2519 originally revised from L. 1837, ch. 460, § 7. Section 2616, as amended by L. 1911, ch. 433; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 37; L. 1837, ch. 460, § 7. Section 2655, new as originally inserted in Code of Civ. Proc.

Revisers' note.—This and the following section make general provisions for contents of citation. In such separate proceeding reference is then made only to any special provision that must be in the citation for that proceeding.

§ 2524. General contents of citation; persons constituting a class; persons unknown or whose names or parts of names are unknown.

In addition to the requirements of the last section, a citation must substantially set forth:

1. Where the names of some persons to be cited comprising a class are unknown, the names of those persons of the class who are known, and a general description of all other persons belonging to such class, showing their connection with the decedent and their interest in the property or matter in question.
2. Where the persons to be cited are unknown, a general description of

such persons showing their connection with the decedent and their interest in the property or matter in question.

In either of said cases where the petitioner is ignorant of the name of a person to be cited, he may designate that person in the citation by a fictitious name or by so much of his name as is known, adding a description identifying the person intended.

3. In every case where it appears that there is no heir-at-law or next of kin, as the case may be; or that it is not known whether or not there be such; or when all of the parties interested are non-resident aliens, the citation shall be issued to the attorney-general of the state.

Source.—New. See former §§ 2518 and 2616. Section 2518 originally revised in part from R. S., pt. 2, ch. 6, tit. 2, § 26. Section 2616, as amended by L. 1911, ch. 433; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 37; L. 1837, ch. 460, § 7. Section 2655 new as originally inserted in Code of Civ. Proc.

Revisers' note.—Following Code, section 451. No. 3 is to eliminate repetition in many places.

Contains part of former § 2518.

Decisions under § 440 do not apply to service upon unknown creditors of a citation issued by the surrogate's court. Matter of Reed (1916), 171 App. Div. 21, 156 N. Y. Supp. 944.

§ 2525. Citation; how served within state.

Personal service of a citation within the state shall be made as follows:

Upon an adult person, or upon an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served.

Upon an infant under the age of fourteen years, by delivering a copy thereof to the infant in person, and to his father, mother or guardian; or if there be none within the state, or if the infant does not reside with a parent, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

Upon a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or upon a corporation by delivering a copy thereof in the manner prescribed for personal service of a summons upon such a person, or upon a corporation in article first of title first of chapter fifth of this act. Upon a public officer by delivering a copy thereof to such officer, or to one of his duly constituted deputies.

Where it appears, by affidavit, to the satisfaction of the surrogate from whose court a citation is issued, that proper and diligent effort has been made to serve it as hereinbefore prescribed in this section upon a resident of the state whose place of residence or place of business is known, and that the person to be served cannot be found at his residence or place of business, and cannot be elsewhere served within the state within a reasonable time, or, if found, that he evades service, so that it cannot be made; the surrogate may make an order directing that service thereof be made, as prescribed in section 436 of this act; and the provisions of that section and of section 437 of this act, relating to the service of a summons, apply to the service of a citation, pursuant to an order made as prescribed in this section.

Where it is necessary in any special proceeding to cite known creditors, and it appears that the number of creditors or persons claiming to be

creditors, residing within the state of New York, upon whom citation is required to be served, exceeds fifty, service thereof may be made upon them by publication thereof in such newspaper or newspapers and for such a length of time as shall be fixed by the surrogate, and by the mailing of a copy of such citation to each of them by deposit of a copy thereof in the post-office, properly enclosed in a post-paid sealed wrapper addressed to each of them at his last known post-office address as stated in the order, at least twenty days prior to the return day thereof.

Source.—Former §§ 2520, 2521 and 2526. Section 2520, as amended by L. 1913, ch. 535. These sections were new as originally inserted in Code of Civ. Proc.

Revisers' note.—This section combines §§ 2520, 2521 and 2526 and provides either personal or substituted service on all residents who can be found or who have a residence or place of business so that personal or substituted service can be made. It also adds the amendment of 1913 (ch. 279), concerning substituted service of resident creditors. This leaves to be served by publication non-residents, residents who cannot be found, and those who have no residence or place of business, and persons unknown, provision for which is made in the next section.

The amendment of 1913 to § 426 is not adopted as to service on infants, as the committee believe it not the best manner of service for use in surrogate's court.

Citation; how served.—A copy of the citation must be delivered to the person served. *Mauran v. Hawley*, 2 Dem. 396.

As to circumstances under which surrogate was held to have good reason to believe that a citation left at the residence of a person came to the knowledge of that person in time to attend at the return day, see *Mead v. Miller*, 3 Dem. 577.

Time of service.—Service of the citation less than the eight days before the return

day gives the court no jurisdiction. *Boerum v. Betts*, 1 Dem. 471. By a proper construction of this section and § 788, the return day specified in a citation may be counted in estimating the eight days required for such a service. *Matter of Carhart*, 2 Dem. 627. A proposal to cause an infant party and his guardian to be brought into this state, in order to effect a shorter service, will not be approved. *Merritt's Will*, 5 Dem. 544.

§ 2526. Service personally without the state, or by publication; when ordered.

The surrogate from whose court a citation is issued may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the state.
2. Where the person to be served is a resident of the state, and substituted service upon him cannot be authorized as provided in section 2525 of this chapter.
3. Where it is to be served upon a party, or a person required to be made a party, whose name, or residence, cannot be ascertained.
4. Where it is to be served upon one or more unknown creditors, next of kin, heirs, legatees or other persons, either individually or included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this chapter.

Source.—Former §§ 2522 and 2523. Section 2522, as amended by L. 1881, ch. 864. These sections were new as originally inserted in Code of Civ. Proc.

Revisers' note.—We omit subdivisions 2, 3 and 4 of the original section 2522 which referred to residents, as those classes were fairly included in provision for substituted service, and by the amendment are made clearly so. Subd. 2 includes in this section all residents who cannot be served under the prior section. Subds. 3 and 4 include persons unknown whether residents or non-residents.

§ 2527. Application for order permitting service by publication or personally without the state.

Application for an order permitting service of a citation by publication or personally without the state of New York must be made upon the petition, or upon an affidavit, which must set forth to the satisfaction of the surrogate the facts which show that the case is one of those specified in section 2526 of this chapter and that the petitioner has used due diligence to ascertain the names and post-office addresses of the parties whose names or post-office addresses are unknown.

Source.—New.

§ 2528. Order, when and how made; contents thereof.

When an order, directing the service of a citation personally without the state, or by publication, is made, if the order authorizes service by publication, it must direct that the citation be served upon the persons named or described in the order, by publication of the citation in two newspapers, therein designated, unless from the petition or affidavit filed it appears that the estate or fund amounts to less than five thousand dollars, in which case only one newspaper shall be designated, for such specified time as the surrogate deems reasonable, not less than once in each of four successive weeks, and by mailing a copy of such citation as provided in section twenty-five hundred and twenty-nine of this chapter; except that the order may dispense with such mailing to persons whose names or addresses are alleged in the petition or affidavit to be unknown, or to persons who are alleged in the petition or affidavit to be within a country with which the United States of America is at war, or to be in a place with which by reason of the existence of a state of war the United States of America does not maintain postal communication. The court shall direct that the citation be mailed on behalf of such persons to such officer as may have been appointed by the president of the United States of America to take possession of the property of alien enemies, at Washington, District of Columbia.

If the order authorizes personal service without the state of New York, it must direct that service be made upon the parties named therein in the manner prescribed in section twenty-five hundred and twenty-nine of this chapter.

The order may authorize both modes of service at the option of the petitioner, or may direct that service be made by either mode without embodying the other. The granting of an order for service by publication, or personally without the state, shall not prevent the personal service of such citation within the state.

Amended by L. 1918, ch. 309, in effect April 23, 1918. The amendment of 1918 inserted the remainder of the first paragraph after the word "unknown" in line 12.

Source.—Former § 2524, as amended by L. 1881, ch. 664; L. 1899, ch. 606. This section was new as originally inserted in Code of Civ. Proc.

Revisers' note.—This will enable the surrogate to make an order for either mode of service, which right has been doubted under the old section. It omits the recitation of manner of service, as the manner of service is prescribed in new section 2529, thus greatly shortening the order, which was always long. The last sentence settles the disputed question whether after the granting of the order personal service could be made within the state.

Insufficient time.—There must be a period of at least twenty-eight days between the day of the first publication of the notice and the return day thereof, and where the publication of a citation for the probate of a will issued on the eleventh day of February, and returnable on the eleventh day of March, was not commenced until the twenty-fourth day before the return day thereof and the citation was not mailed until twenty-five days before the return day, such service did not comply with the statute. *Matter of Wright* (1918), 224 N. Y. 293.

Citation must be published once a week

for four full weeks or twenty-eight days before it is made returnable, excluding day of first publication. *Matter of Wright* (1918), 183 App. Div. 266, 171 N. Y. Supp. 123.

Jurisdiction over a nonresident can be obtained only by voluntary appearance, or by service of a citation, as provided by this section. *Sawmill Co. v. Dock*, 3 Dem. 55.

It is not necessary that the publication of a citation should be completed eight days before the return day of the citation. *Matter of Denton*, 86 App. Div. 359, 83 N. Y. Supp. 778.

§ 2529. When service of citation shall be made; manner of service without the state or by publication.

Any person over eighteen years of age, although a party to the special proceeding, may serve a citation.

Service of a citation upon a resident of the state, or upon a nonresident within the state, must be made, if within the county of the surrogate, or in an adjoining county, at least eight days before the return day thereof; and if in any other county of the state, at least ten days before the return day thereof.

Service of a citation personally without the state of New York, pursuant to an order therefor, must be made in the same manner as is required by this chapter for the personal service of a citation within the state, by delivering a copy of such citation, if within the United States at least twenty days, and if without the United States at least thirty days before the return day thereof.

Service of citation by publication must be made by publication of the citation as prescribed in such order, and by the deposit, on or before the day of the first publication, in a specified post-office, of a copy of the citation, contained in a securely closed post-paid wrapper, directed to the person to be served, at a place specified in the order; and if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed post-paid wrapper directed to the father, or the mother, or the guardian, and the person with whom such infant is sojourning; unless by the terms of the order mailing is dispensed with.

Source.—See former §§ 2518, 2520, 2524, 2525 and 2526. § 2518 originally revised in part from R. S., pt. 2, ch. 6, tit. 2, § 26. § 2520, as amended by L. 1913, ch. 535. § 2525, as amended by L. 1882, ch. 399. §§ 2520, 2524-2526 were new as originally inserted in Code of Civ. Proc.

Revisers' note.—Combines §§ 2520, 2525, 2526. This section taken with § 2525 makes complete provision as to service of citation.

Time between date of service and return.—Where personal service is made either within or without the state, the requirements of this section as to the number of days which must elapse between the date of service and the return date governs; in case service is made by mail, the time between the mailing of the notice of motion and the return day should be double that required in case of personal service. *Matter of Whitewright* (1914), 87 Misc. 534, 151 N. Y. Supp. 241.

§ 2530. Id.; upon infant, etc., additional requirement in certain cases.

Where a person cited, or to be cited, is an infant, or where the surrogate has, in his opinion, reasonable grounds to believe, that a person cited, or to be cited, is an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate may, in his discretion, with or without an application therefor, and in the interest of that person, make an order requiring that a copy of the citation be delivered, in behalf of that person, to a person designated in the order and that service of the citation shall not be deemed complete until such delivery.

Source.—Former § 2527; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—Provisions as to appointment of special guardian all embodied in former § 2530, new § 2534. The last part omitted seems to presuppose that the person to whom a citation is delivered has some right to appear.

Service upon infant or incompetent.—Where application is made under this section for an order directing delivery of a copy of a citation in behalf of a nonresident incompetent, to a person designated, held that, in order to acquire jurisdiction, the citation must also be served upon the nonresident by publication, or delivered to him, as provided by § 2528. *Matter of Cortwright*, 3 Dem. 13.

The only direct grant of authority to a surrogate's court to appoint a guardian ad litem for an infant is contained in this section and § 2534, which apply exclusively to cases where he has been or is to be cited, or is already a party to a special proceeding. *Matter of Watson*, 2 Dem. 642.

§ 2531. Proof of service of a subpoena, citation or other process.

Proof of service of a subpoena, citation or other process issued from a surrogate's court, must be made by the certificate of the sheriff, when served by him, and in any other case by the affidavit of the person so serving it; or, where the person served is of full age and not incompetent, by a written admission signed by him, accompanied with proof, by acknowledgment, affidavit or otherwise, of the genuineness of his signature; provided, however, that where service of a citation or order to show cause is made upon a public officer by delivering a copy thereof to one of his duly constituted deputies, a written admission, signed by such deputy, accompanied with proof in like manner of the genuineness of such deputy's signature shall be sufficient. Proof of publication and deposit in a post-office may be made as prescribed in section four hundred and forty-four of this act.

Amended by L. 1916, ch. 445, and L. 1917, ch. 674, in effect May 29, 1917.

Source.—Former §§ 2525 and 2532, § 2525, as amended by L. 1882, ch. 399; section new as originally inserted in Code of Civ. Proc. § 2532 originally revised from R. S., pt. 2, ch. 2, tit. 1, § 9; L. 1837, ch. 460, § 9.

§ 2532. Publication of citation, etc.

Where a provision of this chapter, or an order made pursuant to such a provision, directs the publication of a citation, notice, or other paper, or the service thereof by publication, the publication must be made in a newspaper published in the county. The surrogate may, also, in his discretion, direct the publication thereof in any other newspaper published in the same or another county, as he deems proper, for the purpose of giving notice to the persons intended to be served or notified. If no newspa-

per is published in the county, the citation, notice or other paper, must be published in the newspaper printed at Albany, in which legal notices are required by law to be published.

Source.—Former § 2535; originally revised from L. 1847, ch. 437, and R. S., pt. 2, ch. 6, tit. 4, § 40.

ARTICLE 2.

APPEARANCE; APPOINTMENT OF SPECIAL GUARDIAN; CONSOLIDATION OF PROCEEDINGS. REFERENCE, TRIAL, DECISION, EXCEPTIONS AND TESTIMONY. ORDERS AND DECREES, EFFECT AND ENFORCEMENT; DOCKETING, DISCHARGING AND STAYING.

- | | |
|---|--|
| <p>§ 2533. Appearance; how made and effect thereof.</p> <p>2534. Special guardian; when to be appointed.</p> <p>2535. Consolidation of proceedings.</p> <p>2536. Surrogate may refer questions of fact.</p> <p>2537. Right to trial by jury preserved, how waived.</p> <p>2538. Trial by jury.</p> <p>2539. Trial by jury; powers of surrogate; motion to set aside verdict and for new trial.</p> <p>2540. Jury in surrogate's court; how obtained; fees of jurors and officers.</p> <p>2541. Decision by surrogate after trial without a jury.</p> <p>2542. Exceptions upon a trial.</p> <p>2543. Testimony of witness; how taken.</p> <p>2544. Idem; by the surrogate of another county.</p> <p>2545. Bequest, et cetera, does not disqualify, et cetera, witness.</p> | <p>§ 2546. Uncontroverted allegations constitute due proof.</p> <p>2547. Filing testimony taken out of court by commission.</p> <p>2548. Definition of decree and order; how order enforced.</p> <p>2549. Decree or order; when evidence of assets.</p> <p>2550. Force and effect of a decree of surrogate's court.</p> <p>2551. Decree for money; how docketed; effect, assignment and discharge.</p> <p>2552. Decree; partial satisfaction of.</p> <p>2553. Enforcement of decree of execution.</p> <p>2554. Idem; by punishment for contempt.</p> <p>2555. Effect and contents of decree revoking letters.</p> <p>2556. The last section qualified.</p> <p>2557. When execution of decree or order is stayed by appeal.</p> |
|---|--|

§ 2533: Appearance; how made and effect thereof.

In a surrogate's court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, appear and prosecute or defend a special proceeding in person, or by attorney regularly admitted to practice in the courts of record, at his election, except in a proceeding to punish him for contempt, or where he is required to appear in person, by special provision of law, or by a special order of the surrogate. An appearance must be evidenced by a notice of appearance signed by the party or by his attorney, or in the case of a public officer, by such officer or a duly constituted deputy in the name of such officer, and filed in the surrogate's court; and where no citation has been served on the person appearing, such notice must be signed by him and be acknowledged or proved, and duly certified.

Amended by L. 1917, ch. 675, in effect May 29, 1917.

Source.—Former § 2528, as amended by L. 1896, ch. 570, and L. 1911, ch. 330, originally revised from L. 1870, ch. 359, § 2.

Revisers' note.—Notice of appearance should be signed to avoid claim by parties who were in court and said nothing, that they appeared and were entitled to notice of appeal or other proceedings. Appearance or default ought to be definite and not subject to dispute as to correctness of the minutes.

Appearance by attorney.—As to appearance by attorney in surrogate's court and lien of such attorney for services rendered, see *Matter of Regan*, 167 N. Y. 338. As to power of surrogate to direct substitution of attorneys in proceedings before him, see *Chatfield v. Hewlett*, 2 Dem. 191; *Hoes v. Halsey*, 2 Dem. 577.

Waiver.—Jurisdiction is not conferred on

surrogate by a waiver of the issue of a citation executed before any proceeding has been taken. *Matter of Graham*, 39 Misc. 226, 79 N. Y. Supp. 573; *Matter of Gregory*, 13 Misc. 363, 35 N. Y. Supp. 105. As to rule in regard to waiver of the issuance and service of a citation before 1896, see *Matter of Post*, 30 Misc. 551, 64 N. Y. Supp. 369.

§ 2534. Special guardian; when to be appointed.

Where a party, who is an infant, does not appear by his general guardian; or where a party, who is a lunatic, idiot, or habitual drunkard, does not appear by his committee; or where any party is an infant, or an habitual drunkard, or for any cause is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the general guardian or committee is adverse to that of the infant, or incompetent person; or that for any other reason, the interests of the latter require the appointment of a special guardian. Where there are unknown persons, or persons whose whereabouts are unknown, the surrogate may, in his discretion, appoint a special guardian for such persons. A person cannot be appointed such a special guardian who is nominated by any party; but this prohibition shall not preclude an infant over fourteen years of age from nominating his own special guardian.

Before entering upon his duties such special guardian shall file his consent to so act.

Source.—Former § 2530; originally revised from R. S., pt. 2, ch. 6, tit. 4, § 3, as amended by L. 1837, ch. 460, § 38; L. 1863, ch. 362, § 6, first sentence, L. 1870, ch. 170, § 4; L. 1872, ch. 693, § 2.

Revisers' note.—§ 2530 rewritten and scope enlarged.

Application of section.—The only direct grant of authority to a surrogate's court to appoint a guardian ad litem for an infant is contained in this section and § 2527, which apply exclusively to cases where he has been or is to be cited, or is already a party to a special proceeding. *Matter of Watson*, 2 Dem. 642.

When appointed.—Appointment of a special guardian for an infant party who does not appear by his general guardian is properly made upon the return day of the citation. An earlier application is premature. *Matter of Leinkauf*, 4 Dem. 1. As to appointment of a person to protect the interests of a widow who had not been judicially declared insane, but who was of unsound mind, see *Matter of Donlon*, 66 Hun 199, 21 N. Y. Supp. 114.

It is the proper practice where no application is made for the appointment of a special guardian upon the return of the citation, for the surrogate to appoint such

a guardian upon his own motion. *Price v. Fenn*, 3 Dem. 341; *Matter of Ludlow*, 5 Redf. 391.

The only qualification required of such guardian is that he should be competent and responsible. *Matter of Van Wagonen*, 69 Hun 365, 23 N. Y. Supp. 636.

Alleged incompetency of heir.—Where the only heir at law and next of kin of a testatrix, successfully traverses the allegation of the petition for probate that she is mentally incompetent to protect her rights, although not judicially declared such, an order appointing a special guardian for her will be revoked so as to enable her to appear in person or by attorney in a probate proceeding. *Matter of Haynes* (1913), 82 Misc. 228, 143 N. Y. Supp. 570.

A party for whom a special guardian must be appointed means a party to be cited under and pursuant to § 2610. *Matter of Redfield* (1916), 94 Misc. 20, 158 N. Y. Supp. 1004.

Div. 237, 152 N. Y. Supp. 822; *Matter of Shedden* (1918), 183 App. Div. 837, 171 N. Y. Supp. 150.

Waiver by failure seasonably to demand. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

§ 1009 which specifies what constitutes a waiver of the right of trial by jury, is not applicable. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

§ 2538. Trial by jury.

In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury, and in any proceeding for the probate of a will in which any controverted question of fact arises, the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same, and in any proceeding in which any controverted question of fact arises, of which any party has, or has not, constitutional right of trial by jury, the surrogate may, in his discretion, make such order without such demand. The surrogate in such order must direct that such trial be had either before himself and a jury, or at a trial term of the supreme court to be held within the county, or in the county court of the county. Either of the surrogates of the county of New York may, in his discretion, make an order transferring to the supreme court any special proceeding for the probate of a will pending in said county. If the trial shall not take place in the surrogate's court the order must state distinctly and plainly each question of fact to be tried, and shall be the only authority necessary for the trial of such question. The verdict, if not set aside by the judge before whom the question is tried, shall be certified to the surrogate's court by the clerk of the court in which the trial took place, and shall be conclusive except upon appeal.

Amended by L. 1915, ch. 275, in effect April 13, 1915.

Source.—Former § 2547, as amended by L. 1895, ch. 946; L. 1910, ch. 576; originally revised from R. S., pt. 2, ch. 6. tit. 4, § 11, in part; L. 1847, ch. 280, § 45.

Revisers' note.—This amendment makes it optional with the surrogate whether he will try by jury or certify the issues for trial in supreme court, and meets the objections that some surrogates are too busy for jury trials and that others have no adequate facilities.

Application.—This section is inapplicable to litigation pending prior to the time of the taking effect of the amendment of 1914, and it seems that former § 2653-a, providing for an action in the supreme court to determine the validity of a will, although repealed, remains in force as to pending proceedings. *Matter of Iovinella* (1915), 166 App. Div. 460, 151 N. Y. Supp. 1007; *Matter of Heinze* (1918), 224 N. Y. 1.

This section has no application to a jury trial in a proceeding brought for the construction of a will. *Matter of Harden* (1914), 88 Misc. 420, 150 N. Y. Supp. 743; see *Matter of Scovill* (1914), 88 Misc. 364, 150 N. Y. Supp. 1070.

Right to jury trial.—There is no "constitutional right of trial by jury" of the issues raised by an answer and reply to a petition by a beneficiary of a testamentary trust for an accounting. *Matter of Fox* (1915), 166 App. Div. 718, 152 N. Y. Supp. 431.

There is no abstract right of trial by jury, either by the common law or by intelligent precedent or by the constitution. *Matter of Woodward* (1918), 105 Misc. 446, 173 N. Y. Supp. 556.

An executor has no constitutional right of trial by jury of the issues in a proceeding by an attorney in the surrogate's court to ascertain the value of services. *Matter of Griffith* (1918), 103 Misc. 562, 170 N. Y. Supp. 629.

Only those issues which by constitutional provision were formerly triable by jury can be submitted to juries in the surrogate's court. After a contested claim against an estate had been allowed and was affirmed on appeal, the petition of the claimant for the removal of her attorney and the substitution of another in his stead was granted but without prejudice to any claim or lien the removed attorney might have for services rendered up to the time of the granting of the order of substitution. In a proceeding to have his claim and lien

determined and enforced his former client was not entitled to a jury trial in the surrogate's court. *Matter of White* (1917), 100 Misc. 56, 164 N. Y. Supp. 934.

A surrogate is not bound by the findings of the jury in a contested probate proceeding. *Matter of Plate* (1916), 93 Misc. 423, 156 N. Y. Supp. 999.

This section must be so construed as to harmonize with § 2614. The jury are not by the new act made judges of probate, but triers of certain controverted facts to be submitted to them by the trial surrogate in probate proceedings. Unless the judge of probate is satisfied with the answers of the jury to the special questions thus submitted to them, it is obvious that the surrogate cannot admit the will to probate if he conscientiously discharges the mandate committed to him alone by § 2614. It would be wrong for the surrogate to ignore his official and personal obligations, because of the findings of a jury, if they were not satisfactory to the surrogate. There is no provision of law which makes the answers or findings of the jury to the questions submitted to them by the surrogate conclusive *per se* on the conscience of the surrogate, unless the trial of such issues is had in the supreme court. *Matter of Eno* (1916), 94 Misc. 100, 157 N. Y. Supp. 553.

Verdict of jury conclusive when not set aside by the judge. *Allen v. Grant* (1918), 171 N. Y. Supp. 769.

Demand by contestants for trial by jury. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

In general.—The only authority given to the court, to which the questions of fact are sent, is to try those questions and certify the result to the surrogate's court. *Matter of Murphy*, 79 App. Div. 541, 81 N. Y. Supp. 101.

When trial by jury directed.—The surrogate may use his discretion in directing a trial by jury of issues of fact. *Corley v. McElmeel*, 149 N. Y. 228. A question cannot be sent to a jury when there is but one party to the dispute in court. *Cromwell v. Phipps*, 6 Dem. 60.

Transfer of a proceeding by the surrogate of New York to the court of common pleas does not affect his power to appoint a temporary administrator. *Matter of Blair*, 60 Hun 523, 15 N. Y. Supp. 212.

When one surrogate of the county of New York, after hearing all of the interested parties, has exercised the discretion given to him by statute to order a probate proceeding tried by jury in the surrogate's court, and no appeal has been taken from the order and the same has become final and conclusive, the other surrogate of said county should not interfere, unless different facts are presented, by directing a trial in the supreme court, notwithstanding the fact that he has the power to make such transfer. *Matter of Eno* (1916), 172 App. Div. 124, 158 N. Y. Supp. 234.

Effect of transfer.—After the removal of a probate proceeding from surrogate's court pursuant to this section, it is doubtful whether the surrogate can vacate the order of transfer in order to entertain an application for an order for the examination, before trial, of a witness about to leave the state. *Matter of Delaplaine*, 6 Dem. 269.

After a special proceeding for the probate of a will has been transferred under this section, the surrogate cannot be called upon to determine the question of the materiality of the testimony of a witness whom contestant desires to examine at the trial. *Matter of McGovern*, 5 Dem. 424.

The procedure where a jury trial is demanded, considered, and the motion for a new trial denied and the motion for a decree of probate on the findings of the jury granted. *Matter of Dorsey* (1916), 94 Misc. 566, 157 N. Y. Supp. 662.

The petitioner in a discovery proceeding in the surrogate's court is not entitled to a jury trial as matter of right. *Matter of Callahan* (1916), 95 Misc. 438, 159 N. Y. Supp. 352.

The right of trial by jury is given to any party appearing in any proceeding in which any controverted question of fact arises, whether such party is for or against the probate of a will. *Matter of Potter* (1916), 94 Misc. 12, 158 N. Y. Supp. 1001.

Demands for jury trial seasonable.—Where in the proceeding for the probate of the earlier dated will a written demand for a jury trial was made by the proponents and in the proceeding for the probate of the will of later date a demand for a jury trial in the objections was filed on the return day of the citation, and the demand in each proceeding was made before any party had begun to try any controverted question of fact, the demands in both proceedings were seasonable, and an order will be granted consolidating both proceedings and granting a jury trial of the issues. *Matter of Potter* (1916), 94 Misc. 12, 158 N. Y. Supp. 1001.

Surrogate's decision.—Although the contestant in a proceeding for the probate of a will has no right to a trial by jury of the issues raised (prior to the present code), he may test the validity of the surrogate's decision by an action in supreme court, as prescribed in former § 2653-a. *Matter of Fischer* (1912), 153 App. Div. 603, 138 N. Y. Supp. 917.

Where in a proceeding brought by an alleged creditor of a testator the answer denies that the petitioner is such a creditor and sets up a counterclaim, a motion by the petitioner for a jury trial made when, after several adjournments, the case was ready for trial, comes too late and will be denied. *Matter of Woodward* (1918), 105 Misc. 446, 173 N. Y. Supp. 556.

Waiver of right to trial by jury.—In an

Div. 237, 152 N. Y. Supp. 822; *Matter of Shedden* (1918), 183 App. Div. 837, 171 N. Y. Supp. 150.

Waiver by failure seasonably to demand. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

§ 1009 which specifies what constitutes a waiver of the right of trial by jury, is not applicable. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

§ 2538. Trial by jury.

In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury, and in any proceeding for the probate of a will in which any controverted question of fact arises, the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same, and in any proceeding in which any controverted question of fact arises, of which any party has, or has not, constitutional right of trial by jury, the surrogate may, in his discretion, make such order without such demand. The surrogate in such order must direct that such trial be had either before himself and a jury, or at a trial term of the supreme court to be held within the county, or in the county court of the county. Either of the surrogates of the county of New York may, in his discretion, make an order transferring to the supreme court any special proceeding for the probate of a will pending in said county. If the trial shall not take place in the surrogate's court the order must state distinctly and plainly each question of fact to be tried, and shall be the only authority necessary for the trial of such question. The verdict, if not set aside by the judge before whom the question is tried, shall be certified to the surrogate's court by the clerk of the court in which the trial took place, and shall be conclusive except upon appeal.

Amended by L. 1915, ch. 275, in effect April 13, 1915.

Source.—Former § 2547, as amended by L. 1895, ch. 946; L. 1910, ch. 576; originally revised from R. S., pt. 2, ch. 6, tit. 4, § 11, in part; L. 1847, ch. 280, § 45.

Revisers' note.—This amendment makes it optional with the surrogate whether he will try by jury or certify the issues for trial in supreme court, and meets the objections that some surrogates are too busy for jury trials and that others have no adequate facilities.

Application.—This section is inapplicable to litigation pending prior to the time of the taking effect of the amendment of 1914, and it seems that former § 2653-a, providing for an action in the supreme court to determine the validity of a will, although repealed, remains in force as to pending proceedings. *Matter of Iovinella* (1915), 166 App. Div. 460, 151 N. Y. Supp. 1007; *Matter of Heinze* (1918), 224 N. Y. 1.

This section has no application to a jury trial in a proceeding brought for the construction of a will. *Matter of Harden* (1914), 88 Misc. 420, 150 N. Y. Supp. 743; see *Matter of Scovill* (1914), 88 Misc. 364, 150 N. Y. Supp. 1070.

Right to jury trial.—There is no "constitutional right of trial by jury" of the issues raised by an answer and reply to a petition by a beneficiary of a testamentary trust for an accounting. *Matter of Fox* (1915), 166 App. Div. 718, 152 N. Y. Supp. 431.

There is no abstract right of trial by jury, either by the common law or by intelligent precedent or by the constitution. *Matter of Woodward* (1918), 105 Misc. 446, 173 N. Y. Supp. 556.

An executor has no constitutional right of trial by jury of the issues in a proceeding by an attorney in the surrogate's court to ascertain the value of services. *Matter of Griffith* (1918), 103 Misc. 562, 170 N. Y. Supp. 629.

Only those issues which by constitutional provision were formerly triable by jury can be submitted to juries in the surrogate's court. After a contested claim against an estate had been allowed and was affirmed on appeal, the petition of the claimant for the removal of her attorney and the substitution of another in his stead was granted but without prejudice to any claim or lien the removed attorney might have for services rendered up to the time of the granting of the order of substitution. In a proceeding to have his claim and lien

determined and enforced his former client was not entitled to a jury trial in the surrogate's court. *Matter of White* (1917), 100 Misc. 56, 164 N. Y. Supp. 934.

A surrogate is not bound by the findings of the jury in a contested probate proceeding. *Matter of Plate* (1916), 93 Misc. 423, 156 N. Y. Supp. 999.

This section must be so construed as to harmonize with § 2614. The jury are not by the new act made judges of probate, but triers of certain controverted facts to be submitted to them by the trial surrogate in probate proceedings. Unless the judge of probate is satisfied with the answers of the jury to the special questions thus submitted to them, it is obvious that the surrogate cannot admit the will to probate if he conscientiously discharges the mandate committed to him alone by § 2614. It would be wrong for the surrogate to ignore his official and personal obligations, because of the findings of a jury, if they were not satisfactory to the surrogate. There is no provision of law which makes the answers or findings of the jury to the questions submitted to them by the surrogate conclusive per se on the conscience of the surrogate, unless the trial of such issues is had in the supreme court. *Matter of Eno* (1916), 94 Misc. 100, 157 N. Y. Supp. 553.

Verdict of jury conclusive when not set aside by the judge. *Allen v. Grant* (1918), 171 N. Y. Supp. 769.

Demand by contestants for trial by jury. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

In general.—The only authority given to the court, to which the questions of fact are sent, is to try those questions and certify the result to the surrogate's court. *Matter of Murphy*, 79 App. Div. 541, 81 N. Y. Supp. 101.

When trial by jury directed.—The surrogate may use his discretion in directing a trial by jury of issues of fact. *Corley v. McElmeel*, 149 N. Y. 228. A question cannot be sent to a jury when there is but one party to the dispute in court. *Cromwell v. Phipps*, 6 Dem. 60.

Transfer of a proceeding by the surrogate of New York to the court of common pleas does not affect his power to appoint a temporary administrator. *Matter of Blair*, 60 Hun 523, 15 N. Y. Supp. 212.

When one surrogate of the county of New York, after hearing all of the interested parties, has exercised the discretion given to him by statute to order a probate proceeding tried by jury in the surrogate's court, and no appeal has been taken from the order and the same has become final and conclusive, the other surrogate of said county should not interfere, unless different facts are presented, by directing a trial in the supreme court, notwithstanding the fact that he has the power to make such transfer. *Matter of Eno* (1916), 172 App. Div. 124, 158 N. Y. Supp. 234.

Effect of transfer.—After the removal of a probate proceeding from surrogate's court pursuant to this section, it is doubtful whether the surrogate can vacate the order of transfer in order to entertain an application for an order for the examination, before trial, of a witness about to leave the state. *Matter of Delaplaine*, 6 Dem. 269.

After a special proceeding for the probate of a will has been transferred under this section, the surrogate cannot be called upon to determine the question of the materiality of the testimony of a witness whom contestant desires to examine at the trial. *Matter of McGovern*, 5 Dem. 424.

The procedure where a jury trial is demanded, considered, and the motion for a new trial denied and the motion for a decree of probate on the findings of the jury granted. *Matter of Dorsey* (1916), 94 Misc. 566, 157 N. Y. Supp. 662.

The petitioner in a discovery proceeding in the surrogate's court is not entitled to a jury trial as matter of right. *Matter of Callahan* (1916), 95 Misc. 438, 159 N. Y. Supp. 352.

The right of trial by jury is given to any party appearing in any proceeding in which any controverted question of fact arises, whether such party is for or against the probate of a will. *Matter of Potter* (1916), 94 Misc. 12, 158 N. Y. Supp. 1001.

Demands for jury trial seasonable.—Where in the proceeding for the probate of the earlier dated will a written demand for a jury trial was made by the proponents and in the proceeding for the probate of the will of later date a demand for a jury trial in the objections was filed on the return day of the citation, and the demand in each proceeding was made before any party had begun to try any controverted question of fact, the demands in both proceedings were seasonable, and an order will be granted consolidating both proceedings and granting a jury trial of the issues. *Matter of Potter* (1916), 94 Misc. 12, 158 N. Y. Supp. 1001.

Surrogate's decision.—Although the contestant in a proceeding for the probate of a will has no right to a trial by jury of the issues raised (prior to the present code), he may test the validity of the surrogate's decision by an action in supreme court, as prescribed in former § 2653-a. *Matter of Fischer* (1912), 153 App. Div. 603, 138 N. Y. Supp. 917.

Where in a proceeding brought by an alleged creditor of a testator the answer denies that the petitioner is such a creditor and sets up a counterclaim, a motion by the petitioner for a jury trial made when, after several adjournments, the case was ready for trial, comes too late and will be denied. *Matter of Woodward* (1918), 105 Misc. 446, 173 N. Y. Supp. 556.

Waiver of right to trial by jury.—In an

accounting proceeding where it appeared that after the matter of certain claims against the estate, which the executor had rejected, had been noticed for trial before the surrogate on a day certain and had been adjourned from time to time, the claimant's right to a trial by jury of the questions presented will be deemed waived, and a demand by his administrator for such a trial will be denied as not having been seasonably made, as provided by this section. *Matter of Wetteran* (1918), 104 Misc. 691, 173 N. Y. Supp. 204.

Where the jury is unable to agree the court has power and under the facts shown should direct a verdict. *Matter of Strong* (1916), 99 Misc. 243, 165 N. Y. Supp. 726.

The determination of the special issues for the jury in a contested probate proceeding is a part of the trial, and where the issues are to be framed in advance of the trial in the surrogate's court of the county of New York they should be framed and settled only on regular notice of settlement as required by § 970, rule 31 of the general rules of practice and rule 7 of practice of the surrogate's court. *Matter of Plate* (1916), 93 Misc. 423, 156 N. Y. Supp. 999.

Question of relationship to testator.—On a petition praying that a decree admitting a will to probate and the letters testamentary issued accordingly be revoked upon the ground that the same were obtained by a false statement of a material fact in that the proponent failed to state that the petitioner was the widow of the decedent, and falsely stated that the testator left him surviving no widow, the question whether the petitioner was the widow of the decedent was not one of which the petitioner had a constitutional right of trial by jury. *Matter of Reinhardt* (1915), 92 Misc. 89, 155 N. Y. Supp. 1020.

Framed issues.—Whether a surrogate shall grant or refuse an application for an order for framed issues in a contested probate proceeding is a matter for the exercise of his discretion upon consideration of the circumstances of each particular case. *Matter of Plate* (1916), 93 Misc. 423, 156 N. Y. Supp. 999.

For provision for attacking decree admitting to probate a will, prior to the amendment of 1914 (ch. 443), see *Wadsworth v. Hinchcliff* (1916), 218 N. Y. 589.

§ 2539. Trial by jury; power of surrogate; motion to set aside verdict and for new trial.

The surrogate has jurisdiction to conduct a trial by jury in any case in which he is permitted or required by this act to order such trial, and in any case where he shall conduct such trial the same shall be had before the surrogate and a jury, and the trial shall proceed in the same manner as if such trial were had in the supreme court at a trial term thereof held in and for the county of such surrogate.

The provisions of this act relating to trial by the court and a jury, or to a motion for new trial, shall apply to surrogates' courts and to the proceedings therein so far as they can be applied to the substance and subject-matter of such proceedings without regard to form, but the surrogate shall have no power to set aside a verdict or to grant a motion for a new trial in any proceeding in which the trial took place in a court other than the surrogate's court.

Source.—New.

Course of jury trial in discretion of surrogate.—The course of a jury trial in a contested probate proceeding rests largely in the discretion of the surrogate presiding at the trial, and where the order of proof and the conduct of the trial on the issues submitted to the jury under the new surrogates' law were correct a motion for judgment on the findings of the jury in favor of the will will be granted and a motion for a new trial denied. The practice on the trial of contested probate proceedings with juries under the new surrogates' law indicated. *Matter of Vetter* (1916), 95 Misc. 63, 158 N. Y. Supp. 450.

Verdict of jury conclusive.—The verdict of a jury in a proceeding for the probate

of a will in the surrogate's court is conclusive, and while the court is under the serious responsibility of setting aside the verdict, if, upon grounds well recognized, it should not endure, there can be no interference with the verdict unless it be accompanied by an order for a new trial by jury, and if the verdict be not set aside there is no power in the court to proceed to decree in defiance of the findings of the jury. *Matter of Dunn* (1916), 94 Misc. 578, 158 N. Y. Supp. 119.

Finding of jury in probate proceeding is conclusive unless verdict is set aside or new trial granted. *Matter of Barlow* (1917), 180 App. Div. 860, 168 N. Y. Supp. 131.

§ 2540. Jury in surrogate's court; how obtained; fees of jurors and officers.

The surrogate may at any time order the drawing of a jury for service in surrogate's court, upon reasonable notice to the parties who have appeared, stating the day, hour and place of such drawing.

For the purpose of procuring the drawing and attendance of a jury, the surrogate shall have all the powers of a justice of the supreme court specified in sections 527 and 528 of the Judiciary Law and in sections 1171 and 1172 of the Code of Civil Procedure; and the clerk of the county of the surrogate shall, upon receiving the order of the surrogate, perform such duties in relation thereto as he is required to perform under a like order of a justice of the supreme court as specified in such sections.

Such jury shall be drawn in the presence of the surrogate, either in his office or in the office of the county clerk, and the minutes thereof shall be made in triplicate, and be signed by the surrogate and the county clerk, and one copy thereof filed in the office of the surrogate, one copy filed in the office of the county clerk, and one copy delivered to the sheriff of the county.

The names of the jurors so drawn shall be returned to the jury box by the county clerk, but if any such juror is again drawn for service in any court, the fact that he served as a juror in surrogate's court shall, upon his request, be a sufficient excuse for not being required to again serve.

In counties where by special act an officer other than the county clerk is designated to draw juries and perform corresponding acts, such officer shall cause the necessary jurors to be summoned and drawn as though a justice of the supreme court had made such order.

The provisions of law applicable to the summoning of jurors, the return of the sheriff, the fees of the sheriff and jurors and their payment, in supreme court, shall apply where jurors are drawn and summoned for service in surrogate's court; and where the county clerk is not a salaried officer, he shall be entitled for his services to such compensation as shall be audited by the board or body entitled to fix his compensation.

The number of days' service of each juror in surrogate's court shall be certified to the county clerk by the clerk of the surrogate's court.

Source.—New.

Revisers' note.—This section provides a simple and inexpensive way of obtaining a jury, without previous advertising. Surrogate court being always in session, the surrogate is given the same power to draw a jury which the supreme court justice has when a term of the supreme court is being held.

Compensation for drawing jurors.—If § 26 of the judiciary law authorizes an additional compensation to the surrogate of Queens county for drawing jurors, it does not authorize such compensation to a surrogate who was in office at the time of the enactment of L. 1914, ch. 443. *People ex rel. Noble v. Mitchell* (1917), 220 N. Y. 86.

§ 2541. Decision by surrogate after trial without a jury.

Upon a trial before the surrogate without a jury, the surrogate must file in his office his decision in writing which shall direct the decree to be entered, which, except for such direction, need not contain either the facts found or the conclusions of law. No party shall have the right, after the close of the trial, to request a finding upon any question of fact or a ruling upon a question of law. For the purposes of appeal or other form or review, the decree made by the surrogate upon the trial by him of an issue of

fact shall have the same effect as the general verdict of a jury would have if the same issues were triable before a court and a jury and were so tried and a general verdict rendered thereon.

Source.—Former § 2544; originally revised from R. S., pt. 2, ch. 6, tit. 1, §§ 6, 50.

Revisers' note.—Section 2545 to be repealed in part. See next section.

By the change we do away with the useless findings and the resulting miscarriage of justice often brought about by error in the findings or refusals to find. If each case goes up on a general verdict, the appellate division can do justice.

Application of section.—Section is not applicable to proceedings begun prior to September 1, 1880. *Mills v. Hoffman*, 92 N. Y. 181. Provisions of this section are applicable to actions tried before a special term of the supreme court, under § 2480, in cases where the surrogate is disabled from acting. *Matter of Chauncey*, 32 Hun 429. See *Matter of Hibbard* (1915), 89 Misc. 707, 153 N. Y. Supp. 1097.

Sections 2541 and 2542 were designed with the intention of making the practice in the surrogate's court substantially the same as in the supreme court. *Matter of Sprathoff*, 50 Misc. 109, 98 N. Y. Supp. 921.

Trial by referee.—When questions of fact are tried before a referee, he, on the settlement of the case, also has the power and it is his duty to pass upon all requests made for findings. This section applies to a case tried by a referee. *Matter of Bayer*, 54 Hun 189, 7 N. Y. Supp. 566. A notice of appeal from the report of a referee and the decree of the surrogate rendered thereon must be liberally construed. *Matter of Lawson*, 42 App. Div. 377, 59 N. Y. Supp. 152.

This section does not abrogate the provisions of § 1023 in regard to the duty of a referee appointed by the surrogate to pass upon particular questions. *Matter of Troughton* (1917), 101 Misc. 386, 166 N. Y. Supp. 1077.

Filing of decision.—The decision which surrogate must file refers to trials conducted before the surrogate as a trial court. *Matter of Niles*, 47 Hun 348. On a trial of an issue of fact before a surrogate a decision must be duly filed as required by this section in order to support a decree. *Matter of Sloane*, 135 App. Div. 703, 119 N. Y. Supp. 667. Surrogate must file his decision, stating his findings of fact and

conclusions of law, before this decree can be reviewed. *Waldo v. Waldo*, 32 Hun 251; *Matter of Marsh*, 45 Hun 107; *Matter of Widmayer*, 52 App. Div. 301, 65 N. Y. Supp. 83; *Matter of Daymon*, 47 App. Div. 315, 61 N. Y. Supp. 997; *Matter of Sherwood*, 75 App. Div. 342, 78 N. Y. Supp. 186. As to duty of surrogate to make and file in his office his decision, see also *Sessions v. Palmeter*, 75 Hun 268, 26 N. Y. Supp. 1076; *Baucus v. Stover*, 89 N. Y. 1. As to what constitutes "decision in writing," see *Matter of Johnston*, 6 Dem. 355.

Necessity of making findings.—The surrogate is merely relieved from the necessity of making findings; he is not prohibited from so doing. *Matter of Amend* (1917), 100 Misc. 90, 165 N. Y. Supp. 76.

Separate findings of fact need not be made in the decisions of the surrogate or his referee. *Matter of Carpenter* (1917), 178 App. Div. 165, 165 N. Y. Supp. 10.

Findings incorporated in decree settling accounts.—Where the result of the findings, entered by the surrogate in an intermediate proceeding to determine whether remaindermen were interested parties, was incorporated in the decree judicially settling the accounts of the executor, none of the parties are prejudiced by such findings, as an appeal from the decree brings up for review every question decided, and an application to vacate the decree on the ground that the findings of fact and the conclusions of law were irregular and unauthorized, will be denied. *Matter of Amend* (1917), 100 Misc. 90, 165 N. Y. Supp. 76.

Requests to find.—As to when surrogate is required to pass upon requests to find, see *Matter of Dodge*, 40 Hun 443; *Dickel v. Yates*, 2 Dem. 229; *Matter of Hoyt*, 5 Dem. 284. -

§ 2542. Exceptions upon a trial.

An exception may be taken to a ruling by a surrogate upon the trial by him of an issue of fact, in a case where such an exception may be taken to a ruling of the court upon a trial, without a jury, of an issue of fact, as prescribed in article third of title first of chapter tenth of this act. The provisions of that article, relating to the manner and effect of taking such an exception, and the settlement of a case containing the exceptions, apply to such a trial before a surrogate; for which purpose, the decree is regarded as a judgment, and notice of an exception may be filed in the surrogate's office.

Source.—Former § 2545; new as originally inserted in Code of Civ. Proc.

Exceptions.—No questions of law can be reviewed upon appeal unless exceptions have been taken as provided by this section. *Matter of Spratt*, 4 App. Div. 1, 38 N. Y. Supp. 329. A general exception to each and every portion of a surrogate's decree is insufficient to raise any specific question. *Angevine v. Jackson*, 103 N. Y. 470.

In the absence of findings or refusals to find any proper exceptions, no questions can be reviewed. *Matter of Broadway*, 74 Hun 630; *In re Robert's Estate*, 26 N. Y. Supp. 838; *Matter of Wood*, 104 N. Y. 103; *Matter of Kellog*, 104 N. Y. 648; *Matter of Sprague*, 125 N. Y. 732. But see preceding section.

Error.—As to error necessary to reverse decree of surrogate, see *Matter of Will of Snelling*, 136 N. Y. 515; *Matter of Folts*, 71 Hun 492, 24 N. Y. Supp. 1052; *Matter of Gaines*, 84 Hun 520, 32 N. Y. Supp. 398, *aff'd* 154 N. Y. 747; *Matter of Degan*, 89 Hun 143, 34 N. Y. Supp. 1137; *Matter of*

Miner, 146 N. Y. 121; *Matter of Morgan*, 104 N. Y. 74; *Snyder v. Sherman*, 88 N. Y. 656; *Matter of Ross*, 87 N. Y. 514; *Matter of Woodward*, 167 N. Y. 28; *Matter of Potter*, 161 N. Y. 84; *Matter of Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496, *aff'd* 153 N. Y. 682; *Matter of Pier-son*, 19 App. Div. 478, 46 N. Y. Supp. 557; *Matter of Benton*, 71 App. Div. 522, 75 N. Y. Supp. 859; *Matter of Hopkins*, 73 App. Div. 559, 77 N. Y. Supp. 178; *Matter of Steenwerth*, 97 App. Div. 113, 89 N. Y. Supp. 654; *Matter of Wilson*, 10 App. Div. 371, 41 N. Y. Supp. 1006; *Matter of Palmeter*, 78 Hun 43, 28 N. Y. Supp. 1062; *Matter of Torkington*, 79 Hun 128, 29 N. Y. Supp. 433; *Matter of Chase*, 41 Hun 203; *Matter of Mellen*, 56 Hun 553, 9 N. Y. Supp. 929.

When decree of surrogate should not be reversed for possible error in exclusion of evidence, see *Matter of Newcomb*, 191 N. Y. 238, *aff'g* 122 App. Div. 920, 107 N. Y. Supp. 1139.

§ 2543. Testimony of witness; how taken.

Where it appears to the satisfaction of the surrogate, that the testimony of a witness is material and necessary, the surrogate may, in his discretion, proceed to the place where the witness is, and there, as in open court, take his examination. Such notice of the time and place of taking the examination, as the surrogate prescribes, must be given, by the party applying therefor.

Source.—Former § 2539; originally revised from L. 1837, ch. 460, § 12; L. 1841, ch. 129, §§ 1-3.

Revisers' note.—This section now will permit the surrogate to take testimony anywhere in the state in any case, and will save much expense and trouble where it is much less expensive for a surrogate to go into another county, than to send the surrogate of another county many miles from his office.

§ 2544. Id.; by the surrogate of another county.

Where the surrogate has good reason to believe that a subscribing or a material witness who is in another county of the state cannot conveniently attend before him, and no issue is pending therein, he may make an order, directing that the witness be examined before the surrogate of the

county in which he is; specifying by an order the nature and manner of the examination. A copy of the order must be transmitted by him to the surrogate designated in the order, together with the original will, where the testimony relates to the execution of a written will. The examination may be taken by one of the clerks described in section 2502 of this chapter. The examination, after it is reduced to writing and subscribed by the witness or otherwise duly authenticated, together with a statement of the proceedings upon the execution of the order, must be certified by the surrogate or clerk taking the examination, attested by the seal of his court, and returned without delay, with the original will, if any, to the surrogate who directed the examination, who must file the same in his office. A surrogate may appoint a referee to take the testimony, who shall report the same to the surrogate who makes the appointment. An examination so taken has the same effect as if it was taken by commission.

Amended by L. 1916, ch. 446, in effect May 9, 1916. The amendment of 1916 changed the third sentence.

Source.—Former § 2540, as amended by L. 1881, ch. 535; L. 1911, ch. 105; originally revised from L. 1837, ch. 460, §§ 13-15; L. 1841, ch. 129.

Revisers' note.—This provision for taking deposition out of the county would save large expense to estate whose witnesses are doctors, nurses and lawyers who have moved away.

§ 2545. Bequest, etc., does not disqualify, etc., witness.

A person is not disqualified or excused from testifying respecting the execution of a will by a provision therein, whether it is beneficial to him or otherwise.

Source.—Former § 2544; originally revised from R. S., pt. 2, ch. 6, tit. 1, §§ 6, 50.

Effect of section.—This section does not change the limitations of § 829. *Cadmus v. Oakley*, 3 Dem. 324. As to when beneficiary is not disqualified, see *Matter of Will of Bernsee*, 71 Hun 27, 24 N. Y. Supp. 504, aff'd 141 N. Y. 389. As to a trustee's competency to testify, see *Matter of Chase*, 41 Hun 203.

§ 2546. Uncontroverted allegations constitute due proof.

Except as otherwise provided by law, a petition, affidavit or account filed in a special proceeding shall be due proof of the facts therein stated, unless controverted by answer, objection or other proof.

Source.—New.

Revisers' note.—This section is drawn to obviate the supposed necessity of offering oral proof to substantiate uncontroverted allegations, due probably to the fact that in former years petitions were sometimes made orally.

Application.—*Matter of Werle* (1915), 91 Misc. 398, 155 N. Y. Supp. 262; *Matter of Brundage* (1917), 101 Misc. 528, 167 N. Y. Supp. 694.

Controverting affidavit on information and belief as authorizing appointment of referee.—Where on motion to exempt an estate from a transfer tax on the ground that at the time of his death decedent was a nonresident, an affidavit filed in opposition by the attorney for the comptroller alleging that he "is informed and verily believes that said decedent was in fact a resident of the state of New York at the time of his death and accordingly deponent is desirous of having the residence of

this decedent determined by this court," sufficiently controverts the moving affidavits to authorize the appointment of a referee to take testimony and report. *Matter of Hyde* (1916), 218 N. Y. 55.

"Due proof" of testator's residence.—Where it appears from the uncontradicted affidavits of the widow of the testator and his brother-in-law, one of the executors of his estate, that the testator at the time of his death was and for some considerable time immediately prior thereto had been a resident of an adjoining state; that after building a house in said state he had removed thereto and continued to live and vote there until the time of his death, and

that his residence was given in the New York city directory as in the adjoining state, and at the time of his death he had no taxable property within this state, and these facts are not controverted, such affidavits constitute due proof that the testator did not reside in this state at the time of his death. *Matter of Hyde* (1915), 169 App. Div. 568, 155 N. Y. Supp. 495.

§ 2547. Filing testimony taken out of court by commission.

Where in any matter before the surrogate or in a surrogate's court the testimony of any witness shall be taken by or on commission, the same, together with the commission on which it is taken, shall be duly filed in the office of the surrogate but need not be recorded.

Source.—Former § 2620, next to last sentence, as added by L. 1888, ch. 508.

§ 2548. Definition of decree and order; how order enforced.

The determination of the rights of the parties to a special proceeding in a surrogate's court, is a decree.

A direction of a surrogate's court, made or entered in writing, and not included in a decree, is an order. It may be enforced in like manner as a similar order, made by the supreme court in an action.

Source.—Former §§ 2550 and 2556, which sections were new as originally inserted in the Code of Civ. Proc.

An order of the appellate division, affirming an order of a surrogate's court settling an intermediate account of executors, held an order finally determining a special proceeding. *Matter of Prentice*, 160 N. Y. 568; *Matter of Van Houten*, 18 App. Div. 301, 46 N. Y. Supp. 190.

§ 2549. Decree or order; when evidence of assets.

A decree directing payment by an executor, administrator, guardian or testamentary trustee, to a creditor of, or a person interested in, the estate or fund, or an order permitting a judgment creditor to issue an execution against an executor or administrator, is, except upon an appeal therefrom, conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay, or for which the order permits the execution to issue. A decree charging a deceased executor, administrator, guardian or trustee with assets upon an accounting under section 2725 of this chapter, is not evidence of assets in the hands of such accounting executor, administrator, guardian or trustee.

Source.—Former §§ 2552 and 2606. § 2552 originally revised from R. S., pt. 2, ch. 6, tit. 5, § 21, in part. § 2606, as amended by L. 1884, ch. 399; L. 1891, ch. 175; L. 1897, ch. 248; L. 1901, ch. 409; L. 1902, ch. 349; section new as originally inserted in Code of Civ. Proc.

Application.—Section not applicable where, on the face of the decree itself, as well as from examination of the proceeding on which it is based, it appears that there were not, in the hands of the administratrix, any moneys or assets with which to make the payment. *Matter of Monell*, 28 Misc. 308, 59 N. Y. Supp. 981.

Decree that executor owes a debt to an estate and directing him to pay the same is conclusive that he has money in his hands. *Matter of Strong*, 111 App. Div. 281, 97 N. Y. Supp. 459, aff'd 186 N. Y. 584.

While other payments may have been legally made by an executor, he cannot excuse his noncompliance with a decree requiring him to pay a certain sum, by saying he has spent the money and has not the amount in his hands to pay as required thereby. *Matter of Waring*, 1 App. Div. 29, 36 N. Y. Supp. 529.

A decree of the surrogate's court, entered against the administratrix of a de-

ceased trustee on an accounting, is not conclusive evidence that there are sufficient assets in her hands as administratrix of the deceased trustees to satisfy the sum directed to be paid by the decree. *Matter of Seaman*, 63 App. Div. 49, 71 N. Y. Supp. 376.

Leave to issue execution.—A person seeking to obtain leave to issue execution upon a judgment recovered by him against an administratrix must show that the administratrix has on hand funds of the estate applicable to the payment of the judgment, which she refuses to apply, or that funds

of the estate have been misapplied which ought to have been devoted to the payment of the judgment. *Matter of Gall*, 40 App. Div. 114, 57 N. Y. Supp. 835; *Matter of Lazelle*, 16 Misc. 515, 40 N. Y. Supp. 343.

Where leave is granted to issue execution against decedent's real property the provision of this section making "an order permitting a judgment creditor to issue an execution," etc., conclusive evidence of assets is inapplicable. *Gillies v. Kreuder*, 1 Dem. 349.

§ 2550. Force and effect of a decree of surrogate's court.

Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained.

Source.—New.

Revisers' note.—With right to a jury trial preserved, the decree ought to be a final determination as to all matters embraced in it.

Decree conclusive.—A decree of a surrogate based upon the findings of a jury that a testatrix, when she made her will and the codicil thereto, was of unsound

mind, is conclusive upon all parties to the proceeding as to the matter embraced therein. *Von Meyer v. Varcoe* (1919), 106 Misc. 426, 175 N. Y. Supp. 826.

§ 2551. Decree for money; how docketed; effect; assignment and discharge.

Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must furnish to any person applying therefor one or more transcripts, duly attested, stating all the particulars with respect to the decree which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered in the supreme court, so far as the provisions of law directing such entries are applicable to such a decree. Each county clerk to whom such a transcript is presented must, upon payment of his fees, immediately file it, and docket the decree in the appropriate docket-book kept in his office as prescribed by law for docketing a judgment of the supreme court. The docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, as if it were such a judgment.

Source.—Former § 2553; originally revised from L. 1837, ch. 460, §§ 63, 64, as amended by L. 1844, ch. 104, § 2.

References.—Docket-books to be kept, Code Civ. Pro., § 1245; docket of judgment, Code Civ. Pro., § 1246; force and effect of docket, Code Civ. Pro., §§ 1249-1272.

In general.—Surrogate's court has absolute control of its records. *Matter of Regan*, 29 Misc. 527, 61 N. Y. Supp. 1074, aff'd 167 N. Y. 338.

A decree so docketed in the clerk's docket-book remains a decree of the surro-

gate's court and the surrogate still retains exclusive jurisdiction over the subject-matter of the decree. *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236. But see *Matter of Underhill*, 1 Connolly 313, 9 N. Y. Supp. 457.

Lien of judgment.—The judgment or order which is authorized by this section is not a lien upon the real estate of the decedent. *Bennett v. Crain*, 41 Hun 183.

§ 2552. Decree; partial satisfaction of.

Upon the application of any person interested, there may be recorded in the surrogate's office any instrument acknowledging payment of moneys

pursuant to the provisions of decrees for the judicial settlement of accounts of executors, administrators, testamentary trustees and guardians. Every such instrument to be recorded shall be acknowledged, or proved and duly certified, and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution, and shall be presumptively a satisfaction and discharge of such decree as to any payment of money or delivery of property therein acknowledged.

Source.—Former § 2502; as added by L. 1906, ch. 350.

§ 2553. Enforcement of decree by execution.

A decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of the surrogate's court, under the seal of the court, and must be made returnable to the court. In all other respects the provisions of this act relating to an execution against the property of a judgment-debtor issued upon a judgment of the supreme court, and the proceedings to collect it, apply to an execution issued from the surrogate's court, and the collection thereof, the decree being, for that purpose, regarded as a judgment; except that the proceedings prescribed in title twelfth of chapter seventeenth of this act, if founded upon such a decree, must be taken as if the decree was a judgment of the county court, or, in the city of New York, of the supreme court.

Source.—Former § 2554, as amended by L. 1895, ch. 946; originally revised from L. 1837, ch. 460, § 64; L. 1844, ch. 104, § 2.

References.—As to other cases in which surrogate's court has anything to do with the issuing of an execution, see Code Civ. Pro., §§ 1825, 1826 and 1830; *Matter of Jansen*, 1 Connolly 362, 9 N. Y. Supp. 451.

An execution upon a surrogate's decree directing the payment of a sum of money, issued to the sheriff of the surrogate's county, is irregular where the decree has not been docketed in the office of the county clerk, and must be set aside on motion. *Disosway v. Hayward*, 1 Dem. 175. The surrogate or his clerk alone has power to

enforce a decree by issuing an execution. *People ex rel. Sackett v. Woodbury*, 70 App. Div. 416, 75 N. Y. Supp. 236; *Bingham v. Burlingame*, 33 Hun 211.

Executions to enforce a surrogate's decree, directing the payment of money by an executor should run against the property of the executor and not against property of the estate. *Matter of Waring*, 7 Misc. 502, 28 N. Y. Supp. 393; *Matter of Quackenbos*, 38 Misc. 66, 76 N. Y. Supp. 964.

§ 2554. Id.; by punishment for contempt.

In either of the following cases, a decree of a surrogate's court directing the payment of money, or requiring the performance of any other act, may be enforced by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court:

1. Where it cannot be enforced by execution, as prescribed in the last section.
2. Where part of it cannot be so enforced by execution; in which case, the part or parts which cannot be so enforced may be enforced as prescribed in this section.

3. Where an execution issued as prescribed in the last section to the sheriff of the surrogate's county has been returned by him wholly or partly unsatisfied.

4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper.

If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution, issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties on his official bond.

Source.—Former § 2555; section new as originally inserted in Code of Civ. Proc.

References.—Proceedings for punishment of civil contempt. Judiciary law, §§ 754, 781.

In general.—Executor may be compelled to pay by contempt proceedings. *Matter of Strong*, 111 App. Div. 281, 97 N. Y. Supp. 459, aff'd 186 N. Y. 584. An application to a surrogate's court to imprison for contempt, under this section, is addressed to the discretion of the court. *Matter of Battle*, 5 Dem. 447. Where the moving papers do not show previous service of a certified copy of the decree on the alleged delinquent, the motion should be denied. *Woodhouse v. Woodhouse*, 5 Redf. 131.

As to enforcement of collateral inheritance tax by proceedings for contempt, see *Matter of Curtis*, 73 Hun 185, 25 N. Y. Supp. 909, aff'd 142 N. Y. 219. As to punishment for disobedience of a decree charging executor with a debt which he owed his testator when he died, see *Matter of David*, 44 Misc. 337, 89 N. Y. Supp. 927. See also *Rugg v. Jenks*, 4 Dem. 105.

Payment of a sum of money.—Contempt proceedings cannot be maintained where execution has not been returned unsatisfied upon a decree requiring the payment of a sum of money. *Matter of Disosway*, 91 N. Y. 235; *Union Trust Co. v. Gage*, 6 Dem. 358. Surrogate's decree directing payment of a supreme court judgment may be enforced by contempt proceedings. *Matter of Mahoney*, 88 App. Div. 140, 84 N. Y. Supp. 329. As to disobedience of surrogate's decree directing payment of money, see *Matter of Snyder*, 103 N. Y. 178.

The disobedience by an executor of a surrogate's decree, directing the payment by him of money generally and not out of a specific fund, may be punished as a criminal contempt. *Matter of Holmes*, No. 2, 79 App. Div. 267, 79 N. Y. Supp. 687, aff'd 176 N. Y. 604. This section does not apply to decrees for the payment of costs only. *Matter of Humfreville*, 154 N. Y. 115. Payment of costs awarded against an administrator personally cannot be enforced by contempt proceedings. *Matter of Ban-*

ning, 108 App. Div. 12, 95 N. Y. Supp. 467.

Upon a motion to punish administrator for contempt in failing to direct distribution of estate in accordance with decree, the surrogate may refuse to consider any questions except the jurisdiction of the court to make the decree and the alleged failure of the administrator to comply therewith. Where the jurisdiction of the surrogate to make a decree directing the distribution of an estate is not questioned and it appears that a certified copy of the decree was duly served upon the administrator and that he has failed to make the payments and the distribution provided for in and by said decree, except in part, the motion to punish him for contempt will be granted. *Matter of Isaacs* (1918), 103 Misc. 184, 169 N. Y. Supp. 1066.

Delinquent executors, etc.—Though subdivision 4 provides for the punishment for contempt without issuing an execution, the manifest spirit of the provisions of the code applicable to other courts seem to require that the preliminary issuing of an execution should not be dispensed with except for some good reason. *Ferguson v. Cummings*, 1 Dem. 433.

A specific legacy to an executor must be held to meet the claims of creditors, and for a failure to do so, when so decreed by the surrogate's court, he is guilty of contempt. *Matter of Pye*, No. 1, 18 App. Div. 306, 46 N. Y. Supp. 350.

Failure of administrator to pay a special guardian an excessive allowance held not a contempt. *Matter of Monell*, 28 Misc. 308, 59 N. Y. Supp. 981. Allowance to a guardian ad litem on a reference enforced against administrator by contempt proceedings. *Beckett v. Place*, 12 Misc. 323, 33 N. Y. Supp. 634.

Failure to comply with final decree on accounting.—A surrogate has jurisdiction to punish an executor for contempt in failing to comply with a final decree entered upon his accounting and from which he has not appealed, ordering him to pay over certain moneys to the estate. *Matter of*

Scheuer (1914), 161 App. Div. 525, 146 N. Y. Supp. 707.

When executor may be released from imprisonment.—An executor, who has been imprisoned for contempt in failing to pay over moneys pursuant to a final decree entered on his accounting, may be released from custody under § 775 of the judiciary law, where it appears that he is in a serious physical condition, and is unable to pay the fine imposed. *Matter of*

Scheuer (1914), 161 App. Div. 528, 146 N. Y. Supp. 709.

Right to release with leave to renew application to punish.—The release from imprisonment on account of poor health and inability to pay should be granted with leave to renew the application to punish for contempt, if the moving party can subsequently establish a change in the executor's condition and ability to pay. *Matter of Scheuer* (1914), 161 App. Div. 528, 146 N. Y. Supp. 709.

§ 2555. Effect and contents of decree revoking letters.

Upon the entry of a decree, made as prescribed in this chapter, revoking letters issued by a surrogate's court to an executor, administrator or guardian, his powers cease. The decree may, in the discretion of the surrogate, require him to account for all money and other property received by him; and to pay and deliver over all money and other property in his hands into the surrogate's court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending, or thereafter to be brought. The revocation does not affect the validity of any act, within the powers conferred by law upon the executor, administrator, or guardian, done by him before the service of the citation, where the other party acted in good faith; or done after the service of the citation, and before entry of the decree, where his powers with respect thereto were not suspended by service of the citation, or where the surrogate, in a case prescribed by law, permitted him to do the same, notwithstanding the pendency of the special proceeding against him; and he is not liable for such an act done by him in good faith.

Source.—Former § 2603; originally revised from R. S., pt. 2, ch. 6, tit. 1, § 38, and tit. 2, §§ 40, 46, 47.

Accounting and delivery of funds.—Power to compel accounting and delivery of funds of the estate on revocation of letters. *Sperb v. McCoun*, 110 N. Y. 605; *Ciuff v. Tower*, 3 Dem. 253; *Peck v. Sherwood*, 5 Redf. 410; *Spencer v. Popham*, 5 Redf. 425; *Matter of Fithian*, 44 Hun 457.

Legatees cannot maintain an action under this section against the executor of the executor of their testator. *Squire v. Bugbee*, 65 App. Div. 429, 72 N. Y. Supp. 1923. See also *Matter of Moehring*, 154 N. Y. 423; *Mount v. Mount*, 68 App. Div. 144, 74 N. Y. Supp. 148. Executor of deceased guardian; form of order directing him to pay over the fund on the ward's attaining majority. *Matter of Hicks*, 54 App. Div.

582, 66 N. Y. Supp. 1028, rev'd on other grounds, -170 N. Y. 195.

Upon a removal of a general guardian, the surrogate may direct the guardian to account for all money and other property received by him and deliver over the money to his successor. *Phillips v. Liebman*, 10 App. Div. 128, 41 N. Y. Supp. 1020. Interest charged against surety from date of a decree revoking letters issued to the executor. *Hood v. Hayward*, 48 Hun 330, 1 N. Y. Supp. 566.

An appointment as temporary administrator is not revived on reversal of the probate. *Matter of Durban* (1916), 175 App. Div. 688, 160 N. Y. Supp. 945.

Section cited.—*Matter of D'Adamo* (1916), 94 Misc. 1, 6, 157 N. Y. Supp. 374.

§ 2556. The last section qualified.

The last section does not affect the liability of a person to whom money or other property has been paid or delivered, as husband, wife, next of kin, or legatee, to respond to the person lawfully entitled thereto, where letters are revoked, because a supposed decedent is living; or because a will

is discovered, after administration has been granted in a case of supposed intestacy or revoking a prior will upon which letters were granted.

Source.—Former § 2604; originally revised from R. S., pt. 2, ch. 6, tit. 1, § 38, and tit. 2, §§ 40, 46, 47.

§ 2557. When execution of decree or order is stayed by appeal.

An appeal from a decree or an order directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court; or an attorney or counsel employed therein, for disobedience to a direction of the surrogate's court, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify when required according to law; does not stay the execution of the decree or order appealed from unless the appellant gives the undertaking required by section 2761 of this chapter.

An appeal from a decree of a surrogate admitting a will to probate, or granting letters testamentary, or letters of administration, or from an order or judgment of the appellate division of the supreme court affirming a decree of the surrogate admitting a will to probate, or granting letters testamentary or letters of administration does not stay the issuing of letters where, in the opinion of the surrogate manifested by an order, the preservation of the estate requires that the letters should issue.

An appeal from a decree revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or appointing a temporary administrator, or an appraiser of personal property does not stay the execution of the decree or order appealed from.

Except as otherwise expressly prescribed in this chapter a perfected appeal has the effect, as a stay of the proceedings to enforce the decree or order appealed from, prescribed in section 1310 of this act, with respect to a perfected appeal from a judgment.

Source.—Former §§ 2579, 2582-2584. § 2579; originally revised from R. S., pt. 3, ch. 9, tit. 3, §§ 111-115. § 2582, in part, as amended by L. 1881, ch. 535; L. 1900, ch. 191; originally revised from L. 1871, ch. 603, § 1. § 2583, originally revised from R. S., pt. 3, ch. 9, tit. 3, § 116. and part of § 110. § 2584, in part; this section new as originally inserted in Code of Civ. Proc.

Application.—Section extends to an appeal to the court of appeals from the determination of the appellate division. *Matter of Gihon*, 48 App. Div. 598, 62 N. Y. Supp. 426. Section has no extra-territorial force. *Matter of Gaines*, 83 Hun 225, 31 N. Y. Supp. 664 aff'd 154 N. Y. 747. The surrogate may authorize executors appointed by him to continue to act as such during the pendency of an appeal from a decree admitting the will to probate. *Matter of Choate*, 105 App. Div. 356, 94 N. Y. Supp. 176.

An order is only required where the appeal is taken prior to the issuance of the letters and the stay operating by virtue of the perfected appeal would leave the estate without any one charged with the power or duty of conserving the assets.

Matter of Kennedy (1919), 186 App. Div. 19, 174 N. Y. Supp. 95.

Appointment of temporary administrator.—A perfected appeal from an order of the surrogate's court, overruling objections to the issuance of letters testamentary, made upon the ground that the executor named in the will was disqualified to act by reason of mental deficiency, stays the proceedings, and it is improper for the court to issue letters testamentary to the executor. On the contrary it should have appointed a temporary administrator pursuant to § 2596. *Matter of Leland* (1916), 175 App. Div. 58, 161 N. Y. Supp. 320.

Judicial settlement of temporary administrator.—Where after the issue of letters testamentary an appeal is taken from a decree of probate, no decree can be entered

judicially settling the accounts of the temporary administrator where the executor is the only person served in the proceeding, as by the appeal he is precluded from acting for the estate unless an order is obtained under this section. *Matter of Dayton* (1917), 100 Misc. 632, 166 N. Y. Supp. 951.

Where letters have been issued, they are not operative or evidence of authority unless by express order of the surrogate. *Matter of Hopkins*, 41 Misc. 83, 85 N. Y. Supp. 35, aff'd 95 App. Div. 57. Authority of administrator suspended by appeal from decree granting his letters, and so remains unless the surrogate by order confers upon him the limited powers specified in this section. *Matter of Place*, 5 Dem. 228. Powers of executor limited during progress of the controversy. *Bible Society v. Oakley*, 4 Dem. 450.

Effect as a stay, of a perfected appeal.—The provisions of this section to the effect that a perfected appeal from the surrogate's court acts as a stay of proceedings to enforce the decree or order appealed from applies to a decree or order for the collection of money, the delivery of property, committing for a contempt, or other things required to be done by the person against whom the order was directed. *Matter of Williams*, 135 App. Div. 123, 119 N. Y. Supp. 892. An attempted appeal does not operate as a stay of proceedings. *Matter*

of *Evans*, 33 Misc. 671, 68 N. Y. Supp. 937, aff'd 58 App. Div. 502, 69 N. Y. Supp. 482. Undertaking required to perfect an appeal by legatees from a surrogate's decree and to stay its enforcement. *Matter of Arkenburgh*, 11 App. Div. 44, 41 N. Y. Supp. 287. As to perfected appeal operating as a stay of proceedings, see *Matter of Arkenburgh*, 17 Misc. 543, 41 N. Y. Supp. 287, aff'd 11 App. Div. 44, 41 N. Y. Supp. 287; *Fernbacher v. Fernbacher*, 4 Dem. 227; *Henry v. Henry*, 4 Dem. 253.

An appeal from an order denying a return to issue upon an accounting of a testamentary trustee and directing the case to proceed before the surrogate does not act as a stay so as to prevent the trial of issue before the surrogate. *Matter of Williams*, 135 App. Div. 123, 119 N. Y. Supp. 892.

The effect of a perfected appeal is to stay the execution of the decree, and if perfected before letters are issued, letters can only issue on an order of the surrogate; and if the appeal is taken after letters issued, the executors can only act if such an order is made after the appeal is taken. And then the letters are restricted to the limited powers specified. If such an order is not made then the executors are stayed from exercising their power or authority. *Matter of Kennedy* (1919). 186 App. Div. 19, 174 N. Y. Supp. 95.

ARTICLE 3.

LETTERS, THEIR REQUISITES, PRIORITY AND AUTHORITY; HOW, WHEN AND TO WHOM GRANTED; REVOCATION; REMOVAL OF TRUSTEE.

- § 2558. Requisites of letters.
- 2559. Limited and restrictive letters.
- 2560. Letters of evidence of authority; effect of appeal.
- 2561. Priority among different letters.
- 2562. Time, how reckoned upon successive letters.
- 2563. When surviving or remaining representative may act; when successor must be appointed.
- 2564. Persons incompetent to receive letters, or act as testamentary trustee.
- 2565. Surrogate may refuse letters under certain conditions.
- 2566. Objections to grant of letters.

- § 2567. Bond; when required.
- 2568. Official oaths of executors, et cetera.
- 2569. Removal or revocation of letters for disqualification, misconduct, et cetera.
- 2570. Petition; citation thereupon; suspension.
- 2571. Hearing; decree; testamentary trusts not affected.
- 2572. Application by executor, et cetera, for permission to resign.
- 2573. Proceedings thereupon.
- 2574. In what cases letters may be evoked or trustee removed without a citation.

§ 2558. Requisites of letters.

Letters testamentary, letters of administration, and letters of guardianship must be in the name of the people of the state. Where they are granted by a surrogate, they must be attested in the name of the officer granting them, signed by him, or by the clerk of the surrogate's court, and sealed with the seal of the surrogate's court. Where they are issued out of another

court, they must be attested in the name of the judge holding the court, signed by the clerk thereof, and sealed with its seal.

To all letters of guardianship of the property of an infant the surrogate must cause a copy of sections 2660 and 2661 of this chapter to be annexed or to be printed thereupon.

Source.—Former §§ 2590 and 2843. § 2590 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 55. § 2843 originally revised from L. 1837, ch. 460, §§ 57, 58.

§ 2559. Limited and restrictive letters.

Letters may be granted limiting and restricting the powers and rights of the holders thereof as follows:

To an executor or administrator where a right of action exists.

To a general guardian where his possession and control of certain property of his ward is limited as provided in section *2560 of this chapter.

Source.—New.

Revisers' note.—Heretofore the only power to issue limited letters has been contained in sections upon other subjects. See former §§ 2664, 2830.

Limited letters of administration may be granted under this section and § 2592 for the purpose of permitting an administrator to prosecute any cause of action; the authority to issue such letters is no longer restricted to causes of action arising under § 1902. *Matter of Pelotti* (1914), 87 Misc. 81, 150 N. Y. Supp. 421.

§ 2560. Letters evidence of authority; effect of appeal.

Subject to the provisions of the next section, regulating the priority among different letters, letters testamentary, letters of administration, and letters of guardianship, granted by a court or officer having jurisdiction to grant them, are conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed upon appeal, or the letters are revoked.

When letters testamentary or letters of administration have been issued in accordance with an order of the surrogate as authorized in section 2557 of this act, such letters so issued confer upon the person named therein all the powers and authority, and subject him to all the duties and liabilities of an executor or administrator in an ordinary case, except that they do not confer power to sell real property by virtue of a provision in the will, or to pay or to satisfy a legacy, or distribute the unbequeathed property of the decedent, until after the final determination of the appeal; and in case letters shall have been issued before such appeal, the executor or administrator, on a like order of the surrogate, may exercise the powers and authority, subject to the duties, liabilities and exceptions above provided.

Source.—Former §§ 2582 and 2591. § 2582, as amended by L. 1881, ch. 535; L. 1900, ch. 191; originally revised from L. 1871, ch. 603, § 1. § 2591 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 56.

Conclusive.—Letters of administration are conclusive as to the right of the administrator to act until the decree upon which they were issued is reversed. *Steele v. Leopold*, 135 App. Div. 247, 120 N. Y. Supp. 569. Even if there was any irregularity in appointment of an administrator, his letters are conclusive of his authority until revoked. *Abbott v. Curran*, 98 N. Y. 665; *Sullivan v. Tioga R. Co.*, 44 Hun 304, aff'd 112 N. Y. 643.

Collateral attack.—Letters properly

* So in original. [Should be 2650.]

granted cannot be collaterally attacked. *Curtis v. Williams*, 3 Dem. 63; *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1063; *More v. Finch*, 65 Hun 404, 20 N. Y. Supp. 164; *Brown v. Landon*, 30 Hun 57; *Lowman v. Elmira C. & N. R. Co.*, 85 Hun 188, 32 N. Y. Supp. 579, *aff'd* 154 N. Y. 765. Only the jurisdiction of the surrogate to issue them can be attacked collaterally. *Crosier v. Cornell Steamboat Co.*, 27 Hun 215.

Accounting of temporary administrator.

—If the facts warrant the order referred to in this section application therefor should be made and, if granted, a supplemental citation must be issued to the executor before a decree can be made in the matter of the accounting of the temporary administrator; if the facts do not warrant the application for such an order the accounting should be deferred until final determination of the appeal. *Matter of Dayton* (1917), 100 Misc. 632, 166 N. Y. Supp. 951.

§ 2561. Priority among different letters.

A person to whom letters are first issued from a surrogate's court having jurisdiction to issue them, has sole and exclusive authority, pursuant to the letters, until the letters are revoked; and he is entitled to demand and recover from any person, to whom letters are afterwards issued, by any other surrogate's court, the property in his hands belonging to the estate or fund. But the acts of a person, to whom letters were afterwards issued, done in good faith, before notice of the letters first issued, are valid; and an action or special proceeding commenced by him, may be continued by and in the name of the person or persons to whom the letters were first issued.

Source.—Former § 2592; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 25.

Revisers' note.—Changes made to include guardian and trustee, and to make it singular in form throughout.

§ 2562. Time, how reckoned upon successive letters.

Where it is prescribed by law, that an act must or may be done within a specified time after letters are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except in a case where it is otherwise specially prescribed by law; or where the first or any subsequent letters are revoked, as prescribed in section 2624 of this chapter, by reason of the want of power in the surrogate's court to issue the same, for any cause.

Source.—Former § 2593; section new as originally inserted in Code of Civ. Proc.

§ 2563. When surviving or remaining representative may act; when successor must be appointed.

Where one of two or more executors or administrators dies, or where letters are revoked with respect to one of them, a successor to the person who dies, or whose letters are revoked, shall not be appointed, except where such an appointment is necessary, in order to comply with the express terms of a will; but the others may proceed and complete the administration of the estate pursuant to the letters, and may continue any action or special proceeding brought by or against all.

Where all the persons to whom letters have been issued die, or where the letters of all have been revoked by a decree of the surrogate's court, that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person or persons whose powers have ceased, as if the letters had not been issued. The suc-

cessor may complete the execution of the trust committed to his predecessor; he may continue in his own name, a civil action, or special proceeding, pending in favor of his predecessor; and he may enforce a judgment, order, or decree in favor of the latter.

Source.—Former §§ 2612 and 2661. § 2612, as added by L. 1893, ch. 686; originally 6, tit. 2, § 40, and ch. 9, tit. 3, § 17; L. 1865, ch. 733, § 1. § 2692 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 44; L. 1837, ch. 460, § 33, in part.

Revisers' note.—Former §§ 2692, 2605 combined, and enlarged to cover death, which was omitted.

Power to compel accounting.—As to power of surrogate to compel accounting of executor who has been removed, see *Matter of Hood*, 104 N. Y. 103; *Haight v. Brishin*, 100 N. Y. 219; *Dunne v. American Surety Co.*, 43 App. Div. 91, 59 N. Y. Supp. 429. A removed trustee may be required to render an account although there has been no express order revoking the letters issued to him. *Matter of Storm*, 84 App. Div. 552, 82 N. Y. Supp. 731. As to power to compel an executor of a deceased executor to account for and turn over a trust estate, see *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795.

Successor's right.—Successor may compel delivery over of money or other property and with the consent of surrogate prosecute the official bond. *Power v.*

Speckman, 126 N. Y. 354. After letters have been revoked, a surrogate cannot compel executor to account, upon petition of a creditor of the decedent, his authority, in this respect, being limited to a case where proceedings are instituted by a successor, or a former co-representative. *Breslin v. Smyth*, 3 Dem. 251.

Appointment of successor.—Where the letters of one of two or more executors or administrators are revoked, there can be no appointment of a successor to the person whose letters are thus revoked, except where such an appointment is necessary in order to comply with the express terms of the will. *Matter of McDonald* (1914), 211 N. Y. 272, aff'g 160 App. Div. 86, 145 N. Y. Supp. 267.

§ 2564. Persons incompetent to receive letters, or act as testamentary

No person is competent to serve as an executor, administrator, testamentary trustee or guardian, who is:

1. Under the age of twenty-one years;
2. An adjudged incompetent;
3. An alien not an inhabitant of this state;
4. A felon;
5. Incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding.

Except as prescribed in section 2567, an executor, testamentary guardian or testamentary trustee, who is not by law required to give a bond, shall not qualify or serve as such where, after objection filed and proof taken, the surrogate finds that:

1. His circumstances are such that they do not afford adequate security to the creditors, or persons interested in the estate or fund for the due administration thereof.
2. He is not a resident of the state of New York.

Source.—Former §§ 2612 and 2661. § 2612, as added by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 3, 4; L. 1867, ch. 782, § 5; L. 1873, ch. 79. § 2661, as added by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 32.

Revisers' note.—By rewriting we have separated the two classes—those who are incompetent and those who may be excluded.

The words of this section are more than a mere restatement of the common-law disability of imbeciles and lunatics. Old age or bodily infirmities, lack of business experience and capacity, or ignorance of the law do not necessarily disqualify; but the

surrogate's court should not grant letters to an unadjudged incompetent, nor to one unable, by reason of incurable bodily disease, to understand the duties undertaken. *Matter of Leland* (1916), 219 N. Y. 387.

An order of the appellate division hold-

ing the executor incompetent is appealable and presents a question of law whether the words "want of understanding" imply an entire lack of mental capacity. *Matter of Leland* (1916), 219 N. Y. 387.

Competency.—Release by wife in an agreement of separation does not disqualify her from administering. *Matter of Wilson*, 92 Hun 318, 36 N. Y. Supp. 882. No degree of moral guilt or delinquency will disqualify unless there has been conviction of crime, nor will habits of intemperance disqualify unless they amount to habitual drunkenness and improvidence. *Matter of Manley*, 12 Misc. 472, 34 N. Y. Supp. 258. When disqualified for drunkenness. *Matter of Reichert*, 34 Misc. 288, 69 N. Y. Supp. 644. Person incompetent for improvidence. *Matter of Ferguson*, 41 Misc. 465, 84 N. Y. Supp. 1102. Improvidence is not shown by fact that applicant for letters had failed in business. *Matter of Greene*, 48 Misc. 31, 90 N. Y. Supp. 98.

Objections to appointment of widow on ground that she murdered testator.—Where, in a proceeding for the probate of a will, written objections are filed by the son of the testator to the issuance of letters testamentary to the widow on the ground that she had deliberately murdered the testator for the purpose of thwarting any attempt on his part to make another will, it is error for the surrogate to refuse to inquire into the objections before issuing letters to the widow. Such a person would be "incompetent to execute the duties of executor by reason of dishon-

esty," and should not be appointed. *Matter of Briggs* (1916), 171 App. Div. 52, 156 N. Y. Supp. 947.

Improvidence.—Where the petitioner is alleged to owe money to the estate, and to have lost money in real estate investments, these facts alone do not justify a finding that he is incompetent by reason of improvidence. *Matter of Brinckmann* (1915), 89 Misc. 41, 152 N. Y. Supp. 542.

Nonresidence excludes only when the claimant is not a citizen of the United States; but where that citizenship exists the nonresidence is immaterial and has no effect upon the priority of right. *Libbey v. Mason*, 112 N. Y. 525, rev'g 42 Hun 470; *Matter of Campbell*, 192 N. Y. 312, aff'g 123 App. Div. 212, 108 N. Y. Supp. 281. Letters of administration cannot be granted to a nonresident alien nor to a resident designated by him. *Matter of Ferrigan*, 92 App. Div. 376, 87 N. Y. Supp. 16. Widow and children incompetent, being aliens and not residents of the state. *Matter of Paolo*, 36 Misc. 514, 73 N. Y. Supp. 1062. A resident, though not a citizen, may be appointed administrator of a decedent. *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053.

Objections should be made before letters are issued to financial responsibility of person named as executor in a will. *Matter of Chauncey* (1917), 101 Misc. 275, 166 N. Y. Supp. 949.

Amendment of 1914 is not retroactive. *Matter of Ripley* (1917), 101 Misc. 465, 167 N. Y. Supp. 162.

§ 2565. Surrogate may refuse letters under certain conditions.

The surrogate may, in his discretion, refuse to grant letters to any person unable to read and write the English language; or to any person who does not file in the surrogate's office an instrument acknowledged or proved, and duly certified designating the clerk of the surrogate's court and his successor in office, on whom service of any process issuing from the surrogate's court may be made in like manner and with like effect as if it were served personally upon himself, whenever the person so receiving letters can not be found and served within the state of New York, after due diligence used.

Source.—Same as for § 2564. *supra*.

Revisers' note.—By this section our courts can obtain jurisdiction of the person of the representative who leaves the state, and thereby save some estates which are now lost.

Executor indebted to testatrix.—A refusal of letters is not justified when the person nominated as executor in a will is indebted to the testatrix at the time of the latter's death. The will having been admitted to probate, the person therein nominated as executor has a right to have letters issued to him. This right he should not be deprived of unless it clearly appears

that he is incompetent or that the facts stated in this section exist and the surrogate exercise his discretion adversely to him. It is no trivial matter to refuse letters testamentary to a person duly nominated in a valid last will and testament. *Matter of Haag* (1917), 99 Misc. 164, 165 N. Y. Supp. 401.

§ 2566. Objections to grant of letters.

Any person interested in the estate or fund may, before letters testamentary, of administration or of guardianship are granted, or a testamentary guardian or trustee is allowed to qualify and serve, file objections showing his interest in the estate or fund, and setting forth specifically one or more legal objections to granting the letters to one or more of the persons about to receive the same, or to allowing testamentary guardian or trustee to qualify and serve. Where such objections are filed, the surrogate must stay the granting of letters or refuse to allow the testamentary guardian or trustee to qualify until the matter is disposed of.

Source.—New.

Revisers' note.—This section is written to make general provision for objections.

It is only when written objections to the issuance of letters testamentary are filed, and the real trial is on that question, that a decree of probate should not direct the letters to issue. *Matter of Kennedy* (1919), 106 Misc. 216, 174 N. Y. Supp. 429.

§ 2567. Bond; when required.

In either of the following cases, a person named as executor in a will, or a testamentary guardian or trustee who is not required by the will to give a bond, may entitle himself to letters or to act thereunder by giving a bond as prescribed by law, although an objection against him has been established to the satisfaction of the surrogate:

1. That his circumstances are such, that they do not afford adequate security to the creditors, or persons interested in the estate or fund, for the due administration of the same.
2. That he is not a resident of the state; and he is a citizen of the United States.

Source.—Former § 2638; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 8, in part; L. 1873, ch. 657.

Revisers' note.—See new § 2639, where all executors having trust duties are required to give bonds, so this section now applies to executors who have no trust duties. The objections are set forth in new §§ 2564, 2565. By striking out the last sentence all non-resident executors must give bonds.

References.—Regulations generally respecting bonds and undertakings, Code Civ. Pro., §§ 810-816; bonds and undertakings to be filed, Gen. Rules of Prac., No. 5; justification of securities, Gen. Rules of Prac., No. 5.

In general.—The section is more favorable to the executor now than the provisions of the revised statutes were. *Hovey v. McLean*, 1 Dem. 396. Executors cannot be called upon to furnish bonds except for reasons specified in section. *Matter of Lowery*, 19 Misc. 83, 43 N. Y. Supp. 972.

The entry of an order requiring the giving of security and neglect or refusal to comply with such order are essential preliminaries to the surrogate's removal of a trustee upon the ground of insolvency. *Morgan v. Morgan*, 3 Dem. 612.

When bond required.—"Adequate security" and "circumstances," mentioned in section, do not relate primarily or exclusively to the pecuniary responsibility of the

executor, but to his moral qualifications. *Matter of Wischmann*, 80 App. Div. 520, 80 N. Y. Supp. 789. Thrift, integrity, good repute, business capacity, and stability of character are circumstances which may be considered. *Martin v. Duke*, 5 Redf. 597.

The fact that one named as executor in a will is worth only one-half as much as testator is not a sufficient reason for requiring a bond. *Ballard v. Charlesworth*, 1 Dem. 501.

Security may be required of a nonresident although a will relieves executors from giving a bond. *People ex rel. Patrick v. Fitzgerald*, 73 App. Div. 339, 76 N. Y. Supp. 865. As to competency of two persons connected with a foreign corporation having office in this state to act as executors without giving bonds. *Postley v. Cheyne*, 4 Dem. 492.

Where the circumstances of one of two testamentary trustees are such as not to

afford adequate security for the proper discharge of his duties, he cannot be relieved from furnishing a bond by establishing the solvency and responsibility of his associate. *Matter of Sears*, 5 Dem. 497.

Failure to give bond when directed by will.—Where a testator gave directions that his executors should furnish bonds but did not make their qualification, nor the issuance of letters to them, conditional on their complying with the direction, and appointed no one else to act in their place

if they failed to comply, the direction to give bonds did not disqualify the executors from acting as such if they failed to give the bonds, and had no further effect than to justify the surrogate, if he deemed it wise, to withhold the issuance of letters testamentary until the bonds were furnished, and his action in granting such letters without bonds was final and conclusive. *Sandford v. Bronx Boro Builders, Inc.* (1916), 175 App. Div. 384, 161 N. Y. Supp. 975.

§ 2568. Official oaths of executors, etc.

The official oath or affirmation of an executor, administrator, guardian, or testamentary trustee, to the effect that he will well, faithfully, and honestly discharge the duties of his office, describing it, must be filed in the surrogate's office, before letters are issued to him, or he is permitted to act. The oath may be taken before any officer who is authorized to administer oaths.

Source.—Former § 2594; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 13 and 41; L. 1837, ch. 460, § 59.

Revisers' note.—It is not thought to be necessary to have an oath certified by a certificate, or taken out of the state by any particular officer.

§ 2569. Removal, or revocation of letters for disqualification, misconduct, etc.

In either of the following cases, a creditor, or person interested in the estate of a decedent, or a ward or friend of a ward, or a person beneficially interested in the execution of a trust, or any surety on a bond of a person to whom letters have been granted or of a trustee may present to the surrogate's court having jurisdiction a petition, praying for a decree revoking those letters, or removing such trustee, and that the respondent may be cited to show cause why a decree should not be made accordingly:

1. Where the respondent was, when appointed or when letters were issued to him, or has since become incompetent, or disqualified by law to act as such, and the grounds of the objection did not exist, or the objection was not taken by the petitioner, or a person whom he represents, before the letters were granted or the appointment made.

2. Where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge; or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding; he is unfit for the due execution of his office.

3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate contained in a decree or order, or any provision of law relating to the discharge of his duty.

4. Where the grant of his letters, or his appointment was obtained by a false suggestion of a material fact.

5. Where by the terms of a will, deed or order his office was to cease upon a contingency which has happened.

6. In the case of an executor, who has not been required to give a bond where his circumstances are such that they do not afford adequate security

to the creditors or persons interested for the due administration of the estate; or where he has removed or is about to remove from the state.

7. In case of a guardian where he has removed or is about to remove from the state, or where the interest of the infant will be promoted by the appointment of another person as guardian.

8. In the case of a temporary administrator, appointed upon the estate of an absentee, where it is shown that the absentee has returned; or that he is living, and capable of returning and resuming the management of his affairs; or that an executor, or administrator-in-chief has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of the state.

Source.—Former §§ 2685, 2817 and 2832. § 2685 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 18; L. 1837, ch. 460, § 34. § 2817 originally revised from L. 1871, ch. 482. § 2832 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 14; L. 1837, ch. 460, §§ 34, 35.

Revisers' note.—The plan is to make these general sections on revocation of letters include guardians and trustees, and so eliminate the separate sections practically repeating the same provisions.

Application.—Matter of Chauncey (1917), 101 Misc. 275, 166 N. Y. Supp. 949.

Who may make application, person interested.—A widow who has assigned her interest in an estate is not a person interested in the estate so as to be entitled to maintain the application. *Woodruff v. Woodruff*, 3 Dem. 505. Nor is a parent as natural guardian of an infant beneficially interested under the will of decedent. *Quin v. Hill*, 6 Dem. 39.

It seems that an executor is a person interested in the estate of his testator for the purpose of applying for the revocation of letters testamentary issued to one as his co-executor. *Hassey v. Keller*, 1 Dem. 577. As to whether one named as executor and legatee, in an alleged will of a decedent not admitted to probate, has a sufficient interest in the estate to enable him to petition under this section, see *Matter of Brewster*, 5 Dem. 259.

A surrogate's court has jurisdiction to determine whether a person petitioning for the removal of an administrator is a creditor. *Matter of Wheeler*, 46 Hun 64. A debtor to the estate of a decedent is not a person interested therein within the meaning of this section. *Drexel v. Berney*, 1 Dem. 163. As to who are persons interested in the estate. *Matter of Petrie*, 5 Dem. 352. As to who may petition, see also *Matter of Stern*, 9 N. Y. Supp. 445; *Hartnett v. Wandell*, 60 N. Y. 346; *Newhouse v. Gale*, 1 Redf. 217; *Fosdick v. Deafield*, 2 Redf. 392; *Stanley v. Stanley*, 4 Dem. 416; *Staples v. Hoffman*, 1 Dem. 63; *Estate of Berney*, 1 Dem. 163; *In re Peaslee's Will*, 73 Hun 113, 25 N. Y. Supp. 940.

To give the surrogate jurisdiction one must be a creditor or person interested in the estate of the deceased. *Sutherland v. St. Lawrence Co.*, 42 Misc. 38, 85 N. Y. Supp. 696.

A person to whom a claim against a

decedent was assigned by a corporation after the issue of letters to a county treasurer, cannot apply for the revocation thereof. *Matter of Ciotto*, 105 App. Div. 143, 93 N. Y. Supp. 973.

The public administrator in a proper case is qualified to begin proceedings for the revocation of letters of administration. *Matter of McMullen* (1914), 85 Misc. 661, 148 N. Y. Supp. 1092.

A proceeding to revoke letters of administration can only be maintained by "a creditor or person interested in the estate" of the deceased. Property exempt under § 2670 cannot be considered in determining whether a surviving husband is a "person interested" in the estate. *In re Mack's Estate* (1917), 164 N. Y. Supp. 590.

Revoking letters of one administrator as terminating right of other to act.—The right of one person to act as administrator of an estate does not terminate *ipso facto* upon the revocation of the letters of administration previously issued to his co-administrator. *Matter of McDonald* (1914), 211 N. Y. 272, aff'g 160 App. Div. 86, 145 N. Y. Supp. 267.

Where the issuance of letters of administration to a stranger as co-administrator is dependent upon the consent of one entitled to the letters, and such consent is withdrawn and the letters of the principal or original administrator are revoked, the letters issued to the co-administrator may be revoked without an allegation of the existence of any of the grounds mentioned in this section. *Matter of Stallo* (1913), 82 Misc. 135, 143 N. Y. Supp. 775.

This section does not apply to a co-administrator who received letters not as a matter of right, but upon the consent of the person entitled thereto. *Matter of Stallo* (1913), 82 Misc. 135, 143 N. Y. Supp. 775.

Power to remove administrator on ground that letters to co-administrator have been

revoked.—The surrogate's court has no power to remove an administrator on the sole ground that the letters of a co-administrator have been revoked. *Matter of McDonald* (1914), 211 N. Y. 272, aff'g 160 App. Div. 86, 145 N. Y. Supp. 267.

Practice; necessity for taking evidence.—A surrogate may not revoke letters of administration under this section where charges of misconduct are denied, without taking evidence and making findings of fact. *Matter of McDonald* (1914), 160 App. Div. 86, 145 N. Y. Supp. 267, aff'd 211 N. Y. 272.

Idem; exercise of discretion.—The discretionary power given the surrogate to refuse to revoke letters in cases arising under subdivisions 3, 4 and 5 of this section necessarily excludes such a discretion under the other subdivisions of said section; and where on the return of a citation issued under § 2570, the proof shows that the executor or trustee complained of is unfit to execute the office for the reasons stated in subdivision 2 of this section, a decree refusing to revoke the letters of such executor or trustee should be reversed. *Matter of Engel* (1913), 155 App. Div. 467, 140 N. Y. Supp. 286.

Idem; fact that executor can do no harm as defense to removal for cause.—If an executor has made a default within the classification contained in this section the fact that his continuance in office can do no harm and that there is no necessity for his removal so far as the safety of the estate is to be regarded is foreign and immaterial to the question of his fitness for the due execution of his remaining obligations and he should be removed notwithstanding such facts. *Matter of Engel* (1914), 83 Misc. 675, 146 N. Y. Supp. 793.

Statutory authority must exist for revocation of letters.—Letters of administration once properly issued can only be revoked under some power which the law has conferred upon surrogates' courts. *Matter of McDonald* (1914), 211 N. Y. 272, aff'g 160 App. Div. 86, 145 N. Y. Supp. 267.

Failure to pay attorney's fees.—The statutory enumeration of causes for which letters of administration may be revoked is exclusive and the failure of an administrator to pay his attorney's fees is not included. *In re Nocton's Estate* (1916), 162 N. Y. Supp. 215.

Decree.—Surrogate's decree providing for the removal of an administrator upon an ex parte application is void. *Matter of Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551.

Review of proceedings under this section will be granted. *Matter of Dittrich*, 120 App. Div. 504, 105 N. Y. Supp. 303.

Disqualification.—An executor becomes disqualified upon the granting of letters upon the application of a nonresident having a prior right. *Matter of Tyers*, 41 Misc. 378, 84 N. Y. Supp. 934. As to disqualification and incompetency, see also

Matter of Gerlach, 29 Misc. 90, 60 N. Y. Supp. 574; *Harrison v. Clark*, 87 N. Y. 572. The phrase "incompetent or disqualified by law," as used in subdivision 1 refer to the provisions of former § 2661 (now § 2564) and not to the question of the prior right of a nonresident to administer. *Matter of Campbell*, 56 Misc. 229, 107 N. Y. Supp. 591, rev'd on other grounds, 123 App. Div. 212, 108 N. Y. Supp. 281.

The fact that an executor and trustee elects to claim his regular commission by filing with the surrogate a renunciation of moneys given him in lieu of commissions as executor and trustee, does not call for the revocation of letters testamentary to him on the ground that under the terms of the will he has by rejecting the bequests disqualified himself as executor and trustee. *Matter of Pulitzer* (1915), 89 Misc. 657, 153 N. Y. Supp. 1100.

Wasting or improperly applying assets.—Payment by an executor of a reasonable sum out of the estate for necessary legal services rendered in the determination thereof, does not render him guilty of "having wasted or improperly applied the money or other assets in his hands" so as to require a revocation of the letters. *Matter of Doscher* (1914), 165 App. Div. 193, 151 N. Y. Supp. 76.

Idem; failure to collect second mortgage.

—Where executors, after the lien of a second mortgage held by the estate is extinguished by the foreclosure of a prior mortgage, do nothing to enforce the collection of the second mortgage, except to collect a small part of the principal and some interest, they are guilty of mismanagement and waste, unfit for the office of executors and their letters testamentary should be revoked. Where said executors were also the guardians of infants to whom the whole estate was given, the letters of guardianship granted to said executors will also be revoked. *Matter of Greifenstein* (1914), 86 Misc. 173, 149 N. Y. Supp. 136.

Misconduct.—Where an executor violates the direction of the will to invest the funds in bonds and mortgages in the state of New York by purchasing real estate in the state of New Jersey and thereby causes a loss to the estate, his letters ought to be revoked. *Hood v. Hood*, 2 Dem. 583. Where an executor and trustee is directed by the will to sell real estate, his gross negligence or bad faith in failing to do so is cause for removal. *Haight v. Bresbin*, 100 N. Y. 220. Where one is guilty of breaches of trust duties which the administratrix owed her husband's creditors, there is cause for the revocation of her letters. *Matter of Heyen*, 40 Misc. 511, 82 N. Y. Supp. 791. Defiance of the directions of a will and making improper investments held sufficient cause. *Matter of Havemeyer*, 3 App. Div. 519, 38 N. Y. Supp. 292.

The fact that a certain trust in real estate has, while in the hands of administrator, greatly diminished in value and in-

come does not of itself show that he has a tendency to improvidence, and cannot alone justify revocation of his letters. *Matter of Treadwell*, 37 Misc. 584, 75 N. Y. Supp. 1058, rev'd on other grounds, 77 App. Div. 155, 79 N. Y. Supp. 83.

Indemnification of the sureties in the executor's bond not being one of the purposes contemplated by the power of sale contained in the will amounts to a misconduct of office. *Fleet v. Simmons*, 3 Dem. 542.

Where an executor asserts a claim to ownership of a large part of the assets of the estate, under a contract made with the testator at a time when his mental capacity was doubtful, and insists upon receiving all benefits coming to him thereunder, he is guilty of misconduct which will authorize his removal. *Matter of Gleason*, 17 Misc. 510, 41 N. Y. Supp. 418.

A surrogate will remove an executor where his constant dissensions with his co-executor as well as his failure to do his part in the management of the estate indicate that his continuance in office will prejudice the best interests of the trust. *Matter of Wheaton*, 37 Misc. 184, 74 N. Y. Supp. 938. As to removal for misconduct, see also *Matter of Monroe*, 142 N. Y. 484; *Matter of Jacob*, 5 App. Div. 508, 38 N. Y. Supp. 1083; *Lichtenberg v. Herdtfelder*, 103 N. Y. 302; *Wilcox v. Quinby*, 20 N. Y. Supp. 5; *Matter of Moulton*, 10 N. Y. Supp. 717; *Estate of Stanton*, 18 St. Rep. 807, 2 N. Y. Supp. 342; *Matter of Hutchinson*, 10 St. Rep. 10.

Refusal of executors to act in presence of third person is no ground for removal. *Matter of Waterman*, 112 App. Div. 313, 98 N. Y. Supp. 583; appeal dismissed, 183 N. Y. 534.

An executor may not be removed from his office merely because he presents a claim against the estate of the decedent or claims that property ostensibly constituting a part thereof in reality belongs to him. *Matter of Drummond* (1917), 100 Misc. 78, 165 N. Y. Supp. 78.

Improvidence.—The term "improvidence" refers to such habits of mind and conduct as render a man generally, and under all circumstances, unfit to serve. *Emerson v. Bowers*, 14 N. Y. 449. That a man is a professional gambler is presumptive evidence of improvidence. *McMahon v. Harrison*, 6 N. Y. 443.

Moral guilt or delinquency not sufficient ground for removal unless person has been convicted of an infamous crime. *Coggs v. Green*, 9 Hun 471. As to removal for mismanagement and improvidence, see *Matter of Hood*, 98 N. Y. 363; s. c. 104 N. Y. 103; *Matter of Place*, 4 St. Rep. 433; *Hassey v. Keller*, 1 Dem. 577; *Matter of Cady*, 36 Hun 122, aff'd 103 N. Y. 678; *Estate of Petrie*, 5 Dem. 352.

Willful refusal to obey surrogate.—As to what amounts to a willful refusal to obey a lawful direction of a surrogate, see *Matter of Arkenburgh*, No. 2, 11 App. Div.

193, 42 N. Y. Supp. 965; *Matter of Pye*, 18 App. Div. 309, 45 N. Y. Supp. 836.

A temporary administratrix should not be removed from office on the ground that she has willfully refused or neglected without good cause to obey a lawful direction of the surrogate contained in an order or decree or to obey a provision of the law relating to the discharge of a duty contrary to subdivision 3 of this section, where it appears that she merely refused to procure, as administratrix, the appeal in an action in which her intestate had been defeated. *Matter of Hill* (1915), 166 App. Div. 303, 151 N. Y. Supp. 791.

False suggestion.—In order to justify a revocation of letters of administration under this subdivision, it must be made to appear that the suggestion was made to the tribunal by which the letters were granted. *Corn v. Corn*, 4 Dem. 394. As to false suggestion, see also *Proctor v. Wanamaker*, 1 Barb. Ch. 302; *Kerr v. Kerr*, 41 N. Y. 272; *Oram v. Oram*, 3 Redf. 300; *Matter of West*, 40 Hun 291, aff'd 111 N. Y. 687; *Stanley v. Stanley*, 4 Dem. 416. See also *Matter of Rathen*, 115 App. Div. 644, 101 N. Y. Supp. 289.

Erroneous statements as to the value of an estate and as to the age of a nonresident brother of the decedent do not constitute a false suggestion of material facts within the meaning of subdivision 4. *Matter of Campbell*, 56 Misc. 229, 107 N. Y. Supp. 591, rev'd on other grounds, 123 App. Div. 212, 108 N. Y. Supp. 281.

Letters of administration obtained by a false suggestion must be revoked. *Matter of Kutter* (1913), 79 Misc. 74, 139 N. Y. Supp. 693.

Where one claiming to be the wife of a decedent sought limited letters of administration under former § 2664, in order that she might be relieved from giving the ordinary security for the faithful performance of her duties, and on such application falsely stated that the decedent left him surviving no next of kin, and also on a hearing before the surrogate gave willful false testimony as to the death of an alleged husband, the surrogate should revoke such letters. *Matter of Eckel* (1917), 177 App. Div. 272, 164 N. Y. Supp. 209.

An intestate died unmarried survived by his father, mother and several brothers and sisters. The public administrator and a resident brother renounced and letters of administration issued to a sister upon her petition. Held, that where the allegation of a petition for revocation of letters brought under subdivision 4 that the administratrix wilfully and deliberately concealed the relationship of a sister, not having included her in the next of kin, is denied by the replying affidavit of the administratrix, an order revoking her letters will be vacated but without prejudice. *Matter of Wallace* (1916), 94 Misc. 558, 159 N. Y. Supp. 733.

Failure to notify brother of intestate

of application for letters is a false suggestion of a material fact. In *re Warthling's Estate* (1918), 169 N. Y. Supp. 877.

To warrant the revocation of letters for a false statement in the petition, it must appear, not only that the statement was false, but that it was a misstatement of a material fact. The misstatement of the value of the estate is not one of a material fact. In *re Quinlan's Estate* (1916), 158 N. Y. Supp. 319.

Revocation of letters to alleged widow.—Where on petition of a sister of a decedent for the revocation of letters of administration granted to one claiming to be his widow she admits that she was never married to decedent, such admission being against her interest, it must be taken as a fact that they were never married, and the letters will therefore be revoked and administration granted to petitioner. *Matter of Morris* (1915), 92 Misc. 630, 157 N. Y. Supp. 472.

Inadequate security.—Objectors may secure the removal of executors acting as trustees, by making manifest to the court that the circumstances of such trustees do not afford adequate security for the due administration of their trust. *Adams v. Van Vleck*, 4 Dem. 343. Mere insolvency insufficient. *Matter of Hart*, 6 St. Rep. 535. Fact that executors are "men of considerable means, not transacting business or having any place of business," insufficient to show inadequate security. *Matter of Sterling*, 1 St. Rep. 139; *Postley v. Cheyne*, 4 Dem. 492.

Executors in a will are entitled to letters testamentary without giving bond, unless their circumstances do not afford adequate security for their due administration of the estate. *Matter of Whitehead*, 3 Dem. 227. As to what constitute circumstances which do not afford adequate security for the due administration of the estate. *Matter of O'Brien*, 145 N. Y. 379; *Freeman v. Kellogg*, 4 Redf. 218.

Removal from state.—The temporary residence in another state of an executor does not show that he has removed from the state of New York. *Matter of McKnight*, 80 App. Div. 284, 80 N. Y. Supp. 251. See also *Estate of Sterling*, 1 St. Rep. 139.

Application by county treasurer for revocation of letters to consul.—Where letters of administration upon the estate of a resident alien and subject of the kingdom of Italy were issued to the proper consular agent, and the estate, which is small, is ready for final distribution, the surrogate under § 2570 may in his discretion refuse to entertain an application made by the county treasurer for the revocation of the letters of administration. *Matter of Baldasarro* (1915), 92 Misc. 627, 156 N. Y. Supp. 175.

When permanent letters are issued, formal revocation of the temporary letters is not necessary, inasmuch as the issue

of permanent letters in itself effects the retirement of the temporary administrator and discontinuance of his administration. *Matter of Neil* (1918), 184 App. Div. 507, 172 N. Y. Supp. 79.

Revocation of ancillary letters.—As the local next of kin are not entitled to ancillary letters and not entitled to notice of an application therefor, they cannot apply for the revocation of such letters on the ground that the papers on which such letters were granted are defective. *Matter of Connell* (1915), 92 Misc. 324, 155 N. Y. Supp. 397.

Temporary administrators.—Subdivision 8 applies to temporary administrators appointed under former § 2668, subdivision 2. *Matter of Eisner*, 5 Dem. 383.

Testamentary trustees; removal, in general.—The surrogate has power to entertain concurrently a proceeding to remove a surviving testamentary trustee and one to fill the resulting vacancy, especially where the petition is made by a co-trustee. *Matter of Boyle* (1915), 166 App. Div. 504, 151 N. Y. Supp. 1022.

Power of removal of testamentary guardians subject to a narrower limitation than that of general guardian. *Mackay v. Fullerton*, 4 Dem. 153. Whatever authority is given by the will to a testamentary trustee may be extinguished by the surrogate. *Lane v. Lewis*, 4 Dem. 468.

Idem; grounds for removal.—Loss by disobeying instructions, improper investments, and unfitness. *Haight v. Brisbin*, 100 N. Y. 219; *Matter of Havemeyer*, 3 App. Div. 519, 38 N. Y. Supp. 292. Habitual drunkenness or improvidence. *Matter of Cady*, 36 Hun 122, *aff'd* 103 N. Y. 678. Gross negligence or bad faith, in failing to sell real estate, by an executor and trustee. *Haight v. Brisbin*, 100 N. Y. 219. Depletion of trust estate. *Matter of McGilivray*, 138 N. Y. 308. Investment by trustee in another state, when proper, see *Ormistoun v. Olcott*, 84 N. Y. 339. A conduct prejudicial to the best interest of the estate. *Matter of Wheaton*, 37 Misc. 184, 74 N. Y. Supp. 938; *Adams v. Van Vleck*, 4 Dem. 343.

Trustee cannot be removed on the ground of insolvency until the entry of an order requiring the giving of security and the neglect or refusal to comply with such order. *Morgan v. Morgan*, 3 Dem. 612; *Beggs v. McCrea*, 62 App. Div. 39, 70 N. Y. Supp. 864.

General guardian; proceedings for removal.—Proceeding for the removal of general guardian, see *Phillips v. Liebmann*, 10 App. Div. 128, 41 N. Y. Supp. 1020. When the surrogate can remove a testamentary guardian, see *Mackay v. Fullerton*, 4 Dem. 153.

The code implies the personal right of an infant to petition. *Matter of Watson*, 2 Dem. 642. When any person may move to change the guardian of the person, see *Griffin v. Saarsfield*, 2 Dem. 4.

Application to remove new guardian should not be granted when it appears that it is made by the former guardian solely because the second guardian contested his right to compensation as attorney, and the proceeding is not brought in the interest of the infant. *Matter of Twichell*, 117 App. Div. 301, 102 N. Y. Supp. 163.

Idem; cause for removal.—Suppression of facts as equivalent to “a false suggestion of a material fact,” under subdivision 4, see *Bolling v. Coughlin*, 5 Redf. 116. Mere neglect to file an inventory and account

not good cause for removal. *Ledwith v. Union Trust Co.*, 2 Dem. 439. When guardian's remissness does not demand the revocation of his letters, see *Ledwith v. Union Trust Co.*, 2 Dem. 439; *Matter of Plumb*, 21 St. Rep. 107, 4 N. Y. Supp. 135. Religion of guardian. *Matter of McConnon*, 69 Misc. 22, 112 N. Y. Supp. 590. Letters of testamentary guardianship will not be revoked merely because the infant has not been provided with a permanent home. *Matter of Pearce* (1912), 77 Misc. 415, 137 N. Y. Supp. 755.

§ 2570. Petition; citation thereupon; suspension.

A petition presented as prescribed in the last section, must set forth the facts showing that the case is one of those therein specified, and unless the surrogate declines to entertain the proceeding, a citation must be issued according to the prayer thereof.

If such citation be issued the surrogate may, in his discretion, make an order suspending the respondent wholly or partly, from the exercise of his powers and authority, during the pendency of the special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the respondent and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in sections 2555 and 2556 of this chapter, with respect to a decree revoking letters.

Source.—Former §§ 2686, 2833 and 2834. § 2686 new as originally inserted in Code of Civ. Proc. § 2833 originally revised from R. S., pt. 2, ch. 8, tit. 3. §§ 14, 15. § 2834 originally revised from L. 1837, ch. 460, § 61.

Revisers' note.—See *Matter of Owsley*, 153 A. D. 90.

Sufficiency of petition.—Allegations in a petition for the removal of an executor or administrator, if made upon information and belief, must disclose the sources of the information and the grounds of the belief. *Atkinson v. Striker*, 2 Dem. 261. An application for the revocation of letters testamentary based upon an allegation couched in the words of the statute, unaccompanied with any more specific statement and which is denied in the answer, should be dismissed. *Grubb v. Hamilton*, 2 Dem. 414. Letters cannot be revoked under prayer for other relief alone. *Matter of Patterson*, 79 Hun 371, 29 N. Y. Supp. 451, aff'd 146 N. Y. 327.

Petition for the revocation of letters testamentary, on the ground that the executor is guilty of misconduct, should specifically set forth the charges of misconduct. *Matter of Burr*, 118 App. Div. 482, 104 N. Y. Supp. 29.

Idem; information and belief.—A petition for the revocation of letters of administration and supporting affidavits in which allegations of fact are made largely on information and belief, are sufficient to give the court jurisdiction to issue a citation where such allegations give as the sources of information persons in being and where the petitioner, affiants and such persons may be called as witnesses. Mat-

ter of *McMullen* (1914), 85 Misc. 661, 148 N. Y. Supp. 1092.

The petition must contain facts showing that the case is one of those specified in § 2569, and where a petition fails to set forth facts disclosing any of the causes specified, the surrogate should decline to entertain the proceeding. *Matter of Gustow* (1917), 220 N. Y. 373.

Proof required.—Proof required before a citation may be issued must be competent legal proof of the same quality which would be required upon a hearing of the issues raised by the petition. *Matter of Owsley* (1912), 153 App. Div. 90, 137 N. Y. Supp. 1040.

The petition must be sustained by affidavit proof in order that citations may issue. *Matter of Monroe*, 142 N. Y. 484. A petition cannot be deemed proof of the truth of its own allegations and must be supplemented by extrinsic written allegations unless oral proof is adduced. *Moorhouse v. Hutchinson*, 2 Dem. 429.

Service of a citation upon an administrator to show cause why he should not be removed is properly made by leaving it at his former residence, where he has left the state and his residence cannot be ascertained. *Harrison v. Clark*, 87 N. Y. 572.

Procedure.—When an answer to the petition is filed raising material questions of

§§ 2571, 2572 LETTERS; REVOCATION, HEARING, ETC; EXECUTORS. 433

fact, the surrogate must take evidence supporting the allegations of the petition and answer, and make findings of fact and conclusions of law. *Matter of Dittrich*, 120 App. Div. 504, 105 N. Y. Supp. 303.

§ 2571. Hearing; decree; testamentary trusts not affected.

Upon the return of a citation, issued as prescribed in the last section, the surrogate may make a decree revoking the letters issued to, or removing, the respondent, or may, in his discretion, dismiss the proceedings upon such terms as justice requires.

Where an executor or an administrator is also a testamentary trustee, a decree revoking his letters does not affect his power or authority as testamentary trustee, except in the case specially prescribed for that purpose in section 2640 of this chapter.

Source.—Former §§ 2687, 2688 and 2833. § 2687 originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 20, 21. § 2688 new as originally inserted in Code of Civ. Proc. § 2833 originally revised from R. S., pt. 2, ch. 8, tit. 3, §§ 14, 15.

Revisers' note.—By consolidating § 2833 with this section we eliminate that section. As now amended the surrogate may use his discretion as to revoking letters. Often parties may have the right to have letters revoked, but, for instance, if a non-resident has not been cited on administration, it might not be for the interest of the estate to revoke them. Under the general power given, the surrogate may require a bond.

By adding § 2688 here we eliminate that section.

In general.—Upon the return of a citation, if the objections, or any of them, are established to the surrogate's satisfaction, he must make a decree revoking the letters issued to the person complained of. *Matter of West*, 40 Hun 291, aff'd 111 N. Y. 687; *Fleet v. Simmons*, 3 Dem. 542; *Matter of Pietrie*, 5 Dem. 352. The question whether letters testamentary issued to executors shall be revoked, is committed to the discretion of the surrogate and the appellate court will not interfere with his exercise of such discretion. *Matter of Keinz*, 88 Hun 298, 34 N. Y. Supp. 339.

The temporary residence of an executor in another state does not show that he has removed from this state and does not warrant a revocation of his letters. *Matter of McKnight*, 80 App. Div. 284, 80 N. Y. Supp. 251. Removal of an executor for temporary absence from the state refused, see *Matter of Magoun*, 41 Misc. 352, 84 N. Y. Supp. 940.

Security given.—Where a decree provides for the revocation of letters testamentary unless the executors file a bond as required by this section and such executors file a bond and continue to act, they cannot thereafter appeal from the decree. *Matter of O'Brien*, 145 N. Y. 379.

Findings.—The surrogate should make specific findings of fact upon which his decree is based; and the duty may not be imposed upon an appellate court of search-

ing the record for facts that should be incorporated in the findings. *Matter of Monroe*, 142 N. Y. 484.

Dismissal of proceedings.—The surrogate in his discretion may dismiss a proceeding for the revocation of letters for neglect to comply with a provision of law, if such provision of law is obeyed and if suitable amends are made to each person injured by the neglect or refusal to obey it. *Sedwith v. Union Trust Co.*, 2 Dem. 439.

Discretion prior to amendment of 1914.—The discretionary power given the surrogate by former § 2687 (now this section), to refuse to revoke letters in cases arising under subdivisions 3, 4 and 5 of former § 2685 (now § 2569), necessarily excluded such a discretion under the other subdivisions of said section; and where on the return of a citation issued under former § 2686, the proof shows that the executor or trustee complained of is unfit to execute the office for the reasons stated in subdivision 2 of former § 2685 (now § 2569), a decree refusing to revoke the letters of such executor or trustee was reversed. *Matter of Engel* (1913), 155 App. Div. 467, 140 N. Y. Supp. 286. This decision now has no effect. The change made in the new code eliminates the special cases in which the surrogate may exercise his discretion, and makes such discretionary power general.

§ 2572. Application by executor, etc., for permission to resign.

An executor, administrator, guardian or testamentary trustee may, at any time, present to the surrogate's court a petition, praying that his account may be judicially settled; that a decree may thereupon be made, re-

voking his letters or permitting him to resign, and discharging him accordingly; and that the same persons may be cited to show cause why such a decree should not be made who must be cited upon a petition for a judicial settlement of his account. The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition praying for a judicial settlement of his account. The surrogate may, in his discretion, entertain or decline to entertain the application.

Source.—Former §§ 2689, 2814, 2835 and 2859. § 2689 originally revised from L. 1870, ch. 359, § 3, in part. § 2814 new as originally inserted in Code of Civ. Proc. § 2835 originally revised from L. 1837, ch. 460, §§ 51, 52, in part. § 2859 new as originally inserted in Code of Civ. Proc.

Revisers' note.—Made general and thus eliminating former §§ 2835, 2814.

In general.—The surrogate has power to revoke letters upon the application of an executor. *Matter of Suarez*, 3 Dem. 164.

A provision in a will for the exigency of a resignation on the part of those therein nominated executors and trustees is entitled to weight in determining whether a cause assigned by an executor for his proposed resignation should be deemed to justify it. *Tilden v. Fiske*, 4 Dem. 357.

A surrogate's court will not revoke an executor's letters at his own request, upon allegations that he has interests, as surviving partner of the decedent, antagonistic to his duties as executor necessitating resort to another tribunal, where the estate should be represented by a disinterested person. *Becker v. Lawson*, 4 Dem. 341.

Who may apply.—A temporary administrator of a decedent's estate has not an absolute right to demand the judicial settlement of his account. As to whether he is an administrator within the meaning of the section, relating to an application for discharge from office, *quaere*. *Bible Society v. Oakley*, 4 Dem. 450.

It was held prior to the change made in this section that a testamentary trustee may apply to the court for leave to resign under former § 2814, but an executor could not thus resign, and could be relieved from his duties only by an application under this section. *Matter of Curtiss*, 15 Misc. 545, 37 N. Y. Supp. 586, aff'd 9 App. Div. 285. The section as amended seems to author-

ize a surrogate to issue a decree permitting an executor to resign.

Resignation of trust.—Trustee should not be permitted to resign his trust and be discharged and at the same time to retain in his possession a share of the trust property for any purpose. *Matter of Olmstead*, 24 App. Div. 190, 49 N. Y. Supp. 104.

Idem; grounds of resignation.—Contemplated residence in foreign country as sufficient reason for resignation as trustee. *Tilden v. Fiske*, 4 Dem. 357. The fact that an executor and testamentary trustee alleges she is too busy with her own private matters, and no longer desires to be busied with her trust, does not constitute a sufficient reason for permission to resign. *Baier v. Baier*, 4 Dem. 162.

Idem; refusal to accept trust.—A testamentary trustee derives his authority from the will. He may refuse to accept the trust, but if he does any act indicative of his acceptance, he may not thereafter resign without the consent of the *cestui que trust* or the court. *Matter of Kellogg* (1915), 214 N. Y. 460.

Where one of two or more trustees refuses to accept and execute a trust, the estate vests in the others, the same as though the trustee refusing to act were dead or had not been named, and the person named as trustee may not retract his refusal to accept the trust, after the others have entered upon their trust duties. *Matter of Kellogg* (1915), 214 N. Y. 460.

§ 2573. Proceedings thereupon.

If the surrogate entertains an application, made as prescribed in the last section, the proceedings thereupon must be the same as upon a petition for a judicial settlement of the petitioner's account; except that the surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition. Upon his fully accounting, and paying over all money which is found to be due from him and delivering over all books, papers and other property in his hands, either into the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, or removing him, and discharging him accordingly.

Source.—Former §§ 2690 and 2836. § 2690 originally revised from L. 1870, ch. 359, § 3, in part. § 2836 originally revised from L. 1837, ch. 460, §§ 52-55, and part of § 56.

Revisers' note.—The omitted words are deemed unnecessary. The section now applies to a guardian or trustee.

Resignation; facts to be shown.—The retirement of an executor must be permitted or disapproved accordingly as the surrogate shall or shall not find that such retirement is justified by sufficient reasons. *Tilden v. Fiske*, 4 Dem. 357. The surrogate cannot justly permit an executor or trustee to resign against the wishes of legatees or *cestuis que trustent*, unless good reasons are shown. *Baier v. Baier*, 4 Dem. 162.

An order removing an administrator may not be assailed by his sureties in an action brought by administrators appointed in his place, upon his official bond, because of irregularity not objected to by him. *Kelly v. West*, 80 N. Y. 139.

Contents of decree.—A decree under § 2569, removing an executor for refusal or neglect to obey a direction of the surrogate, should contain an adjudication or recital that the refusal to comply with the decree was willful, or that his failure or

neglect so to do was without good cause, one of which is a prerequisite to the granting of such a decree. *Matter of Hayes* (1916), 172 App. Div. 680, 158 N. Y. Supp. 527.

A decree or order under said section should be in the alternative, requiring the executor to comply with the former decree of the court within a time specified, and in default thereof that he be removed and his letters revoked. Hence, where a citation required an executor to show cause why an order should not be made directing him to countersign a check with his coexecutor for the payment of an indebtedness due to his coexecutor, "or upon refusal to be removed as such coexecutor," the executor should be afforded an opportunity to sign the check upon the court's deciding that it is his duty so to do before being removed. *Matter of Hayes* (1916), 172 App. Div. 680, 158 N. Y. Supp. 527.

§ 2574. In what cases letters may be revoked or trustee removed without a citation.

In either of the following cases, the surrogate may make a decree revoking letters testamentary, of administration or of guardianship, issued from his court, or removing a testamentary trustee, without a petition or the issuing of a citation:

1. Where the executor, administrator, guardian or trustee is not a resident of the state, or is absent therefrom, and upon being duly cited to account, neglects to appear upon the return of the citation, without showing a satisfactory excuse therefore, and the surrogate has not sufficient reason to believe that such an excuse can be made.

2. Where a citation or order issued to such a person, in a case prescribed by law, cannot be personally served upon him, by reason of his having absconded or concealed himself.

3. Where, by reason of his default in returning an inventory, or his neglect or refusal to obey an order, such a person has remained, for thirty days, committed to jail.

4. Where by the judgment of another court of competent jurisdiction the will under which letters have been issued is declared to be invalid.

5. Where an executor or administrator has failed to give the bond required to sell real estate, or to give a new bond, or a new surety when required to do so by an order or decree of the surrogate's court.

6. Where such person has been convicted of a felony.

7. Where such executor, administrator, guardian or trustee mingles the funds of such estate with his own or deposits the same with any person, association or corporation authorized to do business under the banking law, in an account other than as such executor, administrator, guardian or trustee.

Subd. 7 added by L. 1916, ch. 588, in effect Sept. 1, 1916.

Source.—§§ 2599 and 2691. § 2599 originally revised from L. 1837, ch. 460, § 28. § 2691 originally revised from R. S., pt. 2, ch. 6, tit. 3, § 19; L. 1846, ch. 288, § 1, in part.

Revisers note.—As a person convicted of a felony is not entitled to letters, when he has subsequently been convicted his letters should be revoked. The new matter adds cases provided for in other sections, but never included here. Made to include guardians and trustees.

Where executor has absconded.—Where the creditor's petition to revoke the husband's letters as executor—preliminary to the appointment of an administrator with the will annexed—states that he has absconded and is a fugitive from justice, the surrogate may hear the matters and revoke the husband's letters without issuing a citation. *Sutherland v. St. Lawrence Co.*, 42 Misc. 38, 85 N. Y. Supp. 696.

ARTICLE 4.

BONDS AND UNDERTAKINGS, APPROVAL, RECORDING, PROSECUTION AND DISCHARGE; SURETIES, THEIR RELEASE, RIGHTS AND OBLIGATIONS.

- | | |
|---|--|
| <p>§ 2575. Approval and recording of bonds and undertakings.</p> <p>2576. Deposit of securities to reduce penalty of bond.</p> <p>2577. When new bond or new sureties may be required.</p> <p>2578. Idem; how principal may be required to give a new bond, et cetera.</p> <p>2579. Sureties may apply to be released as to future breaches.</p> <p>2580. Release of old sureties on the giving of new.</p> <p>2581. Principal may substitute new bond or surety after judicial settlement.</p> | <p>§ 2582. Sureties liable for money, et cetera, received in another capacity.</p> <p>2583. When bond may be prosecuted.</p> <p>2584. Successor may prosecute official bond.</p> <p>2585. Action on official bond, when no successor appointed.</p> <p>2586. Discharge of bond or undertaking given on appeal, or for the performance of an act.</p> <p>2587. Application of this article to executors, et cetera, heretofore appointed.</p> |
|---|--|

§ 2575. Approval and recording of bonds and undertakings.

All bonds and undertakings filed in the surrogate's court must be approved as provided in section 812 of this act, except that in counties containing a city of the first or second class or a part of such city, the surrogate or surrogates may, in writing, designate a clerk in the office to approve all or any class of bonds or undertakings, and when approved such bonds and undertakings must be recorded.

Source.—New.

Revisers' note.—In large counties the signing of the approval on bonds by the surrogate is a great labor and could as well be done by a clerk.

Recording is required by § 247, County Law.

§ 2576. Deposit of securities to reduce penalty of bond.

In a case where a bond, or new sureties on a bond, may be required by a surrogate from an executor, administrator, guardian, or testamentary trustee, if the value of the estate or fund is so great that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money, belonging to the estate or fund, be delivered to the county treasurer, or chamberlain, or be deposited subject to the order of the executor, administrator, guar-

dian or testamentary trustee, countersigned by the surrogate, with a trust company, bank or safe deposit company. After such a deposit has been made, the surrogate may fix the amount of the bond with respect to the value of the remainder only of the estate or fund. A security thus deposited shall not be withdrawn from the custody of the depository, and no person other than the county treasurer, chamberlain or the proper officer of the depository, shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate. Such an order can be made in favor of such executor, administrator, guardian or testamentary trustee, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced, by payments or otherwise, that the penalty of the bond originally given will be sufficient in amount to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund.

Source.—Former § 2595, as amended by L. 1885, ch. 516; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—Changed to apply generally and to include the chamberlain in large cities.

References.—As to application of this section to a committee of the property of an incompetent person, see Code Civ. Pro., § 2337. See also *Wright v. Hayden*, 31 Misc. 116, 63 N. Y. Supp. 796.

The purpose of this section is to safeguard the securities of an estate, to relieve the executor, administrator, guardian, or trustee from the giving of an onerous bond, and to save the estate from the expense of paying the premiums accruing upon such

bond. *Matter of Butman*, 130 App. Div. 156, 114 N. Y. Supp. 533.

Reasonable commissions should be paid to a trust company with which securities have been deposited pursuant to this section. *Matter of Butman*, 130 App. Div. 156, 114 N. Y. Supp. 533.

An action is not maintainable by an administrator on a note deposited with a trust company pursuant to this section. *Ditmas v. McKane*, 92 App. Div. 344, 86 N. Y. Supp. 108.

§ 2577. When new bond or new sureties may be required.

Any person interested in an estate or fund, may present to the surrogate's court a petition, setting forth that a surety on a bond, taken as prescribed in this chapter, is *sufficient, or has removed or is about to remove, from the state, or is dead, or that the bond is inadequate in amount; and praying that the principal in the bond may be required to give a new bond, in a larger penalty, or new or additional sureties, as the case requires; or in default thereof, that he may be removed from his office, and that letters issued to him may be revoked. Where the bond so taken is that of a guardian, the petition may also be presented by any relative of the infant. When the bond is that of an executor, or administrator, the petition may also be presented by any creditor of the decedent. If it appears to the surrogate that there is reason to believe that the allegations of the petition are true, a citation shall issue to the principal on the bond to show cause why the prayer of the petition should not be granted.

Amended by L. 1915, ch. 622, in effect May 14, 1915.

Source.—Former § 2597 originally revised from L. 1837, ch. 460, §§ 25, 26 as amended by L. 1862, ch. 229, and § 35.

Revisers' note.—The language in the first line, "estate or fund," makes this section apply in case of a bond of a trustee.

* So in original.

Application.—Section not applicable to the committee of an incompetent person. *Wright v. Hayden*, 31 Misc. 116, 63 N. Y. Supp. 796. Penalty of administrator's bond increased so as to represent property not mentioned in the inventory and not proved to belong to the estate. *Matter of Goundry*, 57 App. Div. 232, 68 N. Y. Supp.

155. Proceedings under this section and § 2600 cannot be blended. *Bick v. Murphy*, 2 Dem. 251.

Death of a surety held not a "removal from the state," within the meaning of this section. *Stevens v. Stevens*, 2 Dem. 469.

§ 2578. *Id.*; how principal may be required to give a new bond, etc.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties; and if the allegations, or any of them, are found to be valid, he must make an order, requiring the principal on the bond to give new or additional sureties, or a new bond in a larger penalty, as the case requires, within such reasonable time, not exceeding twenty days, as the surrogate fixes; and directing that, in default thereof, he be removed or his letters be revoked.

Source.—Former §§ 2598 and 2599. § 2598 originally revised from L. 1837, ch. 460, § 27, as amended by L. 1866, ch. 229. § 2599 originally revised from L. 1837, ch. 460, § 28.

Revisers' note.—It is considered that five days is too short a time.

§ 2579. Sureties may apply to be released as to future breaches.

Any or all of the sureties on a bond taken as prescribed in this chapter, may present a petition to the surrogate's court praying to be released from responsibility on account of any future breach of the condition of the bond, and that the principal on the bond be required to give new sureties and to render and settle his account, and that a citation issue to said principal to show cause why the application should not be granted.

Source.—Former § 2600; originally revised from L. 1837, ch. 460, §§ 29, 30, as amended by L. 1862, ch. 229; L. 1876, ch. 278.

Revisers' note.—All citations will be to "show cause." Last sentence (of former section) unnecessary under general duty to issue citations.

Application.—This section does not authorize release of a surety on a bond given by an administratrix in order to sell real estate. *Matter of McCormick*, 25 Misc. 136, 54 N. Y. Supp. 926. Section does not apply to a bond executed in 1878. *Shook v. Goddard*, 2 Dem. 201. Proceedings under

this section and § 2577 cannot be blended. *Bick v. Murphy*, 2 Dem. 251.

Decree to be entered on the release of a surety under §§ 2579, 2580, see *Matter of Sogaard*, 39 Misc. 519, 80 N. Y. Supp. 379.

§ 2580. Release of old sureties on the giving of new.

Upon the return of the citation issued as prescribed in the last section, if the principal on the bond does not file a new bond in the usual form with new sureties to the satisfaction of the surrogate, the surrogate must make an order requiring said principal to file such new bond within such reasonable time, not exceeding twenty days, as the surrogate fixes. Should the principal file such new bond upon the return of such citation or within the time fixed by such order, the surrogate must thereupon make a decree releasing the petitioner from liability upon the bond for any subsequent act or default of the principal, and requiring the principal to render and settle his account to and including the date of such decree, and to file such ac-

count within a time fixed, not exceeding twenty days from such date; otherwise he must make a decree removing such principal or revoking his letters.

Source.—Former § 2601, as amended by L. 1901, ch. 524; originally revised from L. 1837, ch. 460, §§ 31, 32.

In general.—Surety on old bond may be released from liability for future acts or neglects; motive in seeking relief is unimportant. <i>Lewis v. Watson</i>, 5 Redf. 43; <i>Stevens v. Stevens</i>, 3 Redf. 507.	The penalty prescribed by this section, in the event that new sureties are not furnished is the revocation of the letters. <i>Matter of McCormick</i>, 25 Misc. 136, 54 N. Y. Supp. 926.
--	---

§ 2581. Principal may substitute new bond or surety after judicial settlement.

Whenever there is pending in surrogate's court a proceeding for the intermediate judicial settlement of the account of an executor, administrator, guardian or testamentary trustee who has been required to file an official bond, such principal may ask in such proceeding, upon good cause shown, for leave to file a new bond or a new surety. If the surrogate grants such application he shall thereupon fix the penalty of the new bond, or the amount in which the new surety must justify, and upon the filing and approval of such new bond, or of the undertaking of the new surety, the surrogate may provide in the decree of judicial settlement that the former bond or surety be discharged from and after the date of such decree from all liability, except upon appeal therefrom, as to all matters embraced in said account and decree.

Source.—New.

Revisers' note.—While there is now a provision that the surety may ask for a new bond, there is none that the principal may do so. This change will also enable the principal to reduce the penalty in some cases.

Accounting can be had at any time after one year, or expiration of notice to creditors. New § 2729.

§ 2582. Sureties liable for money, etc., received in another capacity.

A person to whom letters are issued is liable for money or other personal property of the estate which was in his hands, or under his control, when his letters were issued, in whatever capacity it was received by him, or came under his control. Where it was received by him, or came under his control, by virtue of letters previously issued to him in the same or another capacity, an action to recover the money, or damages for failure to deliver the property, may be maintained upon both official bonds; but, as between the sureties upon the official bond given upon the issue of the prior letters, and those upon the official bond given upon the issue of the subsequent letters, the latter are liable over to the former.

Source.—Former § 2596; section new as originally inserted in Code of Civ. Proc.

Liability of sureties.—Action cannot be maintained against the sureties on the bond of a general guardian until there has been an accounting before the surrogate. <i>Rouse v. Payne</i>, 120 App. Div. 687, 105 N. Y. Supp. 549. As to liability of surety company on a guardian's bond for money of the infant left in the guardian's possession at the time of his appointment, see <i>Matter of Fardette</i>, 86 App. Div. 50, 83 N. Y. Supp. 521. The sureties of a	general guardian are liable although the guardian never in his capacity as administrator paid over the money to himself as general guardian. <i>Matter of Noll</i>, 10 App. Div. 356, 41 N. Y. Supp. 765, aff'd 154 N. Y. 765. Sureties on bond of co-administrators liable for joint acts of principals and for the individual defaults of each. <i>Nanz v. Oakley</i>, 120 N. Y. 84. Must be property of the estate in question. <i>Matter of Maybee</i>, 40 Misc. 518, 82 N. Y. Supp. 809.
---	--

Liability not discharged by decree settling administrator's accounts and directing him to retain balance until appointment of a committee for a lunatic, the only heir-at-law and next of kin of the intestate. *Betts v. Avery*, 46 App. Div. 342, 61 N. Y. Supp. 525.

§ 2583. When bond may be prosecuted.

Where an execution, issued upon a surrogate's decree, against the property of an executor, administrator, testamentary trustee, or guardian, has been returned wholly or partly unsatisfied, an action to recover the sum remaining uncollected may be maintained upon his official bond by and in the name of the person in whose favor the decree was made. If the principal debtor is a resident of the state, the execution must have been issued to the county where he resides.

Source.—Former § 2607; originally revised from L. 1836, ch. 460, § 65.

Action on bond.—Provisions of code relating to actions on bonds of administrators, etc., considered. *Hood v. Hayward*, 124 N. Y. 1. To support action under above section execution against principal must have been returned unsatisfied. *Hood v. Hayward*, 124 N. Y. 1; *Matter of Fahy*, 30 Misc. 377, 63 N. Y. Supp. 1031. An assignee of a claim and judgment against an administratrix may sue on her bond. *Bamberger v. American Surety Co.*, 48 Misc. 221, 96 N. Y. Supp. 665.

No leave of surrogate necessary before bringing action against sureties on bond. *Scofield v. Adriance*, 1 Dem. 196. Action on bond may be maintained by a plaintiff who was a party to the bond. *Boyle v. St. John*, 28 Hun 454. As to prosecution of bond, see *Nanz v. Oakley*, 122 N. Y. 631; *Hood v. Hayward*, 124 N. Y. 1; *Sperb v. McCoun*, 110 N. Y. 605; *Altman v. Hofeller*, 83 Hun 426, 31 N. Y. Supp. 881, rev'd 152 N. Y. 498.

Default of principal must be shown. *Haight v. Brisbin*, 100 N. Y. 219. Official default is all that is required. *Power v.*

Speckman, 126 N. Y. 354. Liability of surety on bond of administrator for judgments against him in favor of his intestate, see *Keegan v. Smith*, 60 App. Div. 168, 70 N. Y. Supp. 260, aff'd 172 N. Y. 624.

Guardian and ward.—General guardian may maintain action against sureties upon bond of deceased general guardian for moneys adjudged to be due infant upon involuntary accounting by administrator of deceased guardian. *Van Zandt v. Grant*, 175 N. Y. 150. When the return unsatisfied of an execution under the surrogate's decree against a guardian is not a condition precedent to an action by the ward against the sureties on the guardian's bonds. *Allen v. Kelly*, 55 App. Div. 454, 67 N. Y. Supp. 97. Sureties on guardian's bond concluded by a decree against his executrix. *Martin v. Hann*, 32 App. Div. 602, 53 N. Y. Supp. 186.

Trustee.—Sureties of a defaulting non-resident trustee, when liable without her accounting, see *Yates v. Thomas*, 35 Misc. 552, 71 N. Y. Supp. 1113.

§ 2584. Successor may prosecute official bond.

Where a successor of an executor, administrator, guardian or testamentary trustee has been appointed, he may maintain an action upon his predecessor's official bond, in which he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury, sustained by the estate of the decedent, infant or beneficiary as the case may be, by any act or omission of the principal.

The money recovered in such an action shall be part of the estate or fund in the hands of the successor and must be distributed or otherwise disposed of accordingly; except that a recovery for an act or omission, respecting a right of action, or other property, appropriated by law for the benefit of the husband, wife, family, or next of kin of a decedent, or disposed of by a will for the benefit of any person is for the benefit of the person or persons so entitled thereto.

A decree against such decedent's executor, or administrator, rendered upon an accounting under section 2725 of this chapter, has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during decedent's life time.

Source.—Former §§ 2606 and 2608. § 2606, as amended by L. 1884, ch. 399; L. 1891, ch. 175; L. 1897, ch. 248; L. 1901, ch. 409; L. 1902, ch. 349. § 2608 originally revised from R. S., pt. 2, ch. 6, tit. 3, § 21.

Revisers' note.—Part of § 2606 inserted here as new matter. Section changed to include guardians and trustee.

Defense of sureties.—Sureties on administrator's bond remain liable until they show payment by him, and when the sole defense is a technical and constructive transfer of liability from the administrator, as such, to himself as guardian, this must be clearly established. *Potter v. Ogden*, 136 N. Y. 384. Sureties of a defaulting nonresident trustee, when liable without her accounting. *Yates v. Thomas*, 35 Misc. 552, 71 N. Y. Supp. 1113.

Action by an administrator *de bonis non* against the surety on his predecessor's bond. *Dunne v. American Surety Co.*, 43 App. Div. 91, 59 N. Y. Supp. 429.

Leave of surrogate.—Leave of surrogate not necessary before bringing action

against sureties. *Scofield v. Adriance*, 1 Dem. 196. Action can be brought by successor upon the bond of his predecessor without the return of an execution unsatisfied; not necessary for successor to obtain leave to sue on bond. *Hood v. Hayward*, 124 N. Y. 1, mod'g 48 Hun 330, 1 N. Y. Supp. 566.

Where letters of administration have been revoked for the failure of the administrator to account a judicial determination of his liability is not a condition precedent to the action by his successor upon his official bond. *Fassbner v. American Surety Co.*, 66 Misc. 6, 122 N. Y. Supp. 442.

§ 2585. Action on official bond, when no successor appointed.

Where an executor, administrator, guardian or testamentary trustee has been removed, or his letters have been revoked, and no successor is appointed, any person aggrieved may, upon obtaining an order from the surrogate granting him leave so to do, maintain an action upon the official bond of the person so removed or whose letters have been revoked in behalf of himself and all others interested; in which the plaintiff may recover any money, or the full value of any other property, received by the principal on the bond, and not duly administered by him, and to the full extent of any injury sustained by the estate of the decedent, infant or beneficiary by any act or omission of the principal. The money recovered in such an action must be paid, by the sheriff or other officer who collects it, into the surrogate's court to be paid to a successor when appointed and distributed to the persons entitled thereto.

Source.—Former § 2609; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—Prior section provides for proceeding by successor. No one but successor should maintain the proceeding, but it may be well to retain the provision.

Application.—If a judgment, entered against an executor or administrator after the revocation of his letters, can be enforced against decedent's estate, the remedy is under this section. *Breslin v. Smith*, 3 Dem. 251. Not applicable to the cause of an administrator *de bonis non*. *Dunne v. American Surety Co.*, 43 App. Div. 91, 59 N. Y. Supp. 429.

Who may maintain action.—One admin-

istrator, after the removal of his co-administrator, may sue the sureties upon the bond on which he is an obligor. *Boyle v. St. John*, 28 Hun 454; *Sperb v. McCoun*, 110 N. Y. 605. General guardian may maintain an action on administrator's bond. *Prentiss v. Weatherly*, 68 Hun 114, 22 N. Y. Supp. 680, aff'd 144 N. Y. 707. Action on bond of executor acting as trustee. *Cluff v. Day*, 124 N. Y. 195.

§ 2586. Discharge of bond or undertaking given on appeal, or for the performance of an act.

Any party to a bond or undertaking given upon appeal, or to insure the performance of an act by himself or another, as to which no accounting is

required by law for its discharge, may apply to the surrogate's court, upon notice to all parties interested in the subject-matter, or in the proceeding in which the bond or undertaking was given, for the discharge of the obligation or liability, in whole or in part. The court may thereupon by order certify that the whole obligation or liability on the bond or undertaking is discharged, or may direct that such obligation or liability be discharged in such amount as may be just, and that the bond or undertaking shall thereafter have the same force and effect as if given in terms for the remaining obligation or liability.

Source.—New.

Revisers' note.—There has heretofore been no provision for discharging an appeal bond, or one given for the performance of a definite act.

§ 2587. Application of this article to executors, etc., heretofore appointed.

The provisions of this article apply to an executor, administrator, or guardian, to whom letters have been issued, and to a testamentary trustee whose trust has been created before this chapter takes effect; except that it does not affect, in any manner, the liability of the sureties on a bond executed before this chapter takes effect.

Source.—Former § 2610; section new as originally inserted in Code of Civ. Proc.

TITLE III.

Granting letters of administration, probating and construing wills; issue of letters testamentary, and ancillary letters testamentary and of administration; appointment and qualification of testamentary trustee; appointment and qualification of general, ancillary and testamentary guardian, and guardian by deed; annual accounts by such guardians.

- ARTICLE 1. Grant of letters of administration, and qualification of administrators; public and temporary administrators; administration with the will annexed and de bonis non.
2. Production and probate of wills; objections and their trial; construction of wills; qualification of executors; grant of ancillary letters testamentary and of administration; qualification of testamentary trustee; security from testamentary trustees and executors acting as trustees.
 3. Appointment and qualification of general, ancillary and testamentary guardians, and guardians by deed; filing and examining guardians' annual accounts.

ARTICLE 1.

GRANT OF LETTERS OF ADMINISTRATION, AND QUALIFICATION OF ADMINISTRATOR; PUBLIC AND TEMPORARY ADMINISTRATOR; ADMINISTRATOR WITH THE WILL ANNEXED, AND DE BONIS NON.

- | | |
|---|--|
| <p>§ 2588. Who entitled to letters of administration.</p> <p>2589. Application for letters.</p> <p>2590. Citation; proceedings upon return thereof.</p> <p>2591. Administrator's bond.</p> <p>2592. Limited letters may be issued; bond.</p> <p>2593. County treasurer appointed administrator to qualify and have fees.</p> <p>2594. Public administrator of Kings county.</p> <p>2595. Public administrator of Erie county.</p> <p>2596. When and how temporary administrator may be appointed.</p> <p>2597. General powers, et cetera, of temporary administrator.</p> | <p>§ 2598. Idem; as to requiring creditors to present claims.</p> <p>2599. Idem; as to paying debts.</p> <p>2600. Idem; as to real property.</p> <p>2601. Special powers of temporary administrator of absentee; may provide for family.</p> <p>2602. Notices required by this article; how given.</p> <p>2603. Letters of administration with will annexed; when and to whom granted.</p> <p>2604. Idem; renunciation or exclusion of persons having prior right.</p> <p>2605. How executor or administrator with the will annexed qualifies.</p> <p>2606. Appointment of administrator de bonis non.</p> |
|---|--|

§ 2588. Who entitled to letters of administration.

Administration in case of intestacy must be granted to the persons entitled to take or share in the personal property, who are competent and will accept the same, in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the grandchildren.
4. To the father.
5. To the mother.
6. To the brothers.
7. To the sisters.
8. To any other next of kin entitled to share in the distribution of the

estate, preference being given to the person entitled to take the largest share in the estate, except as hereinafter provided.

If a person entitled to take all the personal estate is an infant, or an incompetent, or has died, his guardian, committee or legal representative, as the case may be, shall have a prior right to letters in his place and stead.

If all the persons entitled to take the personal estate are infants, or adjudged incompetents, or, if no adult or competent person entitled to take or share in the estate will accept the same, letters may be granted to the general guardian of an infant or to the committee of an incompetent, in the place of such infant or incompetent.

If no person entitled to take or share in the estate will accept the same or an appointment is not made by consent as hereinafter provided, then administration shall be granted as follows:

a. To the public administrator.

b. To the county treasurer of the county, or to the petitioner, in the discretion of the surrogate.

c. To any other person or persons.

If several persons have an equal right to administration, they must be preferred in the following order: First, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons. Administration may be granted to one or more competent persons, jointly with, and upon the application of, a person entitled; or to a competent person or persons not entitled, upon the consent of all of the persons entitled to take or share in the estate who are within this state and competent, which consent must be in writing, and filed in the office of the surrogate. For the purposes of this section a trust company or other corporation authorized to act as administrator shall be included in the word "person."

Source.—Former § 2660, as added by L. 1893, ch. 686 and amended by L. 1894, ch. 503; L. 1897, ch. 177; L. 1909, ch. 65; L. 1913, ch. 403; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 27-29, 33, 34; L. 1867, ch. 782, § 6.

Revisers' note.—This now gives preference to public administrator over creditors. Subd. c as amended amply provides for every other interested person, including undertaker, creditor and one interested in action about to be brought. Former subd. 9 transferred to § 2643, adm. c. t. a. (new § 2603).

The general intention of the changes is to give only persons interested the right to administer. The clause after subd. 8 gives the right to the representative of a person who takes the whole estate.

The second sentence after subd. 8 is intended to give a guardian or committee the right to letters where there is no adult or competent person entitled to them, or who will accept, but otherwise not.

The new matter (in the last paragraph) is intended to allow competent and resident parties who take, to consent to have an outsider appointed.

Construction and effect.—The word "intestacy," as used in this section, refers to the person and not to the specific property. *Matter of Maccaffil*, 57 Misc. 264, 107 N. Y. Supp. 1115. No administrator can be appointed unless the person dies intestate. *Matter of Ogden*, 41 Misc. 158, 75 N. Y. Supp. 932. Former §§ 2660 and 2661 (now §§ 2588 and 2564) considered with reference to § 2643 (now § 2603) as to administration with the will annexed. *Matter of Moehring*, 24 Misc. 418, 53 N. Y. Supp. 730; *Matter of Goggin*, 43 Misc. 233,

88 N. Y. Supp. 557; *Matter of Haug*, 29 Misc. 36, 60 N. Y. Supp. 382. Section as amended by the act of 1894 construed. *Matter of Ireland*, 47 Misc. 545, 95 N. Y. Supp. 1079.

Priority in right to letters of administration under this section is not affected by the fact that the person having the prior right is not a resident of this state, if he be a citizen of the United States. *Matter of Campbell*, 123 App. Div. 212, 108 N. Y. Supp. 281, *aff'd* 192 N. Y. 312.

The surrogate has no discretion to ignore the order of priority unless by reason of one of the grounds of incompetency specified in § 2564. *Matter of Campbell*, 123 App. Div. 212, 108 N. Y. Supp. 281, aff'd 192 N. Y. 312.

The surrogate must grant letters to the persons entitled thereto who are competent and willing to serve in the order provided by this section. *Matter of Brinckmann* (1915), 89 Misc. 41, 152 N. Y. Supp. 542.

Proof of priority.—On an application for letters of administration made on the petition of one alleging that he is a surviving son of the decedent to which objections were filed by the widow of the intestate, alleging that the petitioner is not a son of the decedent, the petitioner has not sustained the burden of proving that he is one of the persons entitled to apply for letters of administration, and the application must be dismissed. *Matter of Greco* (1915), 90 Misc. 241, 154 N. Y. Supp. 306.

Prior right of son, named as executor, to letters as against a granddaughter is not defeated by the fact that he has not proceeded with the probate of the will. *Matter of Dressel* (1918), 102 Misc. 648, 170 N. Y. Supp. 151.

Where the surrogate has before him two rival petitions, he may name a temporary administrator, and even choose one not interested, rather than give to either competitor the advantage of possession. *Matter of Durban* (1916), 175 App. Div. 688, 160 N. Y. Supp. 945.

Persons entitled to administer.—A release by a wife, in an agreement of separation, of all her rights in her husband's property does not affect her right to administer upon his property. *Matter of Wilson*, 92 Hun 318, 36 N. Y. Supp. 882.

Minor child preferred to public administrator of Kings county. *Matter of Hudson*, 27 Misc. 539, 75 N. Y. Supp. 1053. Relatives not entitled to share; entitled to administer before the public administrator. *Matter of Lowenstein*, 29 Misc. 722, 62 N. Y. Supp. 819. As to public administrator acting as general administrator, see *Tymon v. Cromwell*, 2 Dem. 650.

Father not entitled to administration where widow and child died subsequent to decedent. *Matter of Seymour*, 33 Misc. 271, 68 N. Y. Supp. 638. Half brother entitled to letters in preference to sister of the whole blood. *Matter of Moran*, 5 Misc. 176, 25 N. Y. Supp. 702. Niece preferred to grandnephew. *Matter of Hawley*, 37 Misc. 667, 76 N. Y. Supp. 461.

Creditor's right. *Matter of Barr*, 38 Misc. 355, 77 N. Y. Supp. 935. Appointment of a nearest friend. *Matter of Paolo*, 36 Misc. 514, 73 N. Y. Supp. 1062.

A sister of decedent who was not entitled to share in her personal estate because the deceased was survived by infant children, cannot have letters of administration granted to her as the right

to administer is given only to persons interested. *Matter of Elder* (1914), 87 Misc. 79, 150 N. Y. Supp. 114.

Idem; cousins.—A cousin of decedent whose father and mother were respectively brother and sister of decedent's father and mother, has no statutory priority in the grant of letters of administration over another cousin, where the relationship of both to decedent proceeds from the same ancestors, to wit, grandparents. *Matter of Tator* (1913), 81 Misc. 83, 141 N. Y. Supp. 927.

The provision of this section that in the appointment of administrators, relatives of the whole blood shall be preferred to those of the half blood, is broad enough to include cousins. *Matter of Tator* (1913), 81 Misc. 83, 141 N. Y. Supp. 927.

Idem; right of widow absolute.—Where an instrument purporting to be a last will and testament is denied probate, the right of the decedent's widow to letters of general administration upon his estate is absolute. *Matter of Judson* (1915), 92 Misc. 136, 156 N. Y. Supp. 270.

Public administrator and creditor; priority.—Upon an application by a creditor of the decedent who was a citizen of Switzerland, and left no resident next of kin, for letters of administration, the public administrator demanded that they be granted to him because by statute he had a prior right thereto. *Held*, that, while the creditor may begin proceedings for appointment as administrator, he will be appointed only in the event of the failure or refusal of the public administrator to accept, or after an order has been made upon his application excusing him from acting, and that the latter has a right to letters of administration prior to that of the creditor. *Matter of Morel* (1918), 103 Misc. 555, 171 N. Y. Supp. 759.

A marriage is always presumed to have been duly solemnized, and where the marriage of decedent is established by those who were actually present at the marriage ceremony, an application by his wife to revoke letters granted to his mother *ex parte*, will be granted where the mother fails to sustain the burden of proof of showing the invalidity of the marriage. *Matter of Simms* (1918), 106 Misc. 118, 172 N. Y. Supp. 670.

Consent of persons entitled.—Administration may be granted to a competent person not entitled thereto upon the written consent of all persons entitled to take or share in the estate who are within the state and competent, but such consent must be filed in the office of the surrogate. *Matter of Murphy* (1914), 87 Misc. 564, 151 N. Y. Supp. 475.

A renunciation of the right to letters of administration is not such a "consent" as is contemplated by this section. *Matter of Murphy* (1914), 87 Misc. 564, 151 N. Y. Supp. 475.

Aliens.—Consul-general of Italy must ad-

minister on the estate of an Italian subject conformably with our laws. *Matter of Logiorato*, 34 Misc. 31, 69 N. Y. Supp. 507.

An alien brother residing in this state is entitled to letters of administration. *In re Pulver's Estate* (1914), 149 N. Y. Supp. 599.

Idem; right of resident brother whose father is non-resident alien.—Administration under this section is to be given only to those relatives of a deceased having an actual right at the time of his death to share in the distribution of his estate. Hence a resident brother of deceased, whose father is a non-resident alien, not being entitled to share in the distribution of the decedent's personal estate is not entitled to letters in preference to the public administrator. *Matter of Kroog* (1914), 84 Misc. 676, 147 N. Y. Supp. 887.

Competent person may be joined.—The provision of this section that refers to joining a competent person with one entitled to letters of administration in case

of intestacy applies to letters of administration with the will annexed. And where the guardian of the sole legatee has been appointed administratrix with the will annexed, letters may be issued to her father on her written consent. *Steele v. Leopold*, 135 App. Div. 247, 120 N. Y. Supp. 569.

Applicability of section to Bronx county.

—The provisions of this section are made applicable to the county of Bronx by the Bronx county act (laws of 1912, chap. 548), and the public administrator of Bronx county exercises the same powers as the public administrator of New York county. *Matter of Kroog* (1914), 84 Misc. 676, 147 N. Y. Supp. 887.

Public administrator.—Where the widow, who has since died, of decedent was not entitled to take all the personal estate, she does not come within the provisions of subd. 8; and the public administrator is entitled to letters *de bonis non*. *Matter of Friedleben* (1918), 103 Misc. 558, 171 N. Y. Supp. 761.

§ 2589. Application for letters.

A creditor, or person interested in the estate of an intestate, or interested in an action brought or about to be brought in which the intestate, if living, would be a proper party, may present to the surrogate's court having jurisdiction, a petition, praying for a decree awarding letters of administration, either to him, or to another person. A citation shall not be issued, and a decree shall not be made where a citation is not necessary, until the petitioner shows to the satisfaction of the surrogate, the existence of all the jurisdictional facts, and particularly that the decedent left no will.

Source.—Former § 2662, as amended by L. 1893, ch. 686; L. 1909, ch. 184; consolidated from former §§ 2660, 2661, the former new when originally inserted in the Code of Civ. Proc. and the latter originally revised from R. S., pt. 2, ch. 6, tit. 2, § 26.

§ 2590. Citation; proceedings upon return thereof.

Every person, being a resident of the state and competent, who has a right to administration prior or equal to that of the petitioner and who has not renounced, must be cited upon a petition for letters of administration; and where the petitioner is not entitled to share in the distribution of the estate there must also be cited all resident infants and adjudged incompetents who are so entitled. The surrogate may, in his discretion, issue a citation to non-residents, or those who have renounced, or to any or all other persons interested in the estate. Where it is not necessary to cite any person, a decree, granting letters may be made on presentation of the petition. Any person who has a right to administration, prior or equal to that of the petitioner, may renounce his right by a written instrument, acknowledged, or proved, and duly certified which must be filed in the surrogate's office; except that a public administrator or county treasurer may not renounce his right and may only be excused from acting as such upon his motion duly made and upon an order made and entered thereupon by the surrogate.

Source.—Former § 2663, as amended by L. 1893, ch. 686; L. 1911, ch. 431; consolidated from former §§ 2662, 2663, 2664, 2665, 2666. § 2662 was new as originally inserted in Code of Civ. Proc. § 2663 was originally revised from R. S., pt. 2, ch. 6, tit. 2, § 37. § 2664 was originally revised from R. S., pt. 2, ch. 6, tit. 2, § 35, in part. § 2665 was new as originally inserted in Code of Civ. Proc. § 2666 was originally revised from L. 1878, ch. 298, § 2.

In general.—Failure to give proper notice is not a jurisdictional defect, but a mere irregularity, of which none can take advantage except such as are entitled to the notice. *Matter of Brewster*, 5 Dem. 259. See *Matter of Brinckmann* (1915), 89 Misc. 41, 152 N. Y. Supp. 542.

When a non-resident is entitled to administer the estate of an intestate as a matter of right and he is without fault on his part, the right cannot be taken away from him without notice. *Matter of Campbell*, 192 N. Y. 312, aff'g 123 App. Div. 212, 108 N. Y. Supp. 281.

Renunciation.—Agreement of separation between husband and wife did not constitute a renunciation. *Matter of Wilson*, 92 Hun 318, 36 N. Y. Supp. 882. See *Casey v. Gardiner*, 4 Bradf. 13.

Parties cited.—Not required where residuary legatee applies for letters of administration with will annexed. *Matter of Richardson*, 8 Misc. 140, 29 N. Y. Supp. 1079. As to appointment of public administrator without citing relatives of intestate, see *Matter of Lowenstein*, 29 Misc. 722, 62 N. Y. Supp. 819. Notice to married sister not necessary. *Matter of Curser*, 89 N. Y. 401.

§ 2591. Administrator's bond.

Before letters are issued to an administrator he must file his official oath, and execute to the people of the state and file with the surrogate, the joint and several bond of himself and two or more sureties, in a penalty fixed by the surrogate, not less than the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law, or by reason of a cause of action which existed in behalf of decedent; except that where the person or persons about to be appointed is or are entitled to the whole estate, the surrogate may dispense with a bond or fix the penalty at such sum as will adequately protect the rights of all creditors. The sum to be fixed as the amount of the penalty must be ascertained by the surrogate, by the examination on oath of the applicant or any other person, or otherwise, as the surrogate thinks proper. The bond must be conditioned that the administrator will faithfully discharge the trust reposed in him as such and obey all lawful decrees and orders of the surrogate's court touching the administration of the estate committed to him.

In cases where the husband or wife and all the next of kin of the decedent or all the persons entitled to share in the estate consent, the penalty of the bond need not exceed double the amount of the claims of the creditors, against the estate, presented to the surrogate, pursuant to a notice to be published once a week for four weeks in such newspaper or newspapers as the surrogate shall direct, reciting an intention to apply for letters under this provision, and notifying creditors to present their claims to the surrogate's court on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof; but no bond so given shall be for less than five thousand dollars; and such bond may be increased by order of the surrogate for cause shown. Pending such application, no temporary administrator shall be appointed, except on petition of such next of kin.

Source.—Former § 2664, as amended by L. 1893, ch. 686 (formerly § 2667); originally revised from R. S., pt. 2, ch. 6, tit. 2, § 42.

Revisers' note.—Gives discretion to reduce or dispense with bond in many cases where it is of no benefit.

Notice omission of "twice" in fixing the bond. On account of necessary payments of expenses and debts at once it would seem that a bond in the value of the property would be sufficient and would save estates much money.

The changes give the surrogate discretion as to the number and location of the papers, and make the section of practical value. Heretofore it was so expensive that it was seldom used.

In general.—It would be contrary to the policy of this state to permit a legacy to fall into the hands of an administrator who had not given bonds for the faithful discharge of his duties. *Matter of Schmid*, 116 App. Div. 706, 102 N. Y. Supp. 80.

Construction and effect.—Section considered with reference to former § 2645. *Peck v. Peck*, 3 Dem. 548; *Curtis v. Williams*, 3 Dem. 63.

Bond of administrator with will annexed appointed to succeed another administrator, how regulated. *Estate of Nesmith*, 6 Dem. 333; *Sutton v. Weeks*, 5 Redf. 353. As to bond of administrator *de bonis non*, see *Sutton v. Weeks*, 5 Redf. 353. As to bond in case of ancillary letters, see *Matter of Prout*, 128 N. Y. 70.

No bond required to be given by foreign consul where there are no creditors. See *Matter of Fatosini*, 33 Misc. 18, 67 N. Y. Supp. 1119.

Amount of bond.—The amount of the penalty of an administrator's bond is fixed not with regard to the debts the intestate owed but the value of his personal estate. *Matter of Govan*, 2 Misc. 291, 23 N. Y. Supp. 766. As to amount in which sure-

ties must qualify, see *Sutton v. Peck*, 5 Redf. 358; *Estate of Burdett*, 5 Law Bull. 32; *Matter of Thompson*, 6 Dem. 56.

The penalty of bond increased so as to represent property not proved to belong to the estate. *Matter of Goundry*, 57 App. Div. 232, 68 N. Y. Supp. 155.

Liability on bond.—*Williams v. Kiernan*, 25 Hun 355; *Johnson v. Smith*, 25 Hun 171; *Harrison v. Clark*, 87 N. Y. 572, aff'g 20 Hun 404; *Deobold v. Opperman*, 111 N. Y. 531; *Potter v. Ogden*, 47 St. Rep. 190, 19 N. Y. Supp. 594; *Loop v. Northrup*, 13 N. Y. Supp. 144; *Power v. Hermester*, 12 N. Y. Supp. 25; *Sperb v. McCoun*, 110 N. Y. 605; *Kelly v. West*, 80 N. Y. 139; *Bloom v. Burdick*, 1 Hill 130; *Gerould v. Wilson*, 16 Hun 530, aff'd 81 N. Y. 573; *Brewster v. Balch*, 41 N. Y. Super. Ct. 63; *Halsted v. Hayman*, 3 Bradf. 426; *Sutton v. Weeks*, 5 Redf. 353. Fact that no bond was filed on the issuing of letters cannot be set up as a defense to an action brought by an administrator. *Sullivan v. Tioga R. Co.*, 44 Hun 304, aff'd 112 N. Y. 643.

Form of bond, see *Gerould v. Wilson*, 81 N. Y. 573, aff'g 16 Hun 530; *Farley v. McConnell*, 7 Lans. 428, aff'd 52 N. Y. 630.

§ 2592. Limited letters may be issued; bond.

Where a right of action is granted to an executor or administrator by special provision of law, or it is alleged that a cause of action existed in behalf of decedent, and it appears to be impracticable to give a bond sufficient to cover the probable amount to be recovered in the case of an executor, or such probable recovery and the existing personal estate in the case of an administrator, the surrogate may dispense with a bond, or fix the penalty at such sum as he shall deem sufficient, and issue letters which as to such cause of action shall be limited to the prosecution thereof, and restraining the executor or administrator from compromise of the action or the enforcement of any judgment recovered therein until the further order of the surrogate made upon filing satisfactory security.

Source.—Former § 2664, in part. See source note, § 2591, *supra*.

The object of this section is to protect the persons ultimately entitled to recovery from loss through the fault or dishonesty of the plaintiff. *Matter of Atterbury* (1918), 222 N. Y. 355.

Scope of section.—A proceeding to vacate certain satisfactions of judgments recovered for the death of the intestate for negligence is within the purview of this section and limited letters of administration will be issued entitling the administrator to institute the proceeding. *Cun-*

ningham v. City of New York (1913), 141 N. Y. Supp. 1000.

Limited letters of administration may be granted under this section and § 2559 for the purpose of permitting an administrator to procure any cause of action; the authority to issue such letters is no longer restricted to causes arising under § 1902. *Matter of Pelotti* (1914), 87 Misc. 81, 150 N. Y. Supp. 421.

Limited letters of administration do not restrict the person to whom they are

granted to the prosecution of any particular person for causing the death of the intestate. *Matter of Halligan*, 50 Misc 481, 100 N. Y. Supp. 622. As to limitation of administrator's powers as set forth in his letters, see *Matter of Lowmann v. Elmira, C. & N. R. Co.*, 85 Hun 188, 32 N. Y. Supp. 579, *aff'd* 154 N. Y. 765; *Estate of Mallon*, 13 Civ. Pro. Rep. 205; *Estate of Le Roy*, 16 Civ. Pro. Rep. 343.

Modified security.—As to effect of modified security, see *Kirwin v. Malone*, 45 App. Div. 93, 61 N. Y. Supp. 844. As to proper practice where modified security has been accepted, see *Matter of Malloy*, 1 Dem. 421.

§ 2593. County treasurer appointed administrator to qualify and have fees.

A county treasurer appointed administrator of an estate shall qualify in the manner prescribed in section 2591; shall be vested with all the powers and rights of other administrators and be subject to the same duties and obligations; and shall be allowed the same fees for his services as are now allowed by law to administrators, which fees shall be in addition to the salary and fees now allowed by law to such county treasurer. Such treasurer may employ an attorney to act for him as such administrator other than the one, if any, appointed to act as the county attorney or the official attorney of such treasurer.

Source.—New.

Revisers' note.—This section in view of the amendment to former §§ 2660, 2663 (new §§ 2590, 2591), giving the county treasurer preference over creditors has been suggested by the state comptroller, who thinks that some responsible official like the county treasurer should be required to act in all cases.

Sections 2665, 2666, 2667, 2668 concerning administration by county treasurer to be repealed. They were unnecessarily technical and complicated. He is now put upon same footing as any other administrator.

Public administrator of Bronx county, commissions. *Matter of Hammer* (1916), 94 Misc. 36, 158 N. Y. Supp. 981.

§ 2594. Public administrator of Kings county.

The surrogate of the county of Kings shall, on or before the nineteenth day of October, nineteen hundred and eleven, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of said county to hold office for the term of five years unless sooner removed for cause, the said term beginning on the nineteenth day of October, nineteen hundred and eleven. In case of a vacancy in said office by reason of death, resignation or otherwise said surrogate shall fill the same by appointing a suitable person as public administrator for the full term of five years from the date of such appointment and qualification. Before entering upon the performance of the duties of his office the person so appointed must take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond with sureties to be approved by a justice of the supreme court, to the county of Kings, in a penal sum of fifty thousand dollars, conditioned for the faithful discharge of all the duties of his office, and that he will fully and correctly account for any pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond must be filed with the clerk of the county. He shall be entitled to retain from all moneys or property of any intestate that come into his hands after deducting all actual and necessary expenses the same commissions as are now allowed by law to executors or administrators, and he shall receive a salary for his services to be fixed by the board of estimate

and apportionment of the city of New York upon the recommendation of the surrogate of the county of Kings, the same to be raised and paid each year in the same manner as are other county charges. The public administrator shall not receive to his own use any fees or emoluments in addition to his salary, and he shall pay into the treasury of the city of New York all commissions and costs received by him from any source whatever; such payments shall be made monthly and shall be accompanied by a sworn statement in such form as the comptroller of the city of New York shall prescribe, showing in detail the costs and commissions received and allowed to him. A suitable office for said public administrator shall be provided for him in one of the county buildings in the county of Kings. The surrogate shall also appoint a counsel and a clerk to said public administrator, their salaries to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of said surrogate and to be raised and paid each year in the same manner as are other county charges. He shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal property and debts of persons dying intestate, and for that purpose to maintain suits as such public administrator as any executor or administrator might by law in the following cases:

1. Whenever such person dies leaving any assets or effects in the county of Kings, and there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, entitled, competent or willing to take out letters of administration on such estate.

2. Whenever assets or effects of any person dying intestate, after his death, come into the county of Kings and there is no such person entitled, competent or willing to take administration of the estate. In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. All provisions of law conferring jurisdiction, authority or power on, or otherwise relating to the office of public administrator of the city of New York and to the office of public administrator in the several counties of the state, so far as applicable apply to and are conferred on the office hereby created. The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion issue letters of temporary administration to such administrator without further security than required by this section.

Source.—Former § 2669, as added by L. 1893, ch. 686 and amended by L. 1904, ch. 357; L. 1911, ch. 774; originally revised from L. 1871, ch. 335, §§ 1-7; § 4, as amended by L. 1882, ch. 124.

Revisers' note.—No change except in subd. 1, "Resident in the state" omitted as it has been found to work injustice.

Preference of appointment.—The public administrator is entitled to letters of administration *de bonis non* of the estate of a deceased, in preference to the widow of the only next of kin of such deceased. *Matter of Hagan* (1912), 78 Misc 322, 139 N. Y. Supp. 463. As to preference of public administrator over a guardian of minor next of kin under L. 1871, chap. 335, amended L. 1877, chap. 154, L. 1882, chap. 124, see *Speckles v. Public Administrator*, 1 Dem. 475. As to duty imposed on courts and surrogate to appoint Brooklyn Trust Co. as administrator under L. 1887, chap.

383, see *Re Goddard*, 94 N. Y. 544; preference of public administrator over Brooklyn Trust Co. under L. 1882, chap. 124. *Goddard v. Public Administrator*, 1 Dem. 480; as to how far act of 1877 is repealed by act of 1882, see *Gilchrist's Estate*, 37 Misc. 543, 75 N. Y. Supp. 1055.

Public administrator preferred to the brother of a decedent who left a father in Ireland, but no wife or decedents. *Gilchrist's Estate*, 37 Misc. 543, 75 N. Y. Supp. 1055. Guardian of a minor son of a decedent is entitled to administer in preference to public administrator. *Matter of*

Hudson, 37 Misc. 539, 75 N. Y. Supp. 1053.

Residence in Kings County.—Under the provision of this section that the public administrator of Kings county shall be entitled to administration whenever a person dying intestate leaves assets or effects in said county and there is no widow, husband or next of kin resident in the

state, a sister of an intestate, otherwise competent and willing, who, though non-resident at the time of the intestate's death, has since established a residence in Kings county, which still continues, is entitled to letters of administration. *Matter of Arbuckle* (1912), 77 Misc. 309, 137 N. Y. Supp. 683.

§ 2595. Public administrator of Erie county.

The surrogate of the county of Erie shall, within ten days after the passage of this act, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of and for said county, to take office immediately, and to hold office for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

In case of a vacancy in said office by reason of death, resignation or otherwise, said surrogate shall fill the same by appointing a suitable person as public administrator, to take office immediately upon his appointment and qualification, and hold for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

Before entering upon the performance of the duties of his office, the person so appointed shall take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond, with sufficient sureties to be approved by a justice of the supreme court, to the county of Erie, in the penal sum of ten thousand dollars, conditioned for the faithful discharge of the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond shall be filed with the clerk of said county.

Said public administrator shall be entitled to retain from all moneys or property that come into his hands, after deducting all actual and necessary expenses, the same commissions as are now allowed by law to executors or administrators, and all provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York, and to the office of public administrator of the county of Kings, and in the several counties of the state apply to and are conferred on the office hereby created.

The surrogate of the county of Erie, where now authorized by law to issue letters of temporary administration, may, in his discretion, issue letters of temporary administration to such public administrator, without further security than required by this section.

Source.—New.

Revisers' note.—In some of the large counties it has been found necessary to have some special laws not applicable to every county.

§ 2596. When and how temporary administrators may be appointed.

On the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more persons letters of temporary administration, in either of the following cases:

1. When for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.

An appointment of a temporary administrator, in a case specified in this subdivision must be made by an order, if a proceeding for grant of letters of administration or probate of a will is then pending. At least ten days' notice of the application for such an order must be given to each party to the proceeding who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days. If no proceeding is pending, application shall be by petition and a citation shall issue in the usual manner directed to the persons entitled to letters of administration in a case where no will is known to exist; or to the executor or executors, trustee or trustees if any, and such legatees and devisees as the surrogate may direct to be cited, in cases where a will has been filed.

2. Where a person of whose estate the surrogate would have jurisdiction, if he were shown to be dead, disappears or is missing, so that, after diligent search, his abode cannot be ascertained, and under circumstances which afford reasonable ground to believe either that he is dead, or that he has become a lunatic, or that he has been secreted, confined, or otherwise unlawfully made away with; and the appointment of a temporary administrator is necessary for the protection of his property, and the rights of creditors or of those who will be interested in the estate, if it is found that he is dead.

Application for such an appointment, in a case specified in this subdivision must be made by petition, in like manner as where an application is made for administration in case of intestacy; and the proceedings are the same as prescribed in this title, relating to such last-mentioned application.

Such an application for the appointment of a temporary administrator in either case may also be made, with like effect, and in like manner, as if made by a creditor, by the county treasurer of the county where the person whose estate is in question last resided; or, if he was not a resident of the state, of the county where any of his property, real or personal, is situated. A temporary administrator must qualify as prescribed in section 2591 of this chapter with respect to an administrator-in-chief.

Source.—Former § 2670, as amended by L. 1893, ch. 686; L. 1901, ch. 20; consolidated from former §§ 2668, 2669. 2670, 2671. § 2668 originally revised from L. 1837, ch. 460, § 23, as amended by L. 1867, ch. 782, § 7. § 2669 originally revised from L. 1864, ch. 71, § 11. § 2670 originally revised from L. 1875, ch. 519, § 1. § 2671 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 43, as amended by L. 1864, ch. 71, § 5.

Revisers' note.—The amendments make the practice more definite and certain.

When such appointment may be made, see *Estate of Shon*, 1 Civ. Pro. Rep. 373; *Mootrie v. Hunt*, 4 Bradf. 173; *Hicks v. Hicks*, 12 Barb. 322; *West v. Mapes*, 14 Wkly. Dig. 92; *Tooker v. Bell*, 1 Dem. 52; *Matter of Eddy*, 10 Misc. 211, 31 N. Y. Supp. 423; *Lawrence v. Parsons*, 27 How. 26; *Matter of Chase*, 32 Hun 318; *Saw Mill Co. v. Dock*, 3 Dem. 55; *Grant's Estate*, 49 N. Y. Supp. 574; *Matter of Hilton*, 29 Misc. 532, 61 N. Y. Supp. 1073; *Matter of Hopkins*, 41 Misc. 83, 83 N. Y.

Supp. 890, aff'd 93 App. Div. 618, 87 N. Y. Supp. 793; *Matter of Hill*, 43 Misc. 583, 89 N. Y. Supp. 552. Notice of application for appointment only required to be given to parties who have appeared. *Matter of Ashmore*, 48 Misc. 312, 96 N. Y. Supp. 772. May be appointed upon proof of death less certain in its character than required upon appointment of general administrator. *Czech v. Bean*, 35 Misc. 729, 72 N. Y. Supp. 402.

The surrogate's refusal to issue letters

is not reviewable on appeal; the remedy, if any, is by mandamus. *McGregor v. Buel*, 24 N. Y. 166. Who may apply, see *Matter of Chase*, 32 Hun 318.

Where for any cause delay necessarily occurs in presenting a last will for probate, or in the grant of letters testamentary upon probate, or letters of administration upon due application, the surrogate has jurisdiction in his discretion, to grant letters of temporary administration upon the petition of a creditor or a person interested in the estate and no one is entitled to notice of the application. *Matter of Chittenden* (1913), 76 Misc. 92, 136 N. Y. Supp. 953.

Executor disqualified.—Where the appellate division on another appeal decides that the executor named is disqualified to act, so that his appointment becomes impossible, there is no need for the appointment of a temporary administrator, but the surrogate's court should be ordered to appoint an administrator with the will annexed. *Matter of Leland* (1916), 175 App. Div. 58, 161 N. Y. Supp. 320.

Where there is an executor or administrator whose right to letters appears and who asserts such right no temporary administrator can be appointed nor does the pendency of an appeal from the decree which recognizes such right afford any reason for delay in the granting of letters to such executor or administrator. *Matter of Judson* (1915), 92 Misc. 136, 156 N. Y. Supp. 270.

Who appointed, see *Matter of Hilton*, 29 Misc. 532, 61 N. Y. Supp. 1073; *Jones v. Hamersley*, 2 Dem. 286; *Re Bankard*, 19 Wkly. Dig. 452; *Cornwell v. Cornwell*, 1 Dem. 1; *In re Wanninger's Estate*, 3 N. Y. Supp. 137; *In re Stearn's Estate*, 9 N. Y. Supp. 748; *Matter of Plath*, 56 Hun 223, 9 N. Y. Supp. 251; *Haas v. Childs*, 4 Dem. 137; *Howard v. Doherty*, 5 Redf. 535.

Liability on bond.—*Dayton v. Johnson*,

69 N. Y. 419; *Gottsberger v. Taylor*, 19 N. Y. 150; *Estate of Allen*, 7 Civ. Pro. Rep. 159.

Compensation.—An order appointing one as a temporary administrator should not provide that he serve without compensation, and where his appointment was conditioned upon his consenting to serve without compensation such consent should be filed in the surrogate's court before the order appointing such administrator is signed. *Matter of Eno* (1915), 92 Misc. 656, 156 N. Y. Supp. 268.

Compensation of temporary administrator. *In re Egan's Estate*, 27 N. Y. Supp. 1009.

A perfected appeal from an order of the surrogate's court, overruling objections to the issuance of letters testamentary, made upon the ground that the executor named in the will was disqualified to act by reason of mental deficiency, stays the proceedings, by virtue of § 2557 and the court should appoint a temporary administrator. *Matter of Leland* (1916), 175 App. Div. 58, 161 N. Y. Supp. 320.

Papers purporting to be wills not filed; procedure.—Where it is alleged that the paper referred to in an application for temporary letters of administration as decedent's last will and testament is in the custody of an attorney who though he had exhibited had neglected to file it, and there is another paper purporting to be a will of decedent in a private safe, and no explanation is given why an order for the deposit thereof has not been obtained, the application does not come within this section and will be denied. The proper procedure is under § 2607 to compel the production of the paper alleged to be in the custody of the attorney, or that the will alleged to be in the safe be filed in the surrogate's court. *Matter of Jussila* (1918), 104 Misc. 579, 172 N. Y. Supp. 170.

§ 2597. General powers, etc., of temporary administrator.

A temporary administrator, appointed as prescribed in this article, has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of these purposes, or for the purpose of determining the title to personal property in his possession, he may maintain any action or special proceeding. An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, or upon any cause of action to which the decedent or absentee would have been a party in like manner and with like effect as if he were an administrator-in-chief. The surrogate may, by an order made upon at least ten days' notice to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee whom he represents, as it appears to be necessary to sell, for the benefit of the estate; or, if it appears

that the safety of the estate requires the notice to be shortened, the surrogate may shorten the notice to not less than two days. The surrogate may, also, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust, or stenographer's or referee's fees on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will or a distributive share or just proportionate part thereof, according to sections twenty-six hundred and eighty-seven, and twenty-six hundred and eighty-eight of this chapter as though he were an executor or administrator.

Amended by L. 1915, ch. 621, in effect Sept. 1, 1915.

Source.—Former § 2672, as amended by L. 1881, ch. 535; originally revised from L. 1837, ch. 460, § 24, as amended by L. 1864, ch. 71, § 9.

Revisers' note.—The section referred to in the last part (of former § 2672) never has been applicable. Scope of section extended by new matter to bring an action.

Action by administrator.—A temporary administrator is merely the collector and conservator of the estate, and may only prosecute such actions as are necessary to reduce the assets to possession. *Hastings v. Tousey*, 123 App. Div. 480, 108 N. Y. Supp. 526. A fire insurance policy is a chose in action upon which a temporary administrator may commence an action. *Matthews v. American Central Ins. Co.*, 154 N. Y. 449. Temporary administrator may commence action for foreclosure of a mortgage, and his right cannot be questioned on the ground that the mortgagee is not shown to be dead. *Czech v. Bean*, 35 Misc. 729, 72 N. Y. Supp. 402.

A temporary administrator is without authority to maintain a suit requiring the transfer of stock on the books of a corporation. *Hastings v. Tousey*, 123 App. Div. 480, 108 N. Y. Supp. 526.

Action against administrator.—An action may be maintained against temporary administrator to recover savings bank pass-book. *Harrison v. Totten*, 53 App. Div. 178, 65 N. Y. Supp. 725. Leave to sue temporary administrator discretionary with surrogate. *Matter of Fleming*, 5 Dem. 336.

Payment of funeral and other expenses.—Surrogate may direct the application of moneys in the hands of temporary administrator to payment of funeral expenses. *Kruse v. Fricke*, 2 Dem. 264; *Matter of Aaron*, 5 Dem. 362. Power, on notice, to direct payment of funeral expenses, etc., relates solely to case of temporary administration. *Hoes v. Halsey*, 2 Dem. 577. Salary of temporary administrator for managing decedent's business may be allowed in addition to compensation as such administrator. *Matter of Moriarty*, 27 Misc. 161, 58 N. Y. Supp. 380.

Expenses of procuring testimony of witnesses to a contested will are not a proper

charge of administration. *Matter of Marcellin*, 25 Misc. 260, 55 N. Y. Supp. 425; *In re McNamee*, 55 N. Y. Supp. 425. Cannot charge to the estate the sum paid to a surety company for becoming his surety. *Jenkins v. Shaffer*, 6 Dem. 59. Temporary administrator not bound nor authorized to pay all the debts of the estate. *Matter of Philp*, 29 Misc. 263, 61 N. Y. Supp. 241. As to payment of counsel for legal services rendered in the course of the administration, see *Stokes v. Dale*, 1 Dem. 260.

Payment of legacy by temporary administrator. *Matter of McGowan*, 124 N. Y. 526; *Matter of Hoyt*, 31 Hun 176. Payment of portion of legacy ordered, although legatees is suing to revoke probate. *Matter of Hughes*, 41 Misc. 75, 83 N. Y. Supp. 646; *Rank v. Camp*, 3 Dem. 278.

The power of the court to authorized payment by a temporary administrator in limited by this section under which payment of referee's fees and other expenses of an examination before trial in a contested probate proceeding, cannot be paid. *In re Suydam's Estate* (1916), 160 N. Y. Supp. 219.

Commissions.—The fact that an executor is not entitled to commission on property specifically bequeathed does not prevent a temporary administrator from receiving them and he is entitled to the same. *Matter of Eagan*, 7 Misc. 262, 27 N. Y. Supp. 1009.

Termination of authority.—The authority of temporary administrators is *ipso facto* terminated by the appointment of an executor or an administrator with the will annexed and without formal revocation of the letters of temporary administrators or an accounting. *People ex rel. Avery v. Purdy* (1913), 155 App. Div. 607, 140 N. Y. Supp. 614.

§ 2598. Id.; as to requiring creditors to present claims.

A temporary administrator, appointed upon the estate of either a decedent or an absentee, has the same power as an administrator-in-chief to

publish a notice requiring creditors of the decedent or absentee to exhibit their demands to him. The publication thereof has the same effect, with respect to the temporary administrator, and also an executor or administrator, subsequently appointed upon the same estate, as if the temporary administrator were the executor or an administrator-in-chief, and the person to whom the subsequent letters are issued were his successors.

Source.—Former § 2673; originally revised from L. 1870, ch. 10, in part.

Revisers' note.—As often as the purpose of appointing a temporary administrator is to pay debts, advertisement for creditors should be begun at once.

§ 2599. Payment of debts by temporary administrator.

At any time after the completion of the publication of the notice to creditors by a temporary administrator, the surrogate may,

1. Prior to an accounting as provided in subdivision two, upon proof, to his satisfaction, that the assets exceed the debts, make an order, permitting the temporary administrator to pay the whole or any part of a debt, due to a creditor of the decedent or absentee; or, upon the petition of a creditor, a citation may issue to the temporary administrator, requiring him to show cause why he should not pay the petitioner's debt; or

2. Upon the petition of any creditor who shall have presented and established his claim or upon the application of the temporary administrator, direct an accounting by such administrator and upon the judicial settlement of his account may direct the payment of the expenses of administration and the ratable distribution of the remaining assets in his hands applicable to the payment of the debts in payment upon the claims presented and established as valid claims against said decedent or absentee, and the payment into court or the retention by the said temporary administrator of whatever may remain of the assets of the personal estate.

When a petition is presented in either of the cases above mentioned, the proceedings are, in all respects, the same as where similar proceedings are instituted by or against an executor or administrator, as prescribed in this chapter.

Amended by L. 1917, ch. 670, in effect Sept. 1, 1917. The amendment of 1917 inserted the second subdivision.

Source.—Former § 2674; originally revised from L. 1870, ch. 359, § 10, in part.

Revisers' note.—In the first part, change made reducing the one year period of delay, as the purpose of the appointment might have been to pay debts.

§ 2600. Control and disposition of real property by temporary administrator.

When a temporary administrator is appointed and a proceeding is pending for the probate of a will of real property, or there is a delay in the granting of letters testamentary or administration on such a will or in the qualification of a trustee named therein, the surrogate may, by the order appointing him, or by a subsequent order, confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof or to do any other act with respect thereto, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or de-

fend any action or special proceeding. The surrogate may, by an order, confer upon him authority to mortgage, lease or sell any or all of the real property, for the purposes specified in article third of this chapter, under such circumstances and restrictions, in such manner, and upon such terms and conditions as are specified in said article.

Amended by L. 1918, ch. 315, in effect Sept. 1, 1918. The amendment of 1918 materially changed the entire section.

Source.—Former § 2675, as amended by L. 1901, ch. 21; originally revised from L. 1870, ch. 359. § 13.

In general.—Appointment of receiver refused, in partition, where temporary administrator had already been appointed by surrogate, who could be authorized to perform the same duties. *Weiher v. Simson*, 41 Misc. 202, 83 N. Y. Supp. 927. Right to maintain an action upon a fire insurance policy, after a loss has occurred. *Matthews v. American Central Ins. Co.*, 154 N. Y. 449.

Title of temporary administrator.—It is quite clear that such an authorization does not confer upon a temporary administrator any title to the real property or any other right than to take such possession as may be necessary to collect the revenue therefrom. In no legal sense can he be said to "receive" the real property as that word is used in the section above referred to. His relation to the real property is exactly analogous to the frequent case of a receiver of the rents of mortgaged premises during the pendency of a foreclosure suit. And he is not entitled to commissions upon the fee value of the property which is the subject of a foreclosure suit. *Matter of Runk* (1918), 181 App. Div. 461, 168 N. Y. Supp. 970; *affd.* 224 N. Y. 570.

Appointment of receiver in foreclosure

action.—The appointment of a receiver in an action for the foreclosure of a mortgage is not in conflict with the prior appointment of a temporary administratrix by the surrogate's court, which court authorized her to take possession of the mortgaged premises and to collect the rents therefrom as provided by this section, especially where the mortgage expressly gives the mortgagee the right to the appointment of a receiver without regard to the adequacy of the security for the debt. Nor does the appointment of a receiver by the supreme court involve any conflict with the jurisdiction of the surrogate. The fact that the payment of the mortgage is guaranteed by a title company, as to whose solvency there is no question, is not a sufficient reason for denying the appointment of a receiver. *Cohn v. Bartlett* (1918), 182 App. Div. 245, 169 N. Y. Supp. 604.

Amendment of 1918 does not change the power of a surrogate to authorize the leasing of real property by temporary administrators to pay administration expenses and claims against the estate. *Matter of Cutter* (1918), 104 Misc. 694, 172 N. Y. Supp. 293.

§ 2601. Special powers of temporary administrator of absentee; may provide for family.

A temporary administrator, appointed upon the estate of an absentee, has all the powers and authority enumerated in the last section, with respect to the real property of the absentee. His acts, done in pursuance of that authority, bind the absentee, if living, or his heir or devisee, if he be dead, in the same manner as the acts of an executor or administrator bind his successor.

Upon proof, satisfactory to the surrogate, that the wife or any infant child of an absentee upon whose estate a temporary administrator has been appointed, is in such circumstances as to require provision to be made out of the estate for his or her maintenance, clothing, or education, the surrogate may make an order, directing the temporary administrator to make such provision therefor as the surrogate deems proper, out of any personal property in his hands, not needed for the payment of debts.

Source.—Former §§ 2676 and 2677. § 2676 new as originally inserted in Code of Civ. Proc. § 2677 originally revised from L. 1875, ch. 519, § 4.

§ 2602. Notices required by this article; how given.

A notice required to be given, as prescribed in this article, to a party other than the temporary administrator, must be served upon the attorney of the party to whom notice is to be given; or, if he has not appeared by an attorney, upon the party, in like manner as a notice may be served upon an attorney in a civil action, brought in the supreme court. But where the attorney or party to be served does not reside in the surrogate's county; or where the attorney for a party has died, and no other appearance for that party has been filed in the surrogate's office; the surrogate may, by order, dispense with notice to that party; or may require notice to be given to him in any manner which he thinks proper.

Source.—Former § 2681; section new as originally inserted in Code of Civ. Proc., except that it includes the last clause of L. 1864, ch. 71, § 6.

§ 2603. Letters of administration with will annexed; when and to whom granted.

If no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time there is no executor, or administrator with the will annexed, qualified to act; the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate as the surrogate deems proper, issue letters of administration with the will annexed, as follows:

1. To an executor or administrator of a sole legatee and devisee named in a will or to the executor or administrator of a sole residuary legatee and devisee named in a will.

2. To one or more of the residuary legatees, who are qualified to act as administrators. A corporation which is a residuary legatee shall be qualified to act as such administrator, although not specially authorized by its charter or any provision of law.

3. If there is no such residuary legatee or none who will accept, then to one or more of the principal or specified legatees so qualified.

4. If there is no such legatee or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified.

If any of the above persons who would otherwise be entitled to letters is an infant or an adjudged incompetent, administration may be granted to his guardian or committee as the case may be, unless there is an adult or competent person equally entitled who will accept the same.

5. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to the public administrator, and if there be none for the county, to the treasurer of the county or to the petitioner in the discretion of the surrogate, and if neither will accept, to any creditor or competent person designated by the surrogate.

Except as to the right of priority as provided in this section, the provisions of section 2588 of this chapter apply to an application for letters of administration with the will annexed.

Subd. 1 amended by L. 1917, ch. 678, in effect Sept. 1, 1917, by adding the last clause.

Source.—Former §§ 2643 and 2660. § 2643, as amended by L. 1881, ch. 535; L. 1895,

ch. 734; L. 1901, ch. 141; L. 1910, ch. 585; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 14. § 2660, as added by L. 1893, ch. 686, and amended by L. 1894, ch. 503; L. 1897, ch. 177; L. 1909, ch. 65; L. 1913, ch. 403; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 27-29, 33, 34; L. 1867, ch. 782, § 6.

Revisers' note.—Subd. 1 taken from former § 2660. New matter in subd. 4 provides for omitting reference to guardian in other portions. Whole section made to work with new § 2588.

Application.—Matter of Leland (1916), 175 App. Div. 58, 161 N. Y. Supp. 320.

Letters, when issued.—Letters of administration with the will annexed should not be granted, especially after a great lapse of time, unless there are unadministered assets. Matter of Bedford, 130 App. Div. 642, 115 N. Y. Supp. 472. As to when letters with will annexed will be issued, see Matter of Rogers, 152 N. Y. 316; Matter of Moehring, 154 N. Y. 423.

One not legally entitled to letters of administration may be joined by consent of one legally entitled. Matter of Moehring, 24 Misc. 418, 53 N. Y. Supp. 730. As to when person is not qualified to act, see Matter of Cutting, 5 Dem. 456.

Where a will provides for additional executors in the event that testator's wife, the principal legatee and sole executrix, should not survive him, but no provision is made for the event of her death after the grant of letters testamentary to her, the proper course upon her death is to apply for the appointment of an administrator with the will annexed. Matter of Robitscher (1915), 92 Misc. 653, 156 N. Y. Supp. 265.

Ancillary letters of administration with the will annexed refused where estate is shown to be solvent on the application of a creditor residing in the state of the decedent's residence. Matter of Gennert, 96 App. Div. 8, 89 N. Y. Supp. 37. As to essentials of jurisdiction to issue letters in New York state on a foreign will, admitted to probate in the testator's domicile. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. Supp. 743.

The order of priority among claimants of letters of administration is not changed by § 2606, post. Hayward v. Place, 4 Dem. 487; Matter of Manley, 12 Misc. 472, 34 N. Y. Supp. 258. This section is based upon the principle that he who has the interest in the estate most needing protection from waste, extravagance, and incompetency shall have the first right to administer. Matter of Goggin, 43 Misc. 233, 88 N. Y. Supp. 557. The priority of right to letters of administration with the will

annexed is absolute and controlling upon the court. Matter of Davis, 48 Misc. 489, 96 N. Y. Supp. 1106.

An applicant for letters of administration, with the will of a decedent annexed, must bring himself within the terms of the section which prescribes the order of priority. Matter of Allen, 2 Dem. 203.

Legatees.—All persons immediately and ultimately interested in a trust fund are to be classed together as "principal or specific legatees" within the meaning of the section, and the surrogate may use his discretion in selecting from their number. Matter of Beakes, 5 Dem. 128. The beneficiary of a trust is not a legatee within the meaning of the section. Matter of Ferguson, 41 Misc. 465, 84 N. Y. Supp. 1102.

The word "principal," as used to describe a legatee who may be entitled to a grant of letters of administration with a will annexed, is the equivalent of "general" and means one who is neither specific nor residuary. Quintard v. Morgan, 4 Dem. 168.

An executor of sole legatee is preferred in administration to a nephew of the testator. Matter of Haug, 29 Misc. 36, 60 N. Y. Supp. 382. A general legatee is preferred to a corporate guardian of infant residuary legatee. Matter of Milhau, 28 Misc. 366, 59 N. Y. Supp. 910.

Where a testator's residuary estate is held in trust and occasion arises for the appointment of an administrator, with the will annexed, the beneficiary of the trust is entitled to letters in preference to the trustee. Matter of Roux, 5 Dem. 523.

The half-sister of a decedent, who would be entitled to a distributive share in her estate in the absence of a will, is a person interested in her estate within the meaning of this section. Matter of Brown, 60 Misc. 628, 113 N. Y. Supp. 937.

A relative of a decedent, who is also a resident of the state, will be preferred to a nonresident stranger in blood. Matter of Powell, 5 Dem. 281.

Creditors.—A claimant under a contract made with executors is not a creditor within the meaning of this section. Fowler v. Wallet, 1 Dem. 240.

§ 2604. Id.; renunciation or exclusion of persons having prior right.

Where a person applies for letters of administration with the will annexed, as prescribed in the last section, and another person has a right to the administration, prior to that of the petitioner, a citation must issue accordingly unless a renunciation acknowledged or proved and duly certified of every person having such a prior right is filed. The surrogate may in

his discretion issue a citation to a person equally entitled. The proceedings thereupon are the same as upon an application for administration upon the estate of an intestate.

Source.—Former § 2644; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 35.

Revisers' note.—Every proceeding is required to have petition. On probate of a will having no executor, this matter is taken care of in petition for probate.

Preserves the former right of a person equally entitled to have letters without citing others equally entitled, which has been found to work well.

When citation required.—Where a residuary legatee applies for letters of administration he is not bound to cite any one. Matter of Richardson, 8 Misc. 140, 29 N. Y. Supp. 1079. As to powers of surrogate to issue letters to one of several having equal claims without citing the others, see Matter of Treadwell, 37 Misc. 584, 75 N. Y. Supp. 1058, rev'd 77 App. Div. 155, 79 N. Y. Supp. 83; Matter of Goggin, 43 Misc. 233, 88 N. Y. Supp. 557.

§ 2605. How executor or administrator with the will annexed qualifies.

An executor from whom a bond is required as prescribed in this chapter, or an administrator with the will annexed, must, before letters are issued to him, qualify as prescribed by law with respect to an administrator upon the estate of an intestate; and the provisions of section 2591 of this chapter, with respect to the bond to be given by the administrator of an intestate, apply to a bond given pursuant to this section; except that, in fixing the penalty thereof, the surrogate must take into consideration the value of the real property, or of the proceeds thereof, which may come to the hands of the executor or administrator, by virtue of any provision contained in the will, and also how much of the estate, if any, has already been administered.

Source.—Former § 2645; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 42, in part.

Revisers' note.—Following § 2693 which says bond to be given to cover unadministered estate. New § 2606.

§ 2606. Appointment of administrator de bonis non.

When all the administrators, to whom letters have been issued, die or become incapable, or the letters are revoked as to all of them, the surrogate must grant letters of administration de bonis non to one or more persons as their successors, in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters are the same, and the same security shall be required, as upon an original application; except that the surrogate may, in his discretion, in case where the estate has been partially administered upon by the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than the value of the assets of the estate remaining unadministered.

Source.—Former § 2693, as amended by L. 1889, ch. 503; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 19, 45; L. 1837, ch. 460, § 33, in part.

Revisers' note.—The part applying to administrator *cum testamento annexo* is now in substance in § 2643 as amended. New § 2603. This change provides directly for administrator *de bonis non* which has never been specifically provided for.

Application of section.—This section does not apply to or govern the order of priority in the appointment of an administrator with the will annexed in a case where all the executors renounce. Matter of Man-lev, 12 Misc. 472, 34 N. Y. Supp. 258; Hayward v. Place, 4 Dem. 487.

Appointment of successor.—It is only when all the executors or administrators die or become incapacitated or the letters

of all of them are revoked that letters will be granted to one or more persons as their successors. *Hood v. Hayward*, 124 N. Y. 1. Upon the death of an executor, it becomes the imperative duty of the surrogate, on the application of a person interested in the estate, to appoint a representative to administer the assets of the testator left unadministered. *Matter of Moehring*, 154 N. Y. 423.

When letters of administration are revoked, the surrogate is only authorized to grant letters of administration to the successor in like manner as if the former letters had not been issued and the same proceedings are required. *Matter of Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551. When an administrator has been removed after the decedent's estate has been

fully administered, the surrogate may thereafter finally settle such administrator's account, without appointing a new administrator. *Prentiss v. Weatherly*, 68 Hun 114, 22 N. Y. Supp. 680, aff'd 144 N. Y. 707.

A petition under this section for the appointment of an administrator with the will annexed is defective if it does not point out by name, petitioner or some other person or persons having prior right, to whom he desires such letters of administration to be awarded. *Popham v. Spencer*, 4 Redf. 399.

Priority.—Letters must be granted as set forth in § 2588. *Matter of Friedleben* (1918), 103 Misc. 558, 171 N. Y. Supp. 761.

ARTICLE 2.

PRODUCTION AND PROBATE OF WILLS; OBJECTIONS AND THEIR TRIAL; CONSTRUCTION OF WILLS; QUALIFICATION OF EXECUTOR; GRANT OF ANCILLARY LETTERS TESTAMENTARY AND OF ADMINISTRATION; QUALIFICATION OF TESTAMENTARY TRUSTEES; SECURITY FROM TESTAMENTARY TRUSTEES AND EXECUTORS ACTING AS TRUSTEES.

- | | |
|--|--|
| <p>§ 2607. Petition to compel production of will.</p> <p>2608. Probate of wills of citizens of the United States domiciled in the United Kingdom of Great Britain and Ireland.</p> <p>2609. Who may propound will; contents of petition.</p> <p>2610. Who to be cited thereupon: contents of citation.</p> <p>2611. Witnesses to be examined; proof required.</p> <p>2612. Absent, et cetera, witnesses to be accounted for; dispensing with testimony; commission; proof of handwriting.</p> <p>2613. Proof of lost or destroyed will.</p> <p>2614. Probate not allowed unless surrogate satisfied, et cetera.</p> <p>2615. Construction of will, how obtained.</p> <p>2616. Notice of probate to legatees and devisees.</p> <p>2617. Who may file objections to the probate of an alleged will; jury trial.</p> <p>2618. Notice to legatees and devisees of objections filed.</p> <p>2619. Proceedings upon jury trial of contested probate.</p> <p>2620. Wills to be recorded and retained; exception.</p> <p>2621. Will certified, or record thereof, may be read in evidence.</p> <p>2622. Recording wills proved elsewhere within the state.</p> | <p>2623. Records of certain wills heretofore proved; how far evidence.</p> <p>2624. Revocation of letters upon proof of will.</p> <p>2625. When letters testamentary may be issued.</p> <p>2626. Supplementary letters; executors not named in letters not to act.</p> <p>2627. Executor failing to qualify or renounce, how excluded.</p> <p>2628. Renunciation by nominated executor; retraction thereof.</p> <p>2629. Ancillary letters upon foreign probate.</p> <p>2630. Idem; upon foreign grant of administration.</p> <p>2631. To whom ancillary letters granted.</p> <p>2632. Petition; citation.</p> <p>2633. Hearing; security.</p> <p>2634. Persons acting under ancillary letters must transmit assets.</p> <p>2635. Idem; when they may be directed to pay, et cetera, without transmission.</p> <p>2636. Idem; general powers and duties.</p> <p>2637. How testamentary trustee shall qualify.</p> <p>2638. Appointment of successor.</p> <p>2639. Security to be required from a trustee or executor acting as trustee.</p> <p>2640. Proceedings where testamentary trustee is also executor or administrator.</p> <p>2641. Application of this chapter.</p> |
|--|--|

§ 2607. Petition to compel production of will.

Whenever it shall appear by petition of any person claiming to be interested in the estate of a decedent, that there is reasonable ground to be-

lieve that any person has destroyed, retained, concealed, or is conspiring with others to destroy, retain or conceal a will or testamentary instrument of a decedent, or has any knowledge as to such facts, the court must make an order requiring the respondent to attend and be examined in the premises, and may in such order or otherwise in the proceeding require the production of any will or testamentary instrument. Service thereof must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in surrogate's court.

Source.—Former § 2621-a, as added by L. 1910, ch. 358.

Revisers' note.—This section rewritten in an effort to make the section useful for the purpose for which it was intended.

Application.—*Matter of Jussila* (1918), 104 Misc. 579, 172 N. Y. Supp. 170.

Proceeding instituted without decree.—A proceeding under this section to compel the production of a concealed will or codicils is not an attack upon a decree of probate and may be instituted irrespective of whether there has been such a decree. *Matter of Work* (1912), 151 App. Div. 707, 136 N. Y. Supp. 218, aff'g 76 Misc. 403, 137 N. Y. Supp. 97.

Objection to sufficiency of petition.—Ordinarily, an objection to the sufficiency of a petition for a citation, for want of jurisdiction should be taken by answer, unless the jurisdiction invoked is wholly statutory when the objection may be taken orally, at any stage, if entered on the record. A proceeding under this section for the discovery of testamentary instruments must be taken either before the entry of a decree of probate or after such a decree has been vacated. *Matter of Work* (1912), 76 Misc. 403, 137 N. Y. Supp. 97, aff'd 151 App. Div. 707, 136 N. Y. Supp. 218.

Person interested.—Where a decedent, by a will which had been admitted to probate, gave all of his property to an institution, and the institution made an agree-

ment with the heirs at law and next of kin of the decedent that, in consideration of the payment of a certain sum of money, they released all their right, title and claim to the property of the decedent it was held that, notwithstanding such agreement, one of such heirs at law was entitled to bring an action, as a person interested in the estate of the decedent, to compel the production of an alleged later will, as her interest was contingent upon the production and probate of the alleged subsequent will and upon the annulment of the contract with the institution. *Matter of Hardy* (1915), 216 N. Y. 132.

The petition must be made by a person claiming to be interested, and in the absence of an allegation to that effect the application will be denied. In *re Roth's Estate* (1918), 173 N. Y. Supp. 399.

If the petitioner has reason to believe that the temporary administrators have in their possession or under their control a will other than the one offered for probate, he may apply for an order directing their attendance for examination. *Matter of Gillender* (1917), 98 Misc. 521, 162 N. Y. Supp. 955.

§ 2608. Probate of wills of citizens of the United States domiciled in the United Kingdom of Great Britain and Ireland.

The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this state and which shall have been duly proven within such foreign jurisdiction, and there admitted to probate, shall be admitted to probate in any county of this state wherein shall be any property affected thereby, upon filing in the office of the surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul-general of the United States resident within such foreign jurisdiction, together with the proofs of the said last will and testament, made and accepted within such foreign jurisdiction, certified in

like manner. Letters testamentary on such last will and testament shall be issued to the persons named therein to be the executors and trustees, or either thereof, or to those of them who, prior to the issuance of such letters, by formal renunciation, duly acknowledged or proven, and duly certified, shall not have renounced the trust therein devolved upon them; provided, that before any such will shall be admitted to probate in any county of this state, the same proceedings shall be had in the surrogate's court of the proper county as are required by law upon the proof of the last will and testament of a resident of this state who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in such will.

Source.—Former § 2705, as added by L. 1909, ch. 65; originally revised from L. 1894, ch. 631, § 1.

Jurisdiction.—In a proceeding to revoke letters of administration on the ground that the intestate is a nonresident, the domicile of origin governs the question of jurisdiction. *Matter of Robitaille* (1912), 78 Misc. 108, 138 N. Y. Supp. 391.

§ 2609. Who may propound will; contents of petition.

A petition for the probate of a will may be presented by:

Any person designated in the will as executor, devisee, legatee, testamentary trustee or guardian;

A creditor of the decedent, or any other person interested in the estate;

Any party to an action brought, or about to be brought, in which action the decedent, if living, would be a proper party.

Such petition in addition to the general allegations contained in section 2521 of this chapter shall describe such will, and any other will of the same testator on file in the surrogate's office, and set forth the names and post-office addresses, so far as they can be obtained with due diligence, of all the devisees, legatees and beneficiaries named in said will, or in any other will so filed.

Source.—Former § 2614, as amended by L. 1897, ch. 177; originally revised from L. 1837, ch. 460, § 4.

Revisers' note.—See general section on contents of petition. New § 2521. Provision made for bringing up any other will filed to avoid separate proceedings.

Who may propound will.—Petition must be presented by a person interested in the estate. *Donlon v. Kimball*, 61 App. Div. 31, 70 N. Y. Supp. 252. A person designated in a will as a legatee may present a petition for its probate. *Dyer v. Erving*, 2 Dem. 160. By next of kin. *Matter of Bradley*, 23 N. Y. Supp. 1127, 53 St. Rep. 540.

Where one seeks the probate of a will of a decedent as a creditor, and his character as such is disputed, he must set forth facts showing *prima facie* that his claim is well founded. *Gove v. Harris*, 4 Dem. 293.

When a person who is named as executor in an alleged will offers it for probate and is met with a contest, he has before him two alternatives, either of which he may adopt. He may cast the burden of the contest upon those who are to be benefited by the probate of the paper or he

may assume the burden himself. *Dodd v. Anderson*, 197 N. Y. 466, rev'g 131 App. Div. 224, 115 N. Y. Supp. 688.

Duty of executor to present will.—It is the right, although perhaps not the absolute duty, of a person named in a will as one of the executors, not only to present the will for probate, but also to insist upon the issue to himself of letters testamentary, and reasonable legal expenses necessarily incurred in good faith in the performance of this right is a proper charge against the estate. *Matter of Fraser* (1914), 165 App. Div. 441, 150 N. Y. Supp. 774.

It is the right and may be the duty of an executor to propound a will for probate. *Dodd v. Anderson*, 131 App. Div. 224, 115 N. Y. Supp. 688, rev'd on other grounds, 197 N. Y. 466. Where upon petition of executor for probate of a will the parties have appeared upon the return day of a citation, the executor has no power, with-

out consent of all parties, to discontinue or withdraw such proceeding. *Matter of Lasak*, 1 Connoly 486, 7 N. Y. Supp. 2.

Death of heirs at law and next of kin before decree entered.—A probate proceeding does not abate by reason of the death of any of the heirs at law and next of kin

of decedent before the entry of the decree admitting the will to probate and such decree binds the personal representatives who voluntarily appeared in the proceeding and submitted to the jurisdiction of the court. *Matter of Herrmann* (1915), 91 Misc. 464, 154 N. Y. Supp. 957.

§ 2610. Who to be cited thereupon; contents of citation.

The following persons must be cited upon a petition, presented as prescribed in the last section:

If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator.

If the will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator.

If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator.

In every case, each person designated in the will as executor, testamentary trustee or guardian, and each person named as executor, testamentary trustee or guardian, or beneficiary in any other will of the same testator filed in the surrogate's office.

In addition to the general contents contained in sections 2523 and 2524 of this chapter, the citation must also set forth the name of the person by whom the will is propounded; whether the will relates exclusively to real property, or to personal property, or to both; and if the will is nuncupative, that fact.

Source.—Former §§ 2615 and 2616. § 2615, as amended by L. 1891, ch. 174; L. 1892, ch. 627; L. 1894, ch. 118, and L. 1905, ch. 438; originally revised from L. 1837, ch. 460, § 5. § 2616, as amended by L. 1911, ch. 433; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 37; L. 1837, ch. 460, § 7

Whom to be cited.—An alien brother and sister should be cited. *Kilfoy v. Powers*, 3 Dem. 198. And heirs-at-law and the next of kin. *Cook v. White*, 43 App. Div. 388, 60 N. Y. Supp. 153, aff'd 167 N. Y. 588; *In re Odell's Estate*, 23 N. Y. Supp. 143; *Dworsky v. Arndtstein*, 29 App. Div. 274, 51 N. Y. Supp. 597; *Matter of Harlow*, 56 St. Rep. 33, 26 N. Y. Supp. 469; *Matter of Bartholeck*, 22 St. Rep. 911, 5 N. Y. Supp. 842. Widow. *Dworsky v. Arndtstein*, 29 App. Div. 274, 51 N. Y. Supp. 597; *Matter of Hamilton*, 76 Hun 200, 27 N. Y. Supp. 813. Guardian of infant, see *Kenney v. Whitmarsh*, 16 Barb. 141; *Matter of Becker*, 28 Hun 207. As to citing of minor who becomes interested after proceedings for probate of will, by reason of the death of one of the parties, see *Russell v. Hartt*, 87 N. Y. 19.

Where a will is filed for probate with codicil thereto, which adversely affects a beneficiary named in the will, there is then on file such a "will" as is contemplated by this section which provides that "each person named" as "beneficiary in any other will of the same testator filed in the surrogate's office" must be cited, and all of the beneficiaries adversely affected by the codicil or a subsequent will

or other codicil must be cited. Any other construction of said § 2610 renders unavailable § 2617, which provides that objections must be filed pending probate or before the close of the testimony. Where in a probate proceeding a citation has not been served upon the legatee named in a will, who is cut off by a codicil thereto, his only remedy is by motion to vacate and set aside the decree of probate and for leave to file objections, or resort to any other remedy available prior to the granting of a decree for probate. *Matter of Johnson* (1918), 105 Misc. 451, 174 N. Y. Supp. 493.

The decree of a surrogate is without effect as to the widow and the heir-at-law of a testator not cited in the probate proceedings. *Dworsky v. Arndtstein*, 29 App. Div. 274, 51 N. Y. Supp. 597.

Unnecessary to cite a legatee who is neither heir-at-law nor next of kin, but he may at any time, *pendente lite*, intervene for his interest. *Walsh v. Ryan*, 1 Bradf. 433. If petition for probate verified by testator's widow allege that testator left no heirs or next of kin or relatives, a citation is unnecessary. *Bailey v. Stewart*, 2 Redf. 212.

Where two instruments have been pre-

sented for probate as wills of the same testator, the executor of the later will will not be permitted to discontinue his proceeding, especially since each person named as executor in any other will of the same testator filed in the surrogate's office, must be cited upon a petition for probate, and if he must be cited as executor of such will it would not be consistent to permit him to withdraw the proceeding for the probate thereof. *Matter of Potter* (1916), 172 App. Div. 458, 155 N. Y. Supp. 939.

An infant grandson of a testatrix and a *cestui que trust* under her will, whose father is living, is neither an heir at law nor next of kin of the testatrix, and where

he is not designated in the will as an executor, testamentary trustee or guardian, he is not entitled to have service of the citation made upon him; neither is he a party to a proceeding to have the will admitted to probate. *Matter of Redfield* (1916), 94 Misc. 20, 158 N. Y. Supp. 1004.

On the probate of a will in a foreign state, if such state does not require notice to parties interested such probate is binding upon such parties residing in this state. *Matter of Horton* (1916), 217 N. Y. 363.

Effect of decree admitting will to probate. *Church v. Wilson* (1912), 152 App. Div. 844, 137 N. Y. Supp. 1002.

§ 2611. Witnesses to be examined; proof required.

Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the state, and competent and able to testify. Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses. The proofs must be reduced to writing. Any party to the proceeding may request the oral examination of the subscribing witnesses to the will and may examine such witnesses and any other witness produced by the proponent before the surrogate, without first filing objections to the probate of such will.

Source.—Former § 2613, as amended by L. 1913, ch. 412; originally revised from L. 1837, ch. 460, parts of §§ 10 and 11.

Revisers' note.—This section provides for full oral or cross examination without filing objections. This often averts a contest. Provision for "surrogates witness" repealed. See § 2617, note.

References.—Requisites of due execution of will, *Decedent Estate Law*, §§ 21, 22, and cases cited thereunder in *Birdseye, Cumming and Gilbert's Annotated Consolidated Laws* (2d Ed.), nuncupative will, when allowed, *Decedent Estate Law*, § 16.

Date of will.—The statute does not require a will to be dated, and the date may be established or corrected by parol evidence. *Matter of Haviland*, 17 Misc. 193, 40 N. Y. Supp. 973.

Knowledge of contents.—As to knowledge by the testator of the contents of the will, see *Cadmus v. Oakley*, 2 Dem. 298; *Matter of Hall*, 5 Misc. 461, 24 N. Y. Supp. 864; *Will of Crumb*, 6 Dem. 478, 2 N. Y. Supp. 744; *Matter of Stillman*, 2 Connolly 207, 9 N. Y. Supp. 446; *Matter of Smith*, 61 Hun 101, 15 N. Y. Supp. 425; *Matter of Greene*, 67 Hun 527, 22 N. Y. Supp. 1112; *Matter of Groot*, 72 Hun 548, 25 N. Y. Supp. 633.

Will executed by a mark, see *Simpson's Will*, 2 Redf. 29; *Matter of Wilson*, 76 Hun 1, 27 N. Y. Supp. 957; *Matter of Smith*, 61 Hun 101, 15 N. Y. Supp. 425; *Matter of Porter's Will*, 1 Misc. 262, 22 N. Y. Supp. 1062.

As to wills executed in duplicate, see *Crossman v. Crossman*, 95 N. Y. 147; *Monroe's Estate*, 1 Connolly 496, 5 N. Y. Supp. 552.

Practice in probate proceedings, see *Downey v. Downey*, 16 Hun 481; *Matter of Watson*, 137 N. Y. 587. Where a will is on deposit in a safe-deposit company, a subpoena *dues tecum* may be issued requiring its production on the return day of the citation for probate. *Matter of Foos*, 2 Dem. 600.

Publication of will, see *Matter of Hunt*, 110 N. Y. 278; *Lane v. Lane*, 95 N. Y. 494; *Matter of Menge*, 13 Misc. 553, 35 N. Y. Supp. 493; *Matter of Elmer*, 88 Hun 290, 34 N. Y. Supp. 406; *Matter of Hardenburgh*, 85 Hun 580, 33 N. Y. Supp. 150; *Matter of Murphy*, 15 Misc. 208, 37 N. Y. Supp. 223; *Matter of Farrell*, 28 Misc. 106, 59 N. Y. Supp. 780, aff'd 166 N. Y. 330; *Matter of McGraw*, 9 App. Div. 372, 41 N. Y. Supp. 481; *Matter of Collins*, 5 Redf. 20; *Matter of Lapham*, 37 Hun 15; *Matter of Dale*, 56 Hun 169, 9 N. Y. Supp. 396; aff'd 134 N. Y. 614; *Matter of Mackey*, 110 N. Y. 611; *Thompson v. Seastedt*, 3 Hun 395, aff'd 62 N. Y. 634; *Barr v. Brown*, 2 Dem. 309; *Seymour v. Van Wyck*, 6 N. Y. 120; *Egan v. Pease*, 4 Dem. 301; *Reeve v. Crosby*, 3 Redf. 74; *Heath v. Cole*, 15 Hun 100; *Burke v. Nolan*, 1 Dem. 346; *Van Hooser v. Van Hooser*, 1 Redf. 365; *Gilbert v. Knox*, 52 N. Y. 125; *Dack v. Dack*, 19 Hun 630; *Matter of Voorhis' Will*, 125 N. Y. 765; *Thompson v. Stevens*, 62

N. Y. 634; Neugent v. Neugent, 2 Redf. 369; Bell v. McMaster, 29 Hun 272; Will of Beckett, 35 Hun 449, aff'd 103 N. Y. 167.

As to what is sufficient publication, see Belding v. Seichardt, 56 N. Y. 680; Matter of Lapham, 37 Hun 15; Matter of Beckett, 103 N. Y. 167; Van Hoffman v. Ward, 4 Redf. 244; Dack v. Dack, 84 N. Y. 663; Darling v. Arthur, 22 Hun 84; Matter of Phillips, 98 N. Y. 267. As to what is deemed insufficient publication, see Burke v. Nolan, 1 Dem. 436; Larabee v. Ballard, 1 Dem. 496; McCord v. Lounsbury, 5 Dem. 68; Matter of Mackey, 110 N. Y. 611; Dodsworth v. Crow, 1 Dem. 256.

Republication.—It seems that a codicil executed with the formalities required by statute for the execution of wills operates as a republication of the will to which it refers, so far as not changed by the codicil. The rule was not changed by the provisions of revised statutes in reference to the execution of wills. Brown v. Clark, 77 N. Y. 369, aff'g 16 Hun 559.

Signature and subscription.—As to the mode of signing by testator, see Matter of Bedell, 2 Connolly 328, 12 N. Y. Supp. 96; Jackson v. Jackson, 39 N. Y. 153; Hartwell v. McMaster, 4 Redf. 389; Knapp v. Reilly, 3 Dem. 427; In re Phelps, 1 Connolly 463, 5 N. Y. Supp. 270; Matter of Williams, 2 Connolly 579, 5 N. Y. Supp. 828; Matter of Strong, 2 Connolly 574, 16 N. Y. Supp. 104.

As to place of subscription by the testator, see Matter of Gedney, 17 Misc. 500, 41 N. Y. Supp. 205; Matter of Whitney, 153 N. Y. 259; Matter of Singer, 19 Misc. 679, 44 N. Y. Supp. 606; Matter of Andrews, 43 App. Div. 394, 60 N. Y. Supp. 141, aff'd 162 N. Y. 1; Matter of Noon, 31 Misc. 420, 65 N. Y. Supp. 568; Matter of Booth, 127 N. Y. 109; Hewitt v. Hewitt, 5 Redf. 271; Dennett v. Taylor, 5 Redf. 561; Matter of Case, 4 Dem. 124; Younger v. Duffie, 95 N. Y. 535; Tonnele v. Hall, 4 N. Y. 140; Hitchcock v. Thompson, 6 Hun 279; Sisters of Charity v. Kelley, 67 N. Y. 409; Williamson v. Williamson, 2 Redf. 449; Matter of Laudy, 78 Hun 479, 29 N. Y. Supp. 136, aff'd 147 N. Y. 699; Matter of Acker, 5 Dem. 19; Matter of Dayger, 47 Hun 127; Matter of O'Neill, 91 N. Y. 516; Matter of Conway, 124 N. Y. 455; Matter of Hewitt, 91 N. Y. 261; Brady v. McCrosson, 5 Redf. 431; Taylor v. Wardlaw, 3 Dem. 48; Vogel v. Schritter, 139 N. Y. 223.

Acknowledgment of will by testator.—See Matter of Eakins, 13 Misc. 557, 35 N. Y. Supp. 489; Matter of Abercrombie, 24 App. Div. 407, 48 N. Y. Supp. 414; Matter of Laudy, 78 Hun 479, 29 N. Y. Supp. 136, aff'd 147 N. Y. 699; Buckhout v. Fisher, 4 Dem. 277; Gardiner v. Raines, 3 Dem. 98; Mitchell v. Mitchell, 16 Hun 97; aff'd 77 N. Y. 596; Matter of Mackay, 44 Hun 571; Matter of Lang, 9 Misc. 521, 30 N. Y. Supp. 388; Matter of Hunt, 42 Hun 434, aff'd 110 N.

Y. 278; Matter of McMilkin, 6 Dem. 347; Jackson v. Jackson, 39 N. Y. 153; Matter of Will of Phillips, 98 N. Y. 267; Sisters of Charity v. Kelley, 67 N. Y. 409; Lewis v. Lewis, 11 N. Y. 220; Barry v. Brown, 2 Dem. 309; Wills v. Mott, 36 N. Y. 486; Matter of Beckett, 103 N. Y. 167; Rutherford v. Rutherford, 1 Dem. 33; Rumsey v. Goldsmith, 3 Dem. 494.

As to acknowledgments which have been held good, see Baskin v. Baskin, 36 N. Y. 416; Matter of Look, 1 Connolly 403, 5 N. Y. Supp. 50; Lane v. Lane, 95 N. Y. 494; Matter of Higgins, 94 N. Y. 554; Buckhout v. Fisher, 4 Dem. 277; Conselyea v. Walker, 2 Dem. 117; Matter of Austin, 45 Hun 1; Matter of Townley, 1 Connolly 400, 4 N. Y. Supp. 455; Matter of Bedell, 2 Connolly 328, 12 N. Y. Supp. 96.

As to acknowledgments which have been held insufficient, see Matter of Van Gieson, 47 Hun 5; Matter of Mackey, 44 Hun 571; Portens v. Holm, 4 Dem. 14; Woolley v. Woolley, 95 N. Y. 231; Rumsey v. Goldsmith, 3 Dem. 494; Matter of McMilkin, 6 Dem. 347.

Attestation.—As to the attestation of a will, see Matter of Blair, 84 Hun 581, 32 N. Y. Supp. 845, aff'd 152 N. Y. 645; Matter of Fish, 88 Hun 56, 34 N. Y. Supp. 536, aff'd 153 N. Y. 679; Matter of Mandelick, 6 Misc. 71, 26 N. Y. Supp. 888; Matter of Losee, 13 Misc. 298, 34 N. Y. Supp. 1120; Matter of Beck, 6 App. Div. 211, 39 N. Y. Supp. 810, aff'd 154 N. Y. 750; Matter of Whitney, 90 Hun 138, 35 N. Y. Supp. 798, rev'd 153 N. Y. 259; Matter of Lyman, 14 Misc. 352, 36 N. Y. Supp. 117; Matter of McLarney, 90 Hun 361, 35 N. Y. Supp. 893, aff'd 153 N. Y. 416; Matter of Woolsey, 17 Misc. 547, 41 N. Y. Supp. 233; Herrick v. Snyder, 27 Misc. 462, 59 N. Y. Supp. 229; Matter of Phillips, 34 Misc. 442, 69 N. Y. Supp. 1011; Coffin v. Coffin, 23 N. Y. 9; Matter of Nelson, 141 N. Y. 152; Taylor v. Brodhead, 5 Redf. 624; Stein v. Wilzinski, 4 Redf. 441; Brady v. McCrosson, 5 Redf. 431.

An attestation clause taken together with proof of the signatures of the testator and the subscribing witnesses is prima facie evidence of due execution and sufficient for probate until overcome by opposing evidence. Matter of Sizer, 129 App. Div. 7, 113 N. Y. Supp. 210, aff'd 195 N. Y. 528.

As to effect of the attestation clause, see Burk's Will, 2 Redf. 239; Jackson v. Jackson, 39 N. Y. 153; Lewis v. Lewis, 20 N. Y. 220; Matter of Will of Pepon, 91 N. Y. 255; In re Cottrell, 95 N. Y. 329; Matter of Frey, 2 Connolly 70, 7 N. Y. Supp. 330; Matter of Bernsee, 71 Hun 27, 24 N. Y. Supp. 504, aff'd 141 N. Y. 389; Brown v. Clark, 77 N. Y. 369; Norton v. Norton, 2 Redf. 6; Matter of Hunt, 110 N. Y. 278; Rolla v. Wright, 2 Dem. 482; Nicholson v. Myers, 3 Dem. 193; Woolley v. Woolley, 95 N. Y. 231; Potens v. Holm, 4 Dem. 14.

Subscribing witness.—As to who is a subscribing witness, see Larabee v. Ballard,

1 Dem. 496. As to the witness to a will, see also Orser v. Orser, 24 N. Y. 51; Matter of Higgins, 94 N. Y. 554; Marx v. McGlynn, 88 N. Y. 357; Troup v. Reid, 2 Dem. 471; Rugg v. Rugg, 21 Hun 383, aff'd 83 N. Y. 592; Matter of Wilson, 76 Hun 1, 27 N. Y. Supp. 957; Matter of Hardenburg, 85 Hun 580, 33 N. Y. Supp. 150; Matter of Clark, 75 Hun 471, 27 N. Y. Supp. 681.

Due execution of a will before two subscribing witnesses is sufficient, and its validity is not affected by the fact that when a third and unnecessary witness was asked to sign the formalities of the statute were not complied with. Matter of Sizer, 129 App. Div. 7, 113 N. Y. Supp. 210, aff'd 195 N. Y. 528.

Production of other witnesses.—Where contestants duly file a notice demanding the examination of witnesses within the jurisdiction, no objection to their materiality appearing in the record on appeal, the admission of the will to probate without such examination will be held erroneous. Matter of Baird, 41 Hun 89. It seems that an order is never necessary for the production of witnesses under this section. Matter of McGovern, 5 Dem. 424.

Examination of witnesses.—Surrogate must cause the witnesses to be examined before him. Matter of Lasak, 1 Connolly 486, 7 N. Y. Supp. 2. At least two of the witnesses must be produced and examined before the surrogate, if so many are within the state and competent and able to testify. Collyer v. Collyer, 4 Dem. 53; Matter of Reynolds, 4 Dem. 68; Worden v. Van Gieson, 6 Dem. 237; Conselyea v. Walker, 2 Dem. 117; Upton v. Bernstein, 76 Hun 516, 27 N. Y. Supp. 1078; Matter of De Haas, 9 App. Div. 561, 41 N. Y. Supp. 696. Where there are only two subscribing witnesses, the examination of both is essential, if both are accessible. Graber v. Haaz, 2 Dem. 216.

A subscribing witness is to be examined if within the state, whether a non-resident or not. Matter of Beck, 6 App. Div. 211, 39 N. Y. Supp. 810, aff'd 154 N. Y. 750.

Where there is a third subscribing witness, it is not essential that he should testify, unless he is compelled to do so by the action of the parties contesting the will. Matter of Owen, 48 App. Div. 507, 62 N. Y. Supp. 919. As to the respective rights and privileges of the parties in relation to the examination of the witnesses. Hoyt v. Jackson, 2 Dem. 443.

Denial by both subscribing witnesses, see In re Cottrell, 95 N. Y. 329; Irwin v. Irwin, 1 Redf. 495. As to disagreement of subscribing witnesses, see Matter of Bernsee, 141 N. Y. 389; Matter of Stillman, 2 Connolly 207, 9 N. Y. Supp. 446; Matter of Nevin's Will, 4 Misc. 22, 24 N. Y. Supp. 838.

As to the non-recollection of one subscribing witness, see Matter of Will of Higgins, 94 N. Y. 554; Aub. Theo. Sem.

v. Calhoun, 25 N. Y. 422; Taylor v. Broadhead, 5 Redf. 624; Matter of Laudy, 78 Hun 479, 29 N. Y. Supp. 136, aff'd 147 N. Y. 699. As to the indefinite recollection of the witnesses, see Matter of Will of Pepon, 91 N. Y. 255. As to the competency of witnesses, see In re Folt's Will, 71 Hun 492, 24 N. Y. Supp. 1052; Rugg v. Rugg, 83 N. Y. 592; In re Bedlow's Will, 67 Hun 408, 22 N. Y. Supp. 290. As to declarations of subscribing witnesses, see Matter of Hesdra, 119 N. Y. 615. As to witnesses regarding mental condition, see Holcomb v. Holcomb, 95 N. Y. 316.

An "examination" under this section contemplates such a particular inquiry into the facts and circumstances surrounding the execution as is calculated to satisfy the surrogate that the will is genuine, and that it was validly executed. Matter of Huber (1918), 181 App. Div. 435, 168 N. Y. Supp. 890.

The right of examination in a probate proceeding extends only to subscribing witnesses and other persons called by proponent, or whose testimony is offered. Matter of Briggs (1917), 180 App. Div. 843, 168 N. Y. Supp. 382.

Any party to the proceeding is entitled to examine the subscribing witnesses whether he has filed objections to the probate or not. Matter of Woerz (1916), 174 App. Div. 430, 161 N. Y. Supp. 209.

The general guardian of an infant interested in an estate may examine a subscribing witness. Matter of Woerz (1916), 174 App. Div. 430, 161 N. Y. Supp. 209.

Proof required.—As to evidence necessary to establish will, see Matter of Briggs, 47 App. Div. 47, 62 N. Y. Supp. 294. As to principles of evidence on proving wills, see Delafield v. Parish, 25 N. Y. 8; Peck v. Cary, 27 N. Y. 9. As to compliance with required formalities, see Matter of Nevin's Will, 4 Misc. 22, 24 N. Y. Supp. 838. As to what amounts to substantial compliance with the statute, see Matter of Voorhis' Will, 125 N. Y. 565; Gilbert v. Knox, 52 N. Y. 125; Coffin v. Coffin, 34 N. Y. 9; Matter of Conway, 124 N. Y. 455. As to the admissibility of evidence, see Hoyt v. Hoyt, 112 N. Y. 493; Loder v. Whelpley, 111 N. Y. 239; Matter of Will of Snelling, 136 N. Y. 515.

As to the burden and order of proof of will, see In re Cottrell, 95 N. Y. 329; Hoyt v. Jackson, 2 Dem. 443; Caw v. Robertson, 5 N. Y. 125; Wood v. Bishop, 1 Dem. 513; Burke v. Nolan, 1 Dem. 436; Lewis v. Lewis, 11 N. Y. 229; Matter of Freeman, 46 Hun 458; Matter of Williams, 2 Connolly 579, 15 N. Y. Supp. 828.

Specimens of the handwriting of a testator are admissible to enable experts to give their opinion as to the genuineness of the signature to the will by comparison. Peck v. Callaghan, 95 N. Y. 73.

Probate refused because of a failure to prove that the deceased subscribed her name or acknowledged to witnesses that

she had done so. *Matter of Van Gieson*, 47 Hun 5. Where one of the subscribing witnesses has died, the attorney may testify that the testator made his mark to the will, and this testimony, together with that of the living subscribing witnesses to the same effect, is sufficient proof of the testator's handwriting, within §§ 2618 and 2620. *Matter of Smith*, 61 Hun 101, 15 N. Y. Supp. 425.

If there is a fatal defect patent upon the face of a paper which cannot be cured by averment or proof, the court may reject what is offered as a will without entering upon formal proof. *Hewitt v. Hewitt*, 5 Redf. 271, aff'd 91 N. Y. 261.

Legacy to witness.—As to a legacy to a witness, see *Matter of Owen*, 48 App. Div. 507, 62 N. Y. Supp. 919; *Matter of Hopkins*, 6 Dem. 13, 3 N. Y. Supp. 661; *Matter of Will of Wilson*, 103 N. Y. 374.

Presumption of death, as to, see *Keller v. Stuck*, 4 Redf. 294; *Estate of Stewart*, 1 Connolly 86, 9 N. Y. Supp. 284; *Matter of Sullivan*, 51 Hun 378, 4 N. Y. Supp. 59.

Deaf and dumb.—As to proof of a will of, see *Matter of Perego*, 65 Hun 478, 20 N. Y. Supp. 394; *Rollwagen v. Rollwagen*, 3 Hun 121, aff'd 63 N. Y. 504.

Who are surrogate's witnesses.—Where counsel for the contestants obtained an order pursuant to this section, for the examination of witnesses, such witnesses are known to the profession of law as "surrogates' witnesses." *Matter of Hermann* (1913), 83 Misc. 283, 145 N. Y. Supp. 291. The provision for so-called "surrogates witnesses" was eliminated by the revision of the surrogates' code, 1914. The above case is of interest as showing the purpose and effect of the practice.

§ 2612. Absent, etc., witnesses to be accounted for; dispensing with testimony; commission; proof of handwriting.

The death, absence from the state, or incompetency by reason of lunacy, or otherwise of a subscribing witness required to be examined as prescribed in this or the last section, or the fact that such witness cannot, with due diligence, be found within the state, or cannot be examined by reason of his physical or mental condition may be shown by affidavit or other competent evidence, and when so shown to the satisfaction of the surrogate, the surrogate may by an order entered in the minutes or recited in the decree dispense with his testimony; or in a case where such witness is absent from the state and it is shown that his testimony can be obtained with reasonable diligence, the surrogate may, in his discretion, and shall upon the demand of any party, require his testimony to be taken by commission. Where the testimony of a subscribing witness has been dispensed with as provided in this section, and one subscribing witness has been examined, the will may be admitted to probate upon the testimony of such subscribing witness alone.

If all the subscribing witnesses to a written will be dead, or incompetent by reason of lunacy or otherwise, to testify, or unable to testify, or are absent from the state and their testimony has been dispensed with as provided in this section, or if a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, or was not present with the other witness at the execution of the will; the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action.

Source.—Former §§ 2619 and 2620. § 2619, as amended by L. 1882, ch. 399; L. 1888, ch. 508, and L. 1902, ch. 114; originally revised from L. 1937, ch. 460, part of §§ 10 and 11; L. 1841, ch. 129, §§ 1-3. § 2620 originally revised from R. S., pt. 2, ch. 6, tit. 1, §§ 13 and 16; L. 1837, ch. 460, § 20.

References.—Proof of handwriting by comparison with writing proved to be genuine, Code Civ. Pro., § 962-d.

In general.—Section does not differ materially from statutes which it replaces.

Rolla v. Wright, 2 Dem. 482. Its purpose is to provide against the infirmities of memory and possible hostility of subscribing witnesses. *Matter of Johnson*, 7 Misc. 220, 27 N. Y. Supp. 649.

Procedure; non-residence of witness.—Probate must be refused unless proponents take steps to examine a subscribing witness orally or by commission or establish satisfactorily their inability so to do. *Graber v. Haaz*, 2 Dem. 216. A witness is not disqualified by non-residence. *Matter of Beck*, 6 App. Div. 211, 39 N. Y. Supp. 810, *aff'd* 154 N. Y. 750. As to scope of former section, see *Upton v. Bernstein*, 76 Hun 516, 27 N. Y. Supp. 1078; *Matter of Laird*, 58 Misc. 477, 111 N. Y. Supp. 631.

Proof of handwriting.—Provision is made for the proving of the handwriting of any or all who may be dead, absent from the state, etc. *Collyer v. Collyer*, 4 Dem. 53.

This section, as amended by chapter 508 of the laws of 1888, does not require the evidence of a subscribing witness absent from the state, to be taken before the probate thereof, unless it is demanded by a party to the proceedings. *Matter of Clark*, 75 Hun 471, 27 N. Y. Supp. 681.

As to when the subscription of a will by the mark of the testator may be proved. *Matter of Kane*, 2 Connolly 249, 20 N. Y. Supp. 123; *Matter of Reynolds*, 4 Dem. 68; *Matter of Dockstader*, 6 Dem. 106; *Worden v. Van Gieson*, 6 Dem. 237; *Matter of Smith*, 61 Hun 101, 15 N. Y. Supp. 425; *Matter of Wilson*, 76 Hun 1, 27 N. Y. Supp. 957; *Matter of Van Gieson*, 47 Hun 5. As to sufficiency of proof in the absence of an attestation clause where the witnesses are dead under this section. *Matter of Briggs*, 47 App. Div. 47, 62 N. Y. Supp. 294.

If a will is susceptible of proof it must be by the testimony of the living witness and by proving the handwriting of the testator and of the subscribing witnesses. *Matter of Kletts's Will*, 3 Misc. 385, 24 N. Y. Supp. 721.

When will may be established.—A will may be established upon proof of the handwriting of the testator and of the subscribing witness and also of such other circumstances as would be sufficient to prove the will upon the trial of an action. *Matter of Purdy*, 25 Misc. 458, 55 N. Y. Supp. 644, *aff'd* 46 App. Div. 33, 61 N. Y. Supp. 430; *Matter of Abel*, 63 Misc. 169, 118 N. Y. Supp. 429; *Matter of Dale*, 56 Hun 169, 9 N. Y. Supp. 396, *aff'd* 134 N. Y. 614; *Matter of Laudy*, 78 Hun 479, 29 N. Y. Supp. 136, *aff'd* 147 N. Y. 699; *Matter of Carll*, 38 Misc. 471, 77 N. Y. Supp. 1036; *Matter of De Haas*, 9 App. Div. 561, 41 N. Y. Supp. 696, s. c. 19 App. Div. 266, 46 N. Y. Supp. 189; *Matter of Foley*, 55 Misc. 162, 106 N. Y. Supp. 474.

Will duly executed and signed may be admitted to probate although subscribing witnesses testify that the testatrix at the time of its execution neither declared the instrument to be her will nor requested the witness to sign as such. *Matter of Wagner*, 67 Misc. 6, 124 N. Y. Supp. 615.

A failure of recollection on the part of

the subscribing witnesses will not defeat probate, if the surrounding circumstances, taken together with attestation clause, satisfactorily establish due execution. *Matter of Schweigert*, 17 Misc. 186, 40 N. Y. Supp. 979; *Matter of Sears*, 33 Misc. 141, 68 N. Y. Supp. 363.

Where the attestation clause is complete the failure of the subscribing witnesses to testify positively to the testator's subscription to his will in their presence, or to the acknowledgment of the signature to them, may well be attributed to lack of memory and a finding that the will was subscribed by decedent in the presence of the subscribing witnesses is justified. *Matter of Severance* (1916), 96 Misc. 384, 161 N. Y. Supp. 452.

Where an instrument in writing propounded as a last will and testament is found last in testator's custody, subscribed by him and two witnesses also deceased, it will be presumed that the instrument was executed in conformity with the statute of wills, and probate thereof will be decreed. *Matter of Rosenthal* (1917), 100 Misc. 84, 164 N. Y. Supp. 1060.

A will may be admitted to probate against the evidence of the subscribing witnesses, or where by want of recollection they are unable to make the proofs as prescribed by law. *Matter of Carey*, 14 Misc. 486, 36 N. Y. Supp. 817, *aff'd* 24 App. Div. 531, 49 N. Y. Supp. 32; *Matter of Fitzgerald*, 33 Misc. 325, 68 N. Y. Supp. 632; *Matter of Cornell*, 89 App. Div. 412, 85 N. Y. Supp. 920.

The fact that the witnesses to a will contradict each other, does not, of itself, make it incumbent upon the surrogate to refuse probate, particularly, where the witnesses have signed an attestation clause reciting a full compliance with the statute. *Matter of Spooner* (1915), 89 Misc. 30, 152 N. Y. Supp. 537.

Although the credibility of witnesses to a will, who testify that there was no due execution, may be impeached by the party offering the same for probate, such impeachment does not supply the place of other evidence showing the execution required by the statute. *Matter of Moore*, 109 App. Div. 762, 96 N. Y. Supp. 729.

Where evidence is given sufficient to sustain a finding that the signatures to a will are genuine, the surrogate is not required to refuse probate by proof of declarations on the part of a deceased subscribing witness to the effect that he fabricated the will. *Matter of Hesdra*, 119 N. Y. 615. Instrument will not be probated where proponents neither take steps to examine subscribing witness orally or by commission, nor establish satisfactorily their inability to do so. *Graber v. Haaz*, 2 Dem. 216.

Where, subsequently to testator's death, his will is destroyed and its contents are sufficiently proved by two credible wit-

nesses and declarations of the testator to the effect that he had made a will are shown, probate will be denied in the absence of proof of the handwriting of deceased subscribing witnesses and of any other proof of the execution of the will. *Matter of Halstead*, 51 Misc. 542, 101 N. Y. Supp. 971.

An attestation clause with proof of the signatures may be sufficient to make out a prima facie case. *Matter of Wagner*, 67 Misc. 6, 124 N. Y. Supp. 615.

Production of will.—The will of an inhabitant of this state, made and executed

herein, cannot be admitted to probate by the surrogate without the production of the will itself. *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187, aff'd 166 N. Y. 610; *Matter of Law*, 80 App. Div. 73, 80 N. Y. Supp. 410, aff'd 175 N. Y. 471.

Proof of the other circumstances affecting due execution of a will may be had by direct evidence of the facts themselves or by proof of other facts from which the existence of the facts in issue may naturally be inferred. *Matter of Abel*, 136 App. Div. 788, 121 N. Y. Supp. 452.

§ 2613. Proof of lost or destroyed will.

A lost or destroyed will can be admitted to probate in a surrogate's court, but only in a case where a judgment establishing the will could be rendered by the supreme court, as prescribed in section 1865 of this act.

Source.—Former § 2621; originally revised from L. 1870, ch. 359, § 8. See also R. S., pt. 2, ch. 6, tit. 1, § 67-b.

References.—Action to establish or impeach a will, Code Civ. Pro., §§ 1861-1867.

Effect in general.—This section does not change the common-law rule that to establish title to realty through a will it was sufficient to prove its due execution by one of the subscribing witnesses. *Upton v. Bernstein*, 76 Hun 516, 27 N. Y. Supp. 1078. The power of a court to admit to probate a will alleged to have been lost or destroyed exists only in the cases prescribed by statute. *Hatch v. Sigman*, 1 Dem. 519.

Presumption of destruction.—Where no testamentary papers can be found after the death of a woman who had made a will, although careful and exhaustive search has been made for them, it is to be presumed that she destroyed her will with the intention of revoking it. *Matter of Kennedy*, 30 Misc. 1, 62 N. Y. Supp. 1011, aff'd 53 App. Div. 105, 65 N. Y. Supp. 879, aff'd 167 N. Y. 163; *Matter of Barnes*, 70 App. Div. 523, 75 N. Y. Supp. 373.

Where the will of testatrix, which was last in her custody was not found at her death, the presumption law is that she destroyed the will *animo revocandi*. The burden of overcoming such presumption is on those interested therein and must be conclusive. *Matter of Ascheim* (1912), 75 Misc. 435, 135 N. Y. Supp. 515.

Nature of proof.—As to what evidence, accompanied by a copy of the will, authorizes its admission to probate. *Matter of Granacher*, 74 App. Div. 567, 77 N. Y. Supp. 748, aff'd 174 N. Y. 504; *Matter of Paine*, 6 Dem. 361. As to what knowledge witnesses must have to establish proof of

lost will, see *Matter of Waldron*, 19 Misc. 333, 44 N. Y. Supp. 353.

In a proceeding to establish a lost will if the witnesses do not testify to a legal execution of the will, probate must be refused. *Matter of Purdy*, 25 Misc. 458, 55 N. Y. Supp. 644, aff'd 46 App. Div. 33, 61 N. Y. Supp. 430. Will must be shown to have been in existence at the death of the testator or to have been fraudulently destroyed during his lifetime. *Matter of Kennedy*, 167 N. Y. 163; *Matter of Marsh*, 45 Hun 107. Proof of an accidental destruction of the will without testator's knowledge or consent, while he was living, is not enough to confer jurisdiction. *Matter of Reiffeld*, 36 Misc. 472, 73 N. Y. Supp. 808. The loss or destruction is a fact material to be proved. *McNally v. Brown*, 5 Redf. 372. Fraudulent destruction not shown by proof that persons interested had opportunities to destroy the will. *Collyer v. Collyer*, 110 N. Y. 481.

A lost will cannot be admitted to probate upon stipulation of counsel agreeing as to its contents, though due execution be established. *Matter of Ruser*, 6 Dem. 31. One who produces and merely verifies an alleged draft of the will cannot be considered the needed additional witness within meaning of this section. *Collyer v. Collyer*, 4 Dem. 53. It seems the existence of a clause in an instrument later than one propounded as a decedent's will and revoking the latter, may be lawfully proved by the testimony of a single witness. *Colligan v. McKernan*, 2 Dem. 421.

§ 2614. Probate not allowed, unless surrogate satisfied, etc.

Before admitting a will to probate, the surrogate must inquire particu-

larly into all the facts and circumstances, and must be satisfied with the genuineness of the will, and the validity of its execution.

If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint; it must be admitted to probate as a will valid to pass real property, or personal property, or both, as the surrogate determines, and the petition and citation require, and must be recorded accordingly. The decree admitting it to probate must state whether the probate was or was not contested.

Source.—Former §§ 2622 and 2623. § 2622 originally revised from L. 1837, ch. 460, parts of §§ 10, 17. § 2623 originally revised from R. S., pt. 2, ch. 6, tit. 1. § 14; L. 1837, ch. 460, § 18; L. 1877, ch. 206, § 2.

Application.—*Matter of Huber* (1918), 181 App. Div. 635, 168 N. Y. Supp. 890.

The section applies equally to wills of real and personal property, and the same proof is required as to each upon the questions stated. *Matter of Bartholick*, 141 N. Y. 166. Proof as to holographic will. *Matter of Turrell*, 166 N. Y. 330.

Surrogate must be satisfied.—The proponent of a will is bound to prove to the satisfaction of the court that the paper in question declares the will of the deceased. *Cooper v. Benedict*, 3 Dem. 136. The surrogate must be satisfied of the validity of the execution of the will. *Matter of Oliver*, 13 Misc. 466, 34 N. Y. Supp. 706; *Hoyt v. Jackson*, 2 Dem. 443.

Where the factum of a will is established to the satisfaction of a surrogate, he should admit the will to probate, unless want of testatmentary capacity or fraud or undue influence is established beyond a reasonable doubt. *Matter of Babcock*, 42 Misc. 235, 86 N. Y. Supp. 670. Where the signature to a will is claimed to be a forgery, the surrogate, if he is not satisfied the signature is genuine, should refuse to admit the will to probate. *Matter of Burtis*, 43 Misc. 437, 89 N. Y. Supp. 441.

Idem; proof of insanity.—Where a decedent, at the time of the alleged execution of a will, is shown to have been aged, ill, physically feeble and with impaired senses, probate must be refused unless there is sufficient evidence showing that the decedent's mind accompanied the will and was cognizant of its provisions. *Hyatt v. Lunin*, 1 Dem. 14.

A will which is the product of delusional insanity must be set aside *in toto*, irrespective of the question as to who does or does not contest it. *Matter of Long*, 43 Misc. 560, 89 N. Y. Supp. 555.

Where it appears that six years before testatrix made her last will she was confined for several months in an institution for the insane, and the whole evidence leaves the question of her sanity in doubt, probate will be denied. *Matter of Giaque* (1914), 83 Misc. 684, 145 N. Y. Supp. 364.

Idem; burden of proving undue influence.—The burden of proving undue influence is

upon the party who asserts it, and while it is seldom susceptible of direct proof, nevertheless in each case there must be affirmative evidence of the facts from which such influence can fairly and reasonably be inferred. *Eckert v. Page*, (1914), 161 App. Div. 154, 146 N. Y. Supp. 513.

Idem; burden of proof on proponent.—The meaning of the expression "the surrogate must be satisfied of the genuineness of the will and the validity of its execution" is that he be satisfied in accordance with probate law. The burden is on proponent in every probate cause and in every instance to satisfy the conscience of the court that the instrument propounded constitutes the last will of a free and capable testator. In many cases where a will charged to be a product of fraud has failed of probate, it is because the proponent has failed to satisfy the court that the will was that of a free and capable testator. On this ground alone the surrogate may decline probate and in probate law the ground is good and sufficient. *Matter of Van Ness* (1912), 78 Misc. 592, 139 N. Y. Supp. 485.

The ultimate burden of the whole case rests on the proponent of a will to establish by a preponderating weight of proof the capacity of the testator to the satisfaction of the surrogate, and consequently where the proofs are in equilibrium the proponent has failed to establish the will. In *re Gedney's Will* (1913), 142 N. Y. Supp. 157.

It is still incumbent upon the proponent of a will to bring the testatmentary paper within the statute of wills in the first instance and this is his affirmative case. So to do the proponent must establish among other things that the testator at the time of executing the will was in all respects competent to make a will. In *re Gedney's Will* (1913), 142 N. Y. Supp. 157.

Where the genuineness of an instrument purporting to be a last will is disputed, the burden of proving to the satisfaction of the surrogate its genuineness and due execution rests on the proponent. In such a case the surrogate may inquire particularly into the circumstances. *Matter of*

Jacobs (1912), 76 Misc. 394, 137 N. Y. Supp. 155.

Idem; nature and weight of evidence.—Before a will is admitted to probate, the evidence should be of such a nature and of such weight and probative force that the court on its conscience can say that the document is what it purports to be; not alone that the statutory formalities of execution were complied with, but that the decedent had testamentary capacity. *Matter of King* (1915), 89 Misc. 638, 154 N. Y. Supp. 238.

Proof of execution.—A will may be admitted to probate upon the uncontradicted evidence of the subscribing witnesses. *Matter of Smart* (1914), 84 Misc. 336, 145 N. Y. Supp. 838.

Where a witness is produced the law imposes upon the surrogate the duty of examining such witness as to the execution of the will, whether the contestants be present or not. *Matter of Baird*, 41 Hun 89. Although the surrogate must be satisfied of the genuineness of the will and the validity of its execution, still he must be so satisfied when the proof taken establishes what the statute requires. *Matter of Hardenburg*, 85 Hun 580, 33 N. Y. Supp. 150.

Idem; refusal of probate for lack of publication.—Where an alleged will having no attestation clause, though signed by the alleged testatrix and subscribing witnesses at her request, was not at any time declared by the testatrix to be her last will and testament, probate must be refused on the ground that there was no publication as required by statute. *Matter of Shaper* (1914), 86 Misc. 577, 149 N. Y. Supp. 486.

Idem; acknowledgment.—Where a testator drew his own will on an ordinary printed form, signed the same at the end thereof, and also wrote his name in the attestation clause merely for the purpose of identification, an acknowledgment of his signature to one of the witnesses with the will so folded that his signature at the end thereof was not visible, the witness seeing only his signature in the attestation clause, is insufficient and probate will be refused although his signature was properly acknowledged to the other witness. *Matter of Keefe* (1913), 155 App. Div. 575, 141 N. Y. Supp. 5.

If it appears to the surrogate.—The phrase, as it occurred in the former section was held to imply that there must be some evidence given tending to show that the person who made the will was competent to make it, and at the time of its execution not under restraint. *Matter of Schreiber*, 112 App. Div. 495, 98 N. Y. Supp. 483; appeal dismissed. 185 N. Y. 610.

Competency of testator.—A proponent must show affirmatively, before resting his case, that the testator was of sound mind. *Matter of Neary*, 61 Misc. 557, 115 N. Y.

Supp. 971. *Ramsdell v. Viele*, 6 Dem. 244. Testator must be shown to have been in all respects competent to make a will and not under restraint. *Matter of Elster*, 39 Misc. 63, 78 N. Y. Supp. 871; *Matter of Freeman*, 46 Hun 458.

Determination of testamentary capacity is a question of fact for the jury and the court is not justified in withdrawing the issue from the jury if on the entire evidence reasonable men might draw different inferences. *Matter of Strong* (1917), 179 App. Div. 539, 166 N. Y. Supp. 862.

If, upon the whole case presented, the judicial conscience is in grave doubt as to whether or not the testator was mentally sound, that doubt must be resolved in favor of the contestant. *Matter of Barbi-neau*, 27 Misc. 417, 59 N. Y. Supp. 375. But see *Knapp v. Reilly*, 3 Dem. 427.

Insane delusions; erroneous belief suggested as a reason for disinheritance. *Matter of O'Dea*, 84 Hun 591, 33 N. Y. Supp. 463. Stupidity and delusions following attacks of heart disease held insufficient. *Matter of Richardson*, 51 App. Div. 637, 64 N. Y. Supp. 944. Belief in Christian Science insufficient. *Matter of Brush*, 35 Misc. 689, 72 N. Y. Supp. 421. Delusions must contribute to disposition made of estate. *Leslie v. Leslie*, 15 Wkly. Dig. 58. Exaggerated opinions insufficient. *Matter of White*, 121 N. Y. 406.

As to proof of testamentary capacity required in the case of one judicially declared to be a lunatic. *Matter of Coe*, 47 App. Div. 177, 62 N. Y. Supp. 376; *Matter of Widmayer*, 34 Misc. 439, 69 N. Y. Supp. 1014. As to probate of a second will where there is an agreement by a husband and wife not to alter a will. *Kine v. Farrell*, 71 App. Div. 219, 75 N. Y. Supp. 542.

The words "competent" and "restraint" as used in this section have no reference to conditions caused by or arising from the prior execution of a joint will or contract, but refer and are limited to mental competency and restraint exercised upon a testator at the time of the preparation and execution of the will offered for probate. *Matter of Hermann* (1917), 178 App. Div. 182, 165 N. Y. Supp. 298.

Appeal from decree.—Although a surrogate, in admitting a will to probate, determines that it was duly executed and that the testator at the time of executing it was in all respects competent to make a will and not under restraint, yet an appeal may be taken from the decree. *Matter of Drake*, 45 App. Div. 206, 60 N. Y. Supp. 1020. When a decree admitting a will to probate should be reversed, and the question of the testatrix's competency to make the will be tried before a jury, considered. *Matter of Goodwin*, 95 App. Div. 183, 88 N. Y. Supp. 734.

Contest of will.—Surrogate must certify whether or not the probate of the will was

contested. *Bryant v. Thompson*, 59 Hun 545, 14 N. Y. Supp. 28.

The finding of a jury is conclusive unless the verdict is set aside or a new trial granted. *Matter of Barlow* (1917), 180 App. Div. 860, 168 N. Y. Supp. 131.

Verdict of jury not conclusive.—There is no provision of the new surrogates' law which makes a verdict of a jury in a con-

tested probate proceeding conclusive upon the surrogate or which relieves him from the paramount obligations of his office. *Matter of Gleason* (1916), 96 Misc. 397, 160 N. Y. Supp. 220; *Matter of Plate* (1916), 93 Misc. 423, 156 N. Y. Supp. 999. Section cited.—*Matter of Kirkholder* (1916), 171 App. Div. 153, 158, 157 N. Y. Supp. 37.

§ 2615. Construction of will, how obtained.

An executor, administrator with the will annexed, or any person interested in obtaining a determination as to the validity, construction or effect of any disposition of property contained in a will, may present to the surrogate's court in which such will was probated, a petition setting forth the facts which show his interest, the names and post-office addresses of the other parties interested, and the particular portion of such will concerning which he requests the determination of the court.

If the surrogate entertains the application, a citation shall issue to all persons interested in the question to be presented, to show cause why such determination should not be made. On the return of the citation the surrogate shall make such decree as justice requires.

If a party expressly puts in issue in a proceeding for the probate of a will the validity, construction, or effect of any disposition of property, contained in such will, the surrogate may determine the question, upon rendering a decree, after notice given in such manner as the surrogate directs to all persons interested who do not appear on such application in person or by attorney; or, unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in section 2614, may admit the will to probate and reserve the questions so raised for future consideration and decree.

Source.—Former § 2624, as amended by L. 1910, ch. 584, and L. 1913, ch. 337; originally revised from L. 1870, ch. 359, § 11.

Revisers' note.—General jurisdiction to construe a will given, either in special proceeding for that purpose, or in pending proceeding, including probate. Heretofore it would be necessary to bring an action for construction in most cases.

Application.—*Matter of Werle* (1915), 91 Misc. 398, 155 N. Y. Supp. 262; *Matter of Schriever* (1915), 91 Misc. 656, 155 N. Y. Supp. 826; *Matter of Hematreet* (1917), 101 Misc. 340, 167 N. Y. Supp. 1016.

Effect of change in revised code.—This section giving the surrogate power not previously enjoyed to construe a will in a proceeding brought for that purpose, must be construed in connection with § 2510. *Matter of Bouchoux* (1915), 89 Misc. 47, 162 N. Y. Supp. 548.

This section which purports to confer legal jurisdiction on the Surrogate to pass on legal devices and legal titles, requires conformity with other rules of procedure. *Matter of Catlin* (1915), 89 Misc. 93, 151 N. Y. Supp. 254.

As a court of construction the surrogate proceeds according to the equitable canons of former and existing courts of construction. Before construction of a will can

take place, interpretation must be resorted to if there is doubt as to testator's meaning. Interpretation is the explication of testator's intention. In interpretation it is the duty of the court to bring the written expression of a testator in harmony with his intention. *In re Kathan's Will* (1913), 141 N. Y. Supp. 705.

The intention of this section is to confer upon the surrogate power and jurisdiction similar to that formerly possessed by courts of equity. *Matter of Mount*, 185 N. Y. 162, aff'g 107 App. Div. 1. 95 N. Y. Supp. 490.

Construction and application under former law.—Section is not mandatory. Surrogate is not required to consider and determine every question which may be raised by any of the parties as to the construction or validity of a will: he may in his discretion properly reserve or postpone the consideration of such question until they actually arise and their determin-

ation becomes necessary to a proper disposition of the estate. *Matter of Mount*, 185 N. Y. 162, aff'g 107 App. Div. 1, 95 N. Y. Supp. 490; *Matter of Powell*, 136 App. Div. 830, 121 N. Y. Supp. 779.

There is no authority to construe a will for the purpose of defeating probate, although it may be examined to discover its bearing upon questions relating to its execution, the capacity of the testator, and the like. *Matter of Davis*, 182 N. Y. 468, aff'g 105 App. Div. 221, 93 N. Y. Supp. 1004. See also *Matter of Pilsbury*, 50 Misc. 367, 99 N. Y. Supp. 62.

Surrogate may, pursuant to this section, construe a will as to the application of § 17 of the decedent estate law, limiting devices and bequests to charitable and other corporations. *Matter of Talmage*, 59 Misc. 130, 112 N. Y. Supp. 206.

Power to construe will.—A surrogate's court may construe a decedent's will in any proceeding where it becomes necessary in order to enable it to exercise powers expressly conferred upon it. *Kelsey v. Van Camp*, 3 Dem. 530; *Matter of Perkins*, 75 Hun 129, 26 N. Y. Supp. 958; aff'd 14th N. Y. 599; *Matter of Thompson*, 5 Dem. 117. As to surrogate's power to construe a will containing dispositions of real and personal property inseparably connected, see *Matter of Austin*, 35 App. Div. 278, 55 N. Y. Supp. 52; *Matter of Shrader*, 63 Hun 36, 17 N. Y. Supp. 273; *Matter of Morganstern*, 9 Misc. 198, 30 N. Y. Supp. 215.

Surrogate may determine construction or effect of disposition of personal property only. *Matter of Van Valkenburg*, 60 Misc. 497, 113 N. Y. Supp. 1108; *Matter of Arensburg*, 52 Misc. 261, 102 N. Y. Supp. 971; aff'd 120 App. Div. 463, 104 N. Y. Supp. 1033.

A foreign administrator has no such interest in a will as will entitle him to ask for a construction of its provisions. *Matter of Davis*, 105 App. Div. 221, 93 N. Y. Supp. 1004; aff'd 182 N. Y. 468.

A surrogate's court has no jurisdiction upon proceedings for probate, to pass upon the validity, construction, or effect of a disposition of personal property contained in a will executed without the limits of this state. *Tiers v. Tiers*, 2 Dem. 209.

An executor cannot procure under this section a construction by a surrogate of a bequest of personality. *Matter of Robertson*, 23 Misc. 450, 51 N. Y. Supp. 502. A party having no interest under the will may not ask for a construction. *Matter of Campbell*, 88 Hun 374, 34 N. Y. Supp. 831. The surrogate's investigation must be confined to questions arising between the parties growing out of the terms of the will and not involving the title of the estate to the property attempted to be disposed of. *Matter of Will of Walker*, 136 App. Div. 20, 120 N. Y. Supp. 122.

Where the validity and effect of certain dispositions of personal property are put

in issue, it is the duty of the surrogate to pass upon the issues, before admitting the will to probate. *Efray v. Foundling Asylum*, 5 Redf. 557; *Hagenmeyer v. Hanselman*, 2 Dem. 87; *Potter v. McAlpine*, 3 Dem. 108; *Pfaier v. Raberg*, 3 Dem. 360; *Lynch v. Loretta*, 4 Dem. 312; *Wardlow v. Home for Incurables*, 4 Dem. 473; *Matter of Tiford*, 5 Dem. 524; *Ludlam v. Holman*, 6 Dem. 194; *Matter of Petit*, 6 Dem. 391; *Matter of Havens*, 6 Dem. 456, 2 N. Y. Supp. 639; *Matter of Hull*, 30 Misc. 281, 63 N. Y. Supp. 725; *Matter of Zimmerman*, 22 Misc. 411, 50 N. Y. Supp. 395; *Matter of Mullen*, 25 Misc. 253, 55 N. Y. Supp. 432; *Matter of Counrod*, 27 Misc. 475, 59 N. Y. Supp. 164; *Matter of Howland*, 37 Misc. 114, 74 N. Y. Supp. 950; *Matter of Probate of Will of Kelman*, 126 N. Y. 75.

The mere fact that one is a party to a controversy over the probate of a will does not entitle him to insist that before the entry of a decree according probate, the court shall pass upon all questions which he may see fit to raise, respecting the validity, construction, or effect of the will, or of any of its provisions. *Jones v. Hamersley*, 4 Dem. 427. As to whether a surrogate's court has authority to direct an executor to expend funds of his decedent's estate, to discover facts, the disclosure whereof is necessary to enable the court to construe the will as prescribed by the section, see *Matter of Moderno*, 5 Dem. 288.

The surrogates have jurisdiction to determine intestacy in the first instance in so far as the factum of a will of personality is concerned. *Matter of Connell* (1912), 75 Misc. 574, 136 N. Y. Supp. 166.

A written demand by any party to a probate proceeding for a construction of a will, even where the petition does not request it, is a sufficient compliance, and the surrogate may proceed to construe the will. *Matter of Farmer* (1917), 99 Misc. 437, 163 N. Y. Supp. 1089.

Where executors allege that it is impossible for them to pay any of the general legacies until it is determined whether they are a charge upon the real estate, the surrogate will entertain an application for a construction of the will. *Matter of Noe* (1916), 94 Misc. 63, 157 N. Y. Supp. 679.

The judicial construction of L. 1853, ch. 238 (now code of civil procedure, § 1866), which authorized the judicial determination of the validity of devises in the same manner as the validity of deeds could be determined, affords a criterion for the true construction of this section in determining the powers of the surrogate thereunder. *Matter of Smith* (1916), 96 Misc. 414, 160 N. Y. Supp. 514.

Construction of portion of will deferred. *Matter of Klumpf* (1916), 95 Misc. 436, 158 N. Y. Supp. 1094.

Construction denied; rights of after-born child.—A petition under this section

to determine whether or not a testator by his last will had provided for his after-born child, in conformity with § 26 of the decedent estate law, must be dismissed, but without prejudice to a proper action to enforce the infant's rights. *Matter of Sauer* (1915), 89 Misc. 105, 151 N. Y. Supp. 465.

Idem; right of infant legatee.—A petition by a general guardian of an infant legatee filed under this section to obtain a determination as to the validity of dispositions of property real and personal under a will must be dismissed, particularly where the court is not advised by the petition of the nature of the real property or whether or not it is all within the county, and no part thereof is described by metes and bounds or even with reference to recorded conveyances. *Matter of Catlin* (1915), 89 Misc. 93, 151 N. Y. Supp. 254.

Idem; where determination not necessary at time of application.—Where special guardians in a probate proceeding apply to the surrogate's court for a determination as to the validity, construction and effect of an attempted disposition by will, the objection that a decision of the matter is unnecessary at that time because no distribution is then to be made will not be heard. *Matter of Heller* (1914), 86 Misc. 148, 149 N. Y. Supp. 122.

Idem; conditional bequest as to payment of debts of legatee to testator.—Where a petition made for the construction of a will by the son of testatrix to whom bequests were made on condition that he pay his debts to the testatrix within a year after her decease alleges that it will be practically impossible for him to comply with the condition and asks that the limitation of one year be eliminated, the application will be denied as any construction of the will based on the assumption that petitioner will not comply with said condition would not only be premature but speculative and impractical. *Matter of Leary* (1915), 91 Misc. 466, 154 N. Y. Supp. 959.

Idem; active relief must be afforded.—Ordinarily, the surrogate's court cannot proceed to construe a last will unless as auxiliary to active relief of some kind within its jurisdiction. *Matter of Kohler* (1916), 96 Misc. 433, 160 N. Y. Supp. 639.

Idem; adjudication must follow act of construction.—The jurisdiction of the surrogate to construe a will cannot be enlarged so as to enable him to determine the title of testatrix to certain personal property unless such an adjudication necessarily follows from a proper act of construction of the will. *Matter of Farmer* (1917), 99 Misc. 437, 163 N. Y. Supp. 1089.

An application by executors and trustees for the instruction and direction of the court as to how to proceed with duties imposed upon them by law, is not one for the construction of a will within the meaning

of this section. *Matter of Zitsperger* (1914), 88 Misc. 386, 151 Supp. 950.

Will of real property.—As to jurisdiction of a surrogate's court to determine the validity, construction, or effect of a testamentary disposition of real property, upon an application for probate, see *Prive v. Foucher*, 3 Dem. 339; *Matter of Ullman*, 67 Hun 5, 21 N. Y. Supp. 758, rev'd 137 N. Y. 403. A surrogate may construe the clause of a will creating a trust in which real and personal property are inseparably blended. *Matter of Trotter*, 182 N. Y. 465, aff'g 104 App. Div. 188, 93 N. Y. Supp. 404.

The surrogate has power to determine whether a will shall be admitted to probate as a will valid to pass real property, without giving to his decision the effect of an adjudication as to the validity of the devises in the will. *Matter of Merri-man*, 136 N. Y. 58.

Where a will relates to both real and personal estate, the surrogate has no jurisdiction to construe the same as to the disposition of the real property. *Matter of Davis*, 59 Misc. 310, 112 N. Y. Supp. 265.

The surrogates' law of 1914 making no provision for a jury trial in proceedings involving legal titles to land, the surrogate may not, in a proceeding for the construction of a will, determine the legal title to real property, nor may he construe a will relating to personal property only unless in connection with some real contention in another proceeding to the solution of which a construction of the will is immediately essential. *Matter of Smith* (1916), 96 Misc. 414, 160 N. Y. Supp. 514.

Disposition of real and personal property.—Where the validity of testamentary dispositions of real and personal property cannot be separated, the surrogate may not, under the powers conferred upon him, construe the will, even by consent. *Matter of Smith* (1916), 96 Misc. 414, 160 N. Y. Supp. 514.

Secret trust.—The surrogate has no power to declare and enforce a secret trust created by will. He has power to determine without taking evidence the invalidity of this attempted disposition of property and his decree is conclusive on that point. *Reynolds v. Reynolds* (1918), 224 N. Y. 429.

Res adjudicata.—Construing a testamentary disposition of personal property is not *res adjudicata* in an action for the construction of the will in reference to the real estate. *Corse v. Chapman*, 153 N. Y. 467.

The supreme court will not take cognizance of a suit for the construction of a will, where complete relief can be obtained in the surrogate's court. Thus it will not entertain a suit to determine how a residuary estate should be divided, where the matter may be determined by the surrogate. *Moore v. DeGroote* (1913), 158 App. Div. 828, 143 N. Y. Supp. 873.

Action under former section 2653a, see N. Y. Supp. 798; Judson v. Staley Tuthill v. Debovoise (1914), 164 App. Div. (1914), 163 App. Div. 62, 148 N. Y. Supp. 728, 150 N. Y. Supp. 387; Wadsworth v. Hinchcliff (1914), 163 App. Div. 266, 148 733.

§ 2616. Notice of probate to legatees and devisees.

Before letters are issued, there shall be filed in the surrogate's court a written notice, entitled in the proceeding, stating the name of the testator, that his last will and testament has been offered for probate, or probated, as the case may be, and the name and post-office address of the proponent, and of each and every legatee, devisee or other beneficiary, as set forth in the petition, who has not been cited or has not appeared or waived citation, with proof by affidavit of the mailing of a copy of such notice to each of said beneficiaries.

Source.—New.

Revisers' note.—The purpose of this section is to give persons interested who are not next-of-kin or heirs notice that they are interested in the will. To require them to be cited would in many cases make large unnecessary expense. This notice is not jurisdictional. It is feared that some legatees lose their legacies because they never have notice of the legacy and there is no judicial settlement of the estate.

See new § 2618 where same notice is used in case of contest.

§ 2617. Who may file objections to the probate of an alleged will; jury trial.

Any person interested in the event as devisee, legatee or otherwise, in a will or codicil offered for probate; or interested as heir-at-law, next of kind, or otherwise, in any property, any portion of which is disposed of or affected, or any portion of which is attempted to be disposed of or affected, by a will or codicil offered for probate; or is interested as devisee, legatee, executor, testamentary trustee or guardian in any other will or codicil alleged to have been made by the same testator and not duly revoked by him; may file objections to any will or codicil so offered for probate.

Such objections must be filed at or before the close of the testimony taken before the surrogate on behalf of the proponent, or at such subsequent time as the surrogate may direct, and if a jury trial of any issue is desired the same shall be demanded in the objections.

Source.—New.

Revisers' note.—Notice in new § 2611, provision for oral or cross examination for laying foundation for objections. The unfair requirement that the proponent shall produce practically all the witnesses a contestant wants to examine provided for in former § 2618 (new § 2611), is repealed.

Who may file objections.—One who though a legatee under a will is neither an heir at law nor next to kin of testatrix, and who makes no claim as a legatee or devisee under any other will or codicil of said decedent, is not entitled to file objections to the probate of her last will. Matter of Nelson (1915), 89 Misc. 25, 152 N. Y. Supp. 734.

Where the husband of testatrix whose only surviving next of kin was a sister, died about a month after executing a waiver of citation to attend the probate of his wife's will, and his will was denied

probate, an application by a nephew of the husband, who was not a legatee under the will of testatrix, to vacate the decree of probate thereof and for leave to file objections, will be denied. Matter of Hart (1918), 105 Misc. 290, 172 N. Y. Supp. 807.

An heir of the husband, who has since died, may not object to probate of the wife's will, where he is neither legatee nor heir of the wife. In re Hart's Estate (1918), 172 N. Y. Supp. 807.

Right of assignee of next of kin to contest where he has a sufficiently distinct

interest under the assignment. *Matter of Zimmerman* (1918), 104 Misc. 516, 172 N. Y. Supp. 80.

A person who is not an heir at law or next of kin of the deceased and whose only interest in the estate is that by a clause of the will he is given a legacy of \$5,000, and who in the event of his being successful in contesting the will would receive nothing, has no standing to object to the probate of the will. A person to be entitled to intervene under this section must have an interest to protect. *In re Cutters' Estate* (1914), 148 N. Y. Supp. 920.

A demand for a jury trial should be made in the objections to probate and where it has not been so made, it will be deemed to have been waived, and a party should not be permitted to withdraw objections from the files in order that they may be refilled with an additional demand for a jury trial, where the time for such demand has expired. *Matter of Holme* (1915), 167 App. Div. 237, 152 N. Y. Supp. 822.

Right of trial by jury.—It was evidently not the intent of the legislature to limit or deprive any party to any proceeding of his right of trial by jury, in case he made the demand under § 2538 when said party was a party in interest in behalf of the probate of a will and not in the objections as a party in interest opposed to the probate of a will. *Matter of Potter* (1916), 94 Misc. 12, 158 N. Y. Supp. 1001.

Demand for trial by jury by contestants at time of filing of objections. *Matter of Carnright* (1917), 180 App. Div. 21, 167 N. Y. Supp. 438.

Default of contestants on probate opened.—Where contestants of a will offered for probate in the surrogate's court did not voluntarily change their counsel, but were abandoned by him on the eve of trial after the filing of objections on their behalf, their motion to open a decree of probate entered on their default should be granted. *Matter of Wolfe* (1917), 181 App. Div. 35, 168 N. Y. Supp. 264.

§ 2618. Notice to legatees and devisees of objections filed.

Whenever objections are filed to the probate of a will, the proponent shall file the notice specified in section 2616 and serve the same on each of the parties therein named, and upon any other persons directed by the surrogate to be notified, in such manner and within such time as the surrogate shall direct, which notice shall have the additional statement included in or endorsed thereon that objections have been filed to the probate of such will and that the same will be heard on a day or at a term of court therein stated. Proof of due service of such notice shall be made and filed in the surrogate's court, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall have been so notified.

Source.—New.

Revisers' note.—Covers requirement for notice in case of contest.

The former section (2617) did not require a citation and the consequent acquiring of jurisdiction by the regular method, although that is common practice.

§ 2619. Proceedings upon jury trial of contested probate.

Upon the trial before the court and a jury of the objections filed to the probate of a will, or codicil, or either, the verdict of the jury or any order or decision of the judge holding the court shall be entered in the minutes of the court; and if the trial was not held in the surrogate's court, such verdict, order or decision shall be certified by the clerk of the court to the surrogate's court, whereupon the surrogate shall enter a final decree accordingly.

Source.—New.

Revisers' note.—Section 2653-a to be repealed.

The plan which enables us to do away with § 2653-a and also with any other trial of a will is as follows:

General jurisdiction enlarged, new § 2510.

Force and effect of decree, new § 2550.

General provisions for jury trial, new §§ 2538, 2539.

Special provisions on probate, new § 2617.

Upon the return of citation any party may have a full examination of the subscribing witnesses and of any other witness necessary to be examined by the proponent to satisfy the surrogate, which witnesses may be cross examined. This is a right every one should have, and it often ends the contest. If any one desires to become a contestant he must then file objections, and if he desires a jury trial, demand it. The trial by jury is then had either in surrogate's court or some other, and the verdict is made a part of the proceedings in surrogate's court.

The final decree is conclusive against everybody who was a party. If a jury trial is not demanded it is waived, and the decree in that case is also conclusive.

It is impossible to have a decree in surrogate's court without an opportunity for trial, and to give that to obtain a presumption before the jury would retain the two trials which it is our object to avoid.

The provision for security for costs after one disagreement will tend to end baseless litigation. New § 2750.

Framed issues.—Whether a surrogate shall grant or refuse an application for an order for framed issues in a contested probate proceeding is a matter for the exercise of his discretion upon consideration of the circumstances of each particular case. The determination of the special issues for the jury in a contested probate proceeding is a part of the trial, and where the issues are to be framed in advance of the trial in the surrogate's court of the county of New York they should be framed and settled only on regular notice of settlement as required by § 970, rule 31 of the general rules of practice, and rule 7 of practice of the surrogate's court. *Matter of Plate* (1916), 93 Misc. 423, 156 N. Y. Supp. 999.

§ 2620. Wills to be recorded and retained; exception.

Every will admitted to probate, together with the decree, order or judgment admitting it to probate shall be recorded in the proper surrogate's court. Where a written will is proved, it must be filed and remain in the surrogate's office. But when it shall be shown, by affidavit or otherwise, to the satisfaction of the surrogate, that the decedent left real or personal property in another state or territory of the United States or in a foreign country, and that the laws of such state, territory or country require the production of the original will before the provisions thereof become effective, the surrogate may, at any time after probate, and upon such notice to the parties interested in the estate as he may think proper, cause any original will remaining on file in his office to be sent by post or otherwise to any court which, or to any officer of such state, territory or country who, under the laws thereof, is empowered to receive the same for probate, or may deliver such will to any person interested in the probate thereof in such state, territory or country, or to his representative, upon such terms as he shall think proper for the preservation of the will and the protection of other parties interested in the estate.

Source.—Former §§ 2498, 2620 and 2623. § 2498 originally revised from R. S., pt. 2, ch. 6, tit. 4, § 60; pt. 3, ch. 2, tit. 1, § 7; L. 1837, ch. 460, § 3. § 2620, as amended by L. 1888, ch. 508; L. 1902, ch. 114; originally revised from R. S., pt. 2, ch. 6, tit. 1, §§ 13, 16, 17; L. 1837, ch. 460, § 20. § 2623 originally revised from R. S., pt. 2, ch. 6, tit. 1, § 14; L. 1877, ch. 206, § 2.

Revisers' note.—Substance found in former §§ 2623 and 2498. Requirement that proofs in uncontested probate be also recorded, omitted. Part of § 2620 put into this section. Section 2635 to be repealed, as many searchers think the original will should always remain in the surrogate's office.

Many real estate lawyers are strongly of the opinion that all wills should remain in the surrogate's office, as provided in new section on prior page. If the section [2635] is retained it ought to provide for retaining the will if any action is pending and for at least two years.

§ 2621. Will certified, or record thereof, may be read in evidence.

The surrogate must cause to be indorsed upon, or annexed to, the original will admitted to probate, or the exemplified copy, or statement of the tenor of the will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be. The will, or the copy or statement, so authenticated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence, and with the effect specified in this chapter.

Source.—Former § 2629, as amended by L. 1882, ch. 399, and L. 1910, ch. 578; originally revised from R. S., pt. 2, ch. 6, tit. 15, and tit. 2, § 58.

§ 2622. Recording wills proved elsewhere within the state.

A certified copy of a will of real property, proved and recorded in any court of the state of competent jurisdiction, must be recorded upon the request of any person interested therein, in the office of the county clerk or register as the case requires of any county in which real property of the testator is situated.

Source.—Former § 2630; originally revised from L. 1837, ch. 460, § 68, in part.

§ 2623. Records of certain wills heretofore proved; how far evidence.

The exemplification of the record of a will, proved before the judge of the former court of probate, and recorded in his office before the first day of January, in the year seventeen hundred and eighty-five, certified under the seal of the officer having custody of the record, must be admitted in evidence in any case, after it has been made to appear that diligent and fruitless search has been made for the original will.

A certified copy of the last will and testament of any deceased person, which has been admitted to probate, whether as a will of real or personal property, or both, and recorded in the office of the surrogate in any county of this state, shall be admitted in evidence in any of the courts of this state, without the proofs and examination taken on the probate thereof, and whether such proofs shall have been recorded or not, with like effect as if the original of such will had been produced and proven in such court, when thirty years have elapsed since the will was admitted to probate and recorded. And the recording of such will shall be evidence that the same was duly admitted to probate. The exemplification of the record of a will which has been proved before the surrogate or judge of probate, or other officer exercising the like jurisdiction of another state must, when certified by the officer having by law, when the certificate was made, custody of the record, be admitted in evidence as if the original will was produced and proved, when thirty years have elapsed since the will was proved.

Source.—Former §§ 2631 and 2632. § 2631 originally revised from R. S., pt. 2, ch. 6, tit. 1, § 20. § 2632, as amended by L. 1881, ch. 705; L. 1894, ch. 89, and L. 1901, ch. 540; originally revised from L. 1857, ch. 173; L. 1871, ch. 361, § 1.

§ 2624. Revocation of letters upon proof of will.

Where, after letters of administration, on the ground of intestacy, have been granted, a will is admitted to probate, and letters are issued thereupon; or where, a subsequent will is admitted to probate and letters are issued thereupon; the decree, granting probate, must revoke the former letters.

Source.—Former § 2684; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 46.

Revisers' note.—Changes made because power to revoke probate has been taken away.

The provision to the effect that a probate decree revokes former letter of administration is only declaratory. If the probate decree should not say that temporary letters are revoked, it is nevertheless plain that such temporary letters have been superseded. *Matter of Durban* (1916), 175 App. Div. 688, 160 N. Y. Supp. 945.

§ 2625. When letters testamentary may be issued.

After a will has been admitted to probate any person entitled to letters thereunder who is competent by law to serve, and who appears and qualifies, is entitled to letters testamentary thereupon.

A person entitled to letters upon a contingency may appear and show that the contingency has happened by which he is entitled to such letters.

A person named as an executor by a person other than the testator under a valid power contained in a will, must appear and file an acknowledged or proved, and duly certified selection of himself as an executor within fifteen days after the date of the decree admitting the will to probate, in default whereof the power of selection is deemed to have been renounced, unless for good cause shown the surrogate extends such time or relieves the default.

Source.—Former §§ 2636 and 2640. § 2636 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 1; L. 1837, ch. 460, § 22. § 2640 new as originally inserted in Code of Civ. Proc.

Revisers' note.—The decree on probate should not recite the happening of the contingency. Let proof be made at any time before letters are issued.

Intent of testator.—The intent of a testator as to how, when and by whom his estate shall be paid out and distributed will be, if necessary, strenuously searched for in the testamentary language and when ascertained, will be carried out in so far as it is not inimical to law; this rule was not affected or modified by former § 2636. *Matter of Bergdorf* (1912), 206 N. Y. 309.

In a contested probate proceeding an application for letters testamentary is an independent proceeding and follows the decree for probate, but no further citation need issue on such application. *Matter of Mayer* (1914), 84 Misc. 9, 145 N. Y. Supp. 665.

Object and effect.—The purpose of giving the surrogate's court jurisdiction to issue letters testamentary and providing

limitations thereupon is to protect the rights of creditors and persons interested in the estate. *Matter of Wischmann*, 80 App. Div. 520, 80 N. Y. Supp. 789.

As to when letters testamentary will issue. *Bible Society v. Oakley*, 4 Dem. 450; *Matter of Sears*, 5 Dem. 497; *People ex rel. Patrick v. Fitzgerald*, 73 App. Div. 339, 76 N. Y. Supp. 865. As to grounds upon which letters must or can be refused. *Postley v. Cheyne*, 4 Dem. 492; *Matter of Cady*, 36 Hun 122; *aff'd* 103 N. Y. 678.

The appearance of a party in the surrogate's court makes its decree conclusive against his right to further question the validity of the making and execution of the will. *Durkee v. Smith* (1915), 153 N. Y. Supp. 316.

§ 2626. Supplementary letters; executors not named in letters not to act.

If the disability of a person under age, or an alien named as executor in a will, be removed before the execution of the provisions of such will is completed, he shall be entitled, on petition being filed setting forth the facts

to supplementary letters testamentary, to be issued in the same manner as the original letters, and authorized to join in the execution of the will with the persons previously appointed. A person named in a will as executor, shall be deemed to be superseded by the issue to another person of letters testamentary, and shall have no power or authority whatever as such executor until he appears and qualifies.

Source.—Former § 2613, as amended by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 2, §§ 5, 15, 16, and 22 by amendment of 1893.

Death of executor.—Where the executor of a will, in which he is given power to sell real property, dies before the execution of such power, an administrator with the will annexed may exercise the power. *Williams v. Williams* (1912), 152 App. Div. 323, 136 N. Y. Supp. 990.

§ 2627. Executor failing to qualify or renounce, how excluded.

If a person named as executor in a will, does not qualify or renounce, within fifteen days after probate thereof; or if a person chosen by virtue of a power in the will, does not qualify or renounce within fifteen days after the filing of the instrument designating him; or, in either case, if objections are filed, and the executor does not qualify or renounce, within five days after they are determined, in his favor, or, in a case specified in section 2567 of this chapter, within five days after an objection has been established; the surrogate must, upon the application of any other executor, or any creditor or person interested in the estate, make an order requiring him to qualify within a time therein specified; and directing that, in default of so doing, he be deemed to have renounced his appointment. Where it appears, by affidavit, or other written proof, to the satisfaction of the surrogate, that such an order cannot, with due diligence, be served personally within the state, upon the person therein named, the surrogate may prescribe the manner in which it must be served, which may be by publication. If the person, so appointed executor, does not qualify within the time fixed, or within such further time as the surrogate allows for that purpose, an order must be made reciting the facts, and declaring that he has renounced his appointment as executor.

Such an order may be revoked by the surrogate in his discretion, and letters testamentary may be issued to the person so failing to renounce or qualify, upon his application, in a case where he might have retracted an express renunciation, as prescribed in the next section.

Source.—Former § 2642, as amended by L. 1883, ch. 401; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 9-12.

Revisers' note.—Time to qualify reduced from 30 to 15 days, in line with the intention to avoid unnecessary delay.

Effect and application.—This section does not prevent a testator from placing such limitations on the exercise of powers granted by him as he may deem fit. *Herriott v. Prime*, 87 Hun 95, 33 N. Y. Supp. 970; *aff'd* 155 N. Y. 5. No one can take out letters of administration in this state after a foreign probate, except by or through the consent of the foreign executor. *Balwin v. Rice*, 44 Misc. 64, 89 N. Y. Supp. 743.

Failure of one executor to qualify.—Where there has been an executor who was

qualified to execute a trust, a failure of other executors, also appointed, to qualify, does not affect the execution of the trust by the executor who was qualified to execute. *Steinhardt v. Cunningham*, 55 Hun 375, 8 N. Y. Supp. 627; *aff'd* 130 N. Y. 292. Where the beneficiary and a third person are appointed trustees and the latter refuses to qualify, the former is incompetent to execute the trust of a power of sale given for the purposes thereof. *Haendle v. Stewart*, 84 App. Div. 274, 82 N. Y. Supp. 823. A power of sale to executors

"and to any two of them," may be exercised by one of three executors who alone qualifies under the will. *Draper v. Montgomery*, 108 App. Div. 63, 95 N. Y. Supp. 904.

§ 2628. Renunciation by nominated executor; retraction thereof.

A person, named as executor in a will, may renounce the appointment by an instrument in writing, signed by him, and acknowledged, or proved, and duly certified, or attested by one or more witnesses, and proved to the satisfaction of the surrogate. Such a renunciation may be retracted by a like instrument, at any time before letters testamentary, or letters of administration with the will annexed, have been issued to any other person in his place; or, after they have been so issued, if they have been revoked, or the person to whom they were issued, has died, or become a lunatic, and there is no other acting executor or administrator. Where a retraction is so made, letters testamentary may, in the discretion of the surrogate, be issued to the person making it upon such notice as the surrogate may require. An instrument specified in this section must be filed in the surrogate's office.

Source.—Former § 2639; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 8.

Renunciation.—An oral renunciation of an executorship, made in open court, is valid. *Matter of Baldwin*, 27 App. Div. 506, 50 N. Y. Supp. 872. As to right of executor to decline to serve. *Matter of Wilkin*, 90 App. Div. 324, 86 N. Y. Supp. 360.

Retraction.—A renunciation of a right to administer with the will annexed may be withdrawn by permission of the court before it has been used and letters not be revoked merely because prior to appointment such a renunciation had been executed by the appointee. *Matter of Treadwell*, 37 Misc. 584, 75 N. Y. Supp. 1058; rev'd on other grounds, 77 App. Div. 155, 79 N. Y. Supp. 83. As to retraction of

renunciation, see *Matter of Haug*, 29 Misc. 36, 60 N. Y. Supp. 382.

An application for letters testamentary by an executor who formerly renounced but who revoked such renunciation is addressed to the discretion of the surrogate. *Matter of Cornell*, 17 Misc. 468, 41 N. Y. Supp. 255.

A resignation of the office of executor is not subject to retraction. *Matter of Beakes*, 5 Dem. 128.

An executor may withdraw his objections to a will and subsequently join in a petition for the probate thereof. *Matter of Dunham* (1914), 165 App. Div. 165, 150 N. Y. Supp. 692.

§ 2629. Ancillary letters upon foreign probate.

Where a will of personal property made by a person who resided without the state at the time of the execution thereof, or at the time of his death, has been admitted to probate or established within the foreign country, or admitted to probate within the state or the territory of the United States, where it was executed, or where the testator resided at the time of his death; the surrogate's court having jurisdiction of the estate, must, upon an application made as prescribed in this article, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in section forty-five of the decedent estate law, record the will and the foreign letters, and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires.

Source.—Former § 2695, as amended by L. 1888, ch. 495, and L. 1909, ch. 65; originally revised from R. S., pt. 2, ch. 6, tit. 1, § 68-a, last half; L. 1840, ch. 384, § 2.

Revisers' note.—The changes are made because sometimes, in a foreign country, wills are not probated, but are established by a procedure peculiar to that country.

In general.—There is a marked distinction between wills admitted to probate in the state of New York and wills filed or recorded in this state upon an exemplification of the record of probate in another state; the surrogate's jurisdiction to issue letters in the latter class is limited to the issue of ancillary letters testamentary or ancillary letters of administration with the will annexed. *Baldwin v. Rice*, 44 Misc. 64, 89 N. Y. Supp. 743. The chief object of our statute as to ancillary administration of estates is to protect the claims of creditors residing in this state. *Moyer v. Weil*, 1 Dem. 71. Statute provides a complete scheme for establishing and giving effect within this state to wills duly admitted to probate in other states. *Clark v. Poor*, 73 Hun 143, 25 N. Y. Supp. 908. As to when letters are ancillary and when principal, see *Hendrickson v. Ladd*, 2 Dem. 402. As to when a court of equity will assume jurisdiction of a fund in this state as against foreign executors, see *Montgomery v. Boyd*, 78 App. Div. 64, 79 N. Y. Supp. 879.

The action of a surrogate in issuing letters of administration cannot be attacked collaterally. *Brown v. Landon*, 30 Hun 57.

Petition must be accompanied by a copy of the will and a copy of the foreign letters, if any were issued. *Baldwin v. Rice*, 183 N. Y. 55, aff'g 100 App. Div. 241, 89 N. Y. Supp. 738.

When application for ancillary letters of administration, denied. *Matter of Eaton* (1918), 102 Misc. 370, 169 N. Y. Supp. 871.

Sufficiency of application.—A person relying upon the decree of a foreign probate court must prove the jurisdictional facts. *Matter of Law*, 56 App. Div. 454, 67 N. Y. Supp. 857; *Matter of Hudson*, 5 Redf. 333; *Estate of Winnington*, 1 Civ. Pro. Rep. 264. It is not necessary to show that the will in question was executed according to the laws of this state. *Matter of Langbein*, 1 Dem. 448. As to allegations necessary to confer jurisdiction upon surrogate to grant ancillary letters upon a foreign will, see *Taylor v. Syme*, 162 N. Y. 513, rev'g 17 App. Div. 517, 45 N. Y. Supp. 707.

As to application for letters testamentary upon the will of a citizen resident in China, proved before a United States consul there, see *Mater of Taintor*, 5 Redf. 79.

Affidavit of residence of testator should be properly authenticated. *Estate of Gavin*, 15 Civ. Pro. Rep. 390. It must appear that assets exist within this state. *Evans v. Schoonmaker*, 2 Dem. 249.

Application not granted when made by a creditor residing in the state of the decedent's residence, to which place all personal property in the state of New York at the decedent's death has been removed, the estate being solvent. *Matter of Gennert*, 96 App. Div. 8, 89 N. Y. Supp. 37.

Evidence of foreign probate proceedings.

—If a probate court of another state otherwise has jurisdiction it may make a decree admitting a will to probate which is binding upon nonresidents, even though notice has, by statute, been dispensed with on the original probate, and such probate becomes conclusive in the absence of contest within such period as is provided by the laws of that state. It is error when a will is offered for probate in this state under such circumstances to reject evidence of such probate proceedings. *Matter of Horton* (1916), 217 N. Y. 363.

Erroneous probate of will in this state upon theory that it had been admitted to probate in province of Quebec; invalidity of probate of such will because probate in province of Quebec failed to comply with requirements of the code and will was not properly authenticated. *Matter of Connell* (1917), 221 N. Y. 190.

It was the intention of the legislature in adding the words "or established" after the words "admitted to probate" to distinguish between the procedure necessary to the probate of a will as required by the laws of this state or the laws of any state or territory in the United States and the procedure required to give effect to a testamentary instrument by the laws of a foreign country, particularly one where the civil law prevails. *Matter of Harwood* (1918), 104 Misc. 653, 172 N. Y. Supp. 296.

§ 2630. Id.; upon foreign grant of administration.

Upon application by the party entitled as hereinafter provided, or by his duly authorized attorney-in-fact made as prescribed in this article, to a surrogate's court having jurisdiction of the estate, and upon the presentation of a copy, authenticated as prescribed in section forty-five of the decedent estate law, of letters of administration upon the estate of a decedent who resided at the time of his death without this state, but within the United States, granted within the state or territory where the decedent so resided, or, in cases where the decedent, at the time of his death, resided without the United States, upon the presentation to such surrogate's court

of satisfactory proof that the party so applying either personally or by such attorney-in-fact, is entitled to the possession in the foreign country of the personal estate of such decedent, the surrogate's court to which such copy of such foreign letters so authenticated, or such proof, is so presented, must issue ancillary letters of administration in accordance with such application, except in the following cases:

1. Where original letters testamentary or ancillary letters upon foreign probate have been previously issued, or the application therefor has not been finally disposed of.

2. Where original letters of administration, upon the estate, have been previously issued to a person entitled to the same, who is legally competent to act, or the application therefor has not been finally disposed of.

Source.—Former § 2696, as amended by L. 1881, ch. 53; L. 1888, ch. 495, and L. 1909, ch. 65; originally revised from R. S., pt. 2, ch. 6, tit. 2, § 31.

Revisers' note.—Change prohibits granting ancillary letters when another application is pending.

In general.—Where one applying for ancillary letters was entitled in the province of Quebec to the possession of the personal property of decedent, the letters may issue to him. *Ross v. Willett*, 76 Hun 211, 27 N. Y. Supp. 785. See, generally, *Matter of Williams*, 5 Dem. 292; *Weed v. Waterbury*, 5 Redf. 114.

Where, pending an application, by one legally competent to act, for original let-

ters of administration of the estate of an intestate who resided in another state at the time of his death, a domiciliary administrator asks that ancillary letters be issued to him, the court, though it has power, is not compelled to grant the prayer of the former, but may, in its discretion, issue letters, either original or ancillary, to the foreign representative. *Lussen v. Timmerman*, 4 Dem. 250.

§ 2631. To whom ancillary letters granted.

Where the will specially appoints one or more persons as the executor or executors thereof, with respect to personal property situated within the state, the ancillary letters testamentary must be directed to the person or persons so appointed, or to those who are competent to act and who qualify. If all are incompetent or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, issued as prescribed in this article, must be directed to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent, unless another person applies therefor, and files with his petition, an instrument, executed by the foreign executor or administrator, or person otherwise entitled as aforesaid; or, if there are two or more, by all who have qualified and are acting; and also acknowledged, or proved, and duly certified, authorizing the petitioner to receive such ancillary letters, in which case, the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him. Where two or more persons are named in the foreign letters, or in an instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown to the surrogate's satisfaction, the decree so directs.

Source.—Former § 2697, as amended by L. 1881, ch. 535; originally revised from L. 1863, ch. 403, § 1, in part.

In general.—No one can take out administration in this state, after a foreign probate, except by or through the consent of the foreign executor. *Baldwin v. Rice*,

44 Misc. 64, 89 N. Y. Supp. 743. See also *Hendrickson v. Ladd*, 2 Dem. 402; *Matter of Williams*, 5 Dem. 292.

Ancillary letters cannot be issued to a

person other than the foreign executor or administrator unless such person files with his petition the consent of the foreign executor or administrator. *Baldwin v. Rice*, 100 App. Div. 241, 89 N. Y. Supp. 738, 91 N. Y. Supp. 1086.

Who entitled to ancillary letters.—Under the law as it existed previous to the amendment of 1914, the only persons entitled to ancillary letters in this state were the persons entitled to the possession, in the domiciliary state, of the personal estate of the decedent. *Matter of Connell* (1915), 92 Misc. 324, 155 N. Y. Supp. 397.

Proof of laws of foreign country.—Where upon application for ancillary letters of administration with the will annexed, it appears that the will was established in Peru where it was executed, and where testator resided at the time of his death, and the petition does not clearly set forth who is, or who are, entitled to the possession of the personal property of the testator, competent proof must be furnished of the laws of that country from which the authority of the person entitled to the possession of the estate therein is derived. *Matter of Prevost* (1915), 89 Misc. 704, 153 N. Y. Supp. 1092.

§ 2632. Petition; citation.

An application for ancillary letters testamentary, or ancillary letters of administration, as prescribed in this article, must be made by petition which must set forth the amount of security given on the original appointment, the name and residence of each creditor, or person claiming to be a creditor residing within the state, and the amount of his claim so far as the same may be ascertained. Citation shall thereupon issue to the state comptroller, and to such creditors, and may issue generally to all creditors or persons claiming to be creditors.

Source.—Former § 2698, as amended by L. 1899, ch. 717, and L. 1910, ch. 234; originally revised from L. 1863, ch. 403, §§ 2, 3.

Revisers' note.—Provision made for more full petition so that surrogate may determine as to bond. See next section.

The citation is required to be issued to creditors only. *Matter of Prout*, 128 N. Y. 70. See also *Matter of Gennert*, 96 App. Div. 8, 89 N. Y. Supp. 37.

On an application for ancillary letters, the full names and the residences of each creditor or person claiming to be a creditor, residing within the state, must be given, and not the names of the firms of which they are members, nor merely the initials of their Christian names. *Estate of Thompson*, 1 Civ. Pro. Rep. 264. A failure

to allege indebtedness of decedent to creditors within this state is fatal to the effectiveness of a petition. *Hendrickson v. Ladd*, 2 Dem. 402.

Local next of kin are not entitled to notice of an application for ancillary letters, but for protection they should resort to the courts of the last domicile of decedent where the last will of their testatrix is acted on by public authority. *Matter of Connell* (1915), 92 Misc. 324, 155 N. Y. Supp. 397.

§ 2633. Hearing; security.

Upon the return of the citation, the surrogate must ascertain, as nearly as he can do so, the amount of debts due or claimed to be due, from the decedent to residents of the state. Before ancillary letters are issued, the person to whom they are awarded, must qualify, as prescribed for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the state, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive from the persons to whom the letters are issued, upon an accounting and distribution, either within the state, or within the jurisdiction where the principal letters were issued. If however there appear to be no such creditors, or transfer tax assessable, and a citation to show cause why such letters should not issue without a

bond, has been directed generally to all creditors within the state and has been duly served by publication, such letters may issue without a bond.

Source.—Former § 2699; originally revised from L. 1863, ch. 403, § 1, in part.

Revisers' note.—The new matter provides a way to dispense with a bond in many cases where to give one is useless and a burden.

Security, when required.—It is discretionary with the court to require the payment of local creditors or security to insure their payment by the foreign administrator. *Maas v. German Sav. Bank*, 73 App. Div. 524, 77 N. Y. Supp. 256; *aff'd* 176 N. Y. 377. A bond in the penalty of double the value of the personality in this state may be required. *Matter of Prout*, 128 N. Y. 70. Penalty is fixed not with regard to the debts intestate owed, but the

value of his personal estate. *Estate of Govan*, 2 Misc. 291, 23 N. Y. Supp. 766. Compare *Evans v. Schoonmaker*, 2 Dem. 249.

In fixing the penalty of the bond, the surrogate may ignore a disputed claim which is not shown to be probably enforceable. *Matter of Musgrave*, 5 Dem. 427. As to what facts the surrogate must ascertain before issuing letters, see *Matter of Gennert*, 96 App. Div. 8, 89 N. Y. Supp. 37.

§ 2634. Persons acting under ancillary letters must transmit assets.

The person to whom ancillary letters are issued, as prescribed in this article, must unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record, in an action to which that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or country, where the principal letters were granted, to be disposed of pursuant to the laws thereof.

Source.—Former § 2700; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—The surrogate should not be obliged to allow a credit for money transmitted when creditors have not been paid.

In general.—The directory language of § 2635 does not change the meaning of this section. *Smith v. Second Nat. Bank*, 169 N. Y. 467. The only authority which is expressly given to a surrogate to direct any other disposition of funds in the hands of one holding ancillary letters than the transmission of the same as provided in this section, is § 2635. *Matter of Gennert*, 96 App. Div. 8, 89 N. Y. Supp. 37. Application of section considered, see *Matter of Dunn*, 39 App. Div. 510, 57 N. Y. Supp. 444; *Maas v. German Sav. Bank*, 73 App. Div. 524, 77 N. Y. Supp. 256, *aff'd* 173 N. Y. 377.

Ancillary administration is supplemental to the principal administration and, except as to domestic creditors, subordinate to it. *Taylor v. Syme*, 162 N. Y. 513.

The authority of an ancillary executor

is strictly limited to personal property having its situs within the jurisdiction of his appointment. *Lockwood v. United States Steel Corporation* (1912), 153 App. Div. 655, 138 N. Y. Supp. 725.

Transmission of assets.—Where ancillary letters are issued, the persons acting thereunder must transmit the assets to the state, territory, or country where the principal letters are granted. *Matter of Fitch*, 160 N. Y. 87. The only duty of an ancillary administrator in this state is to transmit the assets received by him to the state or country where the principal letters were granted, unless he is directed by express decree to retain some portion of the same for the purpose of payment of debts due to resident creditors. *Smith v. Second Nat. Bank*, 70 Hun 357, 24 N. Y. Supp. 419.

§ 2635. Id.; when they may be directed to pay, etc., without transmission.

The surrogate's court, or any court of the state, which has jurisdiction of an action to procure an accounting, or a judgment construing the will, may in a proper case, by its judgment or decree, direct a person, to whom ancillary letters are issued as prescribed in this article, to pay, out of the money or the avails of the property, received by him under the ancillary letters,

and with which he is chargeable upon his accounting, the debts of the decedent, due to creditors residing within the state; or, if the amount of all the decedent's debts here and elsewhere exceeds the amount of all the decedent's personal property applicable thereto, to pay such a sum to each creditor, residing within the state as equals that creditor's share of all the distributable assets, or to distribute the same among the legatees or next of kin, or otherwise dispose of the same, as justice requires.

Source.—Former § 2701; section new as originally inserted in Code of Civ. Proc.

Object and effect of section considered, see *Smith v. Second Nat. Bank*, 169 N. Y. 467.

As to payment of a decedent's savings bank account to a foreign administrator, after letters of administration have been issued in the state of New York. *Maas v. German Sav. Bank*, 73 App. Div. 524, 77 N. Y. Supp. 256, aff'd 176 N. Y. 377.

The ancillary executor must remit all collected assets to the original probate jurisdiction, unless there are creditors who are citizens of our own state, in which event

a distribution may be ordered here. *Hopper v. Hopper*, 125 N. Y. 400; *Dammert v. Osborn*, 140 N. Y. 30, 47; *Matter of Gennert*, 96 App. Div. 8, 89 N. Y. Supp. 37; *Smith v. Second Nat. Bank*, 70 Hun 357, 24 N. Y. Supp. 419, rev'd on other grounds, 169 N. Y. 467.

The law of the domicile should be applied unless such application will interfere with rights of creditors or infringe some controlling principle of public policy. *Matter of Hughes*, 95 N. Y. 60.

§ 2636. Id.; general powers and duties.

The provisions of this chapter, relating to the rights, powers, duties and liabilities of an executor or administrator, apply to a person to whom ancillary letters are granted, as prescribed in this article; except those contained in title fourth thereof relating to the mortgage, lease or sale of real property, or where special provision is otherwise made in this article; or where a contrary intent is expressed in, or plainly to be inferred from, the context.

Source.—Former § 2702; section new as originally inserted in Code of Civ. Proc.

Provisions of Code applicable, see *Lang v. Railroad Co.*, 75 Hun 151, 27 N. Y. Supp. 90, aff'd 144 N. Y. 717; *Hopper v. Hopper*, 125 N. Y. 400. The exceptions specified do not limit his title to the assets of the estate in his hands, but such title is co-extensive with that of a domestic or principal administrator. *Smith v. Second Nat. Bank*, 169 N. Y. 467.

An ancillary administrator has the same

power to pledge the assets of the estate for the purposes of the estate that a domestic administrator has. *Smith v. Second Nat. Bank*, 169 N. Y. 467. As to right of ancillary administratrix to begin proceedings under chapter 18, title 5 of the Code, see *Hendrickson v. Ladd*, 2 Dem. 402. As to actions by executors and administrators on contract made by them. *Bingham v. Marine Nat. Bank*, 41 Hun 376.

§ 2637. How testamentary trustee shall qualify.

A testamentary trustee named in a will or appointed by the surrogate shall, before exercising the duties of his office, qualify by taking and filing with the surrogate an oath of office and such bond as may be required by the surrogate.

A trust company or other trustee exempted by law from taking an oath of office, and filing a bond, shall file a consent to accept such appointment duly executed and acknowledged.

Source.—New.

§ 2638. Appointment of successor.

When all the persons named in a will as testamentary trustees die prior to the probate of the will, or by an instrument in writing renounce the appointment, or when no testamentary trustee is named in a will to execute a trust created therein, or when all the testamentary trustees die or become incompetent, or are by a decree of the surrogate's court, removed, or allowed to resign, or where one of two or more persons named in a will as testamentary trustees dies prior to the probate of the will, or by an instrument in writing, renounces his or their appointment, or where one of two or more testamentary trustees dies or becomes a lunatic, or is by decree of the surrogate's court removed or allowed to resign, and the trust has not been fully executed, the surrogate's court may appoint a trustee or successor or successors, unless such appointment would contravene the express terms of the will, or in a case where there is a trustee in office, unless all the beneficiaries waive such appointment in writing. Until a successor is appointed the remaining trustee or trustees may proceed and execute the trust. The trustee or successor may be appointed upon the application of any person interested and upon notice to such persons as the surrogate may designate.

Amended by L. 1919, ch. 192, in effect Sept. 1, 1919. The amendment of 1919 inserted the words "or when no testamentary trustee is named in a will to execute a trust created therein" in lines 3 and 4; and inserted the words "trustee or" in lines 11 and 16.

Source.—Former § 2818, as amended by L. 1884, ch. 408, and L. 1903, ch. 370; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 34-37, 39 by the amendment of 1893.

Revisers' note.—It is thought by many to be advisable to appoint a successor when one of two or more trustees dies. To accomplish this the amendments are suggested.

Application of section generally.—As this section existed prior to 1903, it made no provision for a case where one of two or more testamentary trustees renounced and failed to qualify. *Matter of Wilkin*, 90 App. Div. 324, 86 N. Y. Supp. 360.

Application.—*Matter of Goulden* (1918), 102 Misc. 642, 170 N. Y. Supp. 154.

As amended in 1903, this section authorizes a surrogate to appoint a successor to a deceased testamentary trustee; the supreme court has not exclusive jurisdiction in such case. *Matter of Chase*, 40 Misc. 616, 83 N. Y. Supp. 62. See *Weston v. Goodrich*, 86 Hun 194, 33 N. Y. Supp. 382.

Covers the cases of all trusts, whether express or otherwise. *Matter of Valentine*, 3 Dem. 563. Applies only to a case where one of two trustees is dead, has become a lunatic, has been removed or has resigned, and not to a case where one of the two trustees has never qualified. *Haendle v. Stewart*, 84 App. Div. 274, 82 N. Y. Supp. 823. Intended to provide for a case where all the testamentary trustees died or resigned. *Royce v. Adams*, 123 N. Y. 402.

Attempt to procure the appointment of a testamentary trustee as ground of disbarment of attorney, see *Matter of —*, 10 App. Div. 491, 42 N. Y. Supp. 268; *Matter of McGillivray*, 138 N. Y. 308.

Appointment of a substituted testamentary trustee is authorized only where the

trust is unexecuted. *Matter of Finck* (1918), 103 Misc. 526, 170 N. Y. Supp. 510.

This section does not give the court power to appoint a trustee where there has been a failure to make an appointment by will. *Matter of Welch* (1918), 105 Misc. 27, 172 N. Y. Supp. 349.

Trust vests in supreme court only so far as may be consistent with the power to appoint a successor pursuant to this section. *Matter of Brady*, 58 Misc. 108, 110 N. Y. Supp. 755.

Successor to a deceased testamentary trustee.—Proper course to be followed, see *Tompkins v. Moseman*, 5 Redf. 402; *Matter of Whitehead*, 3 Dem. 227; *Conant v. Wright*, 22 App. Div. 216, 48 N. Y. Supp. 422, aff'd 162 N. Y. 635. Death of executor engaged in the execution of an express trust; appointment of successor under this section, see *Matter of Hecht*, 71 Hun 62, 24 N. Y. Supp. 540.

To justify the appointment of a successor of a testamentary trustee the court must be satisfied that such appointment will be for the benefit of the *cestui que trust*. *Matter of Dietz*, 132 App. Div. 641, 117 N. Y. Supp. 461; *Matter of Leavitt*, 135 App. Div. 7, 119 N. Y. Supp. 769.

Effect of separable character of the duties of executor and trustee, see *Matter of Clark*, 5 Redf. 466.

When successor appointed.—No jurisdic-

tion to appoint a new trustee until the surviving trustee is fully discharged and has ceased to have any power as a trustee. *Conant v. Wright*, 19 Misc. 321, 44 N. Y. Supp. 727. Objection to a testamentary trustee because he was a nonresident alien and had not signified his acceptance. *Lane v. Lewis*, 4 Dem. 468. When the partial interest of the trustee may not interfere with its execution, see *Rankine v. Metzger*, 69 App. Div. 264, 74 N. Y. Supp. 649, aff'd 174 N. Y. 540.

Idem; proof required.—Where all but one of four trustees died, to whom and the survivors of whom testator devised his estate in trust, an application for the appointment of a successor testamentary trustee under this section must show that it is for the benefit of the *cestuis que trustent* so to do. *Matter of Zerega* (1913), 81 Misc. 113, 142 N. Y. Supp. 144.

Internment of testamentary trustee as a dangerous alien enemy does not warrant the appointment of a substituted trustee. *Matter of Amsinck* (1918), 103 Misc. 124, 169 N. Y. Supp. 336.

Powers of surviving trustees.—Where a will provides that, if the number of trustees thereunder shall be reduced to less than three, then the survivors shall increase their number to not less than three nor more than five persons, and after the death of one of the three trustees appointed by the will, the *cestui que trust* refuses to consent to the appointment of a successor, the survivors may without application to the supreme court convey a marketable title to real property held in trust. *Lane v. Hustace* (1913), 154 App. Div. 636, 139 N. Y. Supp. 784.

§ 2639. Security to be required from a trustee or executor acting as trustee.

Whenever by any last will and testament, or by an order of the surrogate's court, a trustee is appointed, or an executor is appointed who is required to hold, manage, or invest any money, securities or property real or personal for the benefit of another, such trustee, or executor, before receiving any such property into his possession or control shall, unless contrary to the express terms of the will, execute to the people of the state of New York, in the usual form, a bond with sufficient surety or sureties in an amount to be fixed by the surrogate. Upon any judicial settlement and partial distribution of such estate or fund the decree may provide for the discharge of the existing bond, and the filing of a new bond covering the amount still remaining in the hands of such executor or trustee.

This section shall not affect any executor or trustee named in a will executed before this section takes effect.

Source.—New. See former §§ 2815 and 2816.

Revisers' note.—It may not be wise to require all executors to give a bond, and if the time fixed is after first judicial settlement none will be had—therefore have limited the giving of a bond to an executor who is also trustee.

The fact that executors with trust powers are not required to give a bond, has caused much loss to many persons. An executor who only acts in settling an estate is not required to give a bond—only one whose control of the fund will cover a period of years.

Limitation of § 2637.—The provision that this section shall not affect any executor or trustee named in a will executed before this section takes effect, limits the effect of § 2637, which provides, generally, that a testamentary trustee shall qualify by taking and filing with the surrogate an oath of office and such bond as may be required by the surrogate. In re *Michels' Estate* (1916), 160 N. Y. Supp. 520.

§ 2640. Proceedings where testamentary trustee is also executor or administrator.

Where the same person is a testamentary trustee, and also the executor of the will, or an administrator upon the same estate, proceedings taken by or against him, as prescribed in this chapter, do not affect him as executor or administrator, or the creditors of, or persons interested in, the general estate, except in one of the following cases:

1. Where he presents a petition, praying for the revocation of his letters, he may, also, in the same petition, set forth the facts upon showing which he would be allowed to resign as testamentary trustee; and may thereupon pray for a decree allowing him so to resign, and for a citation accordingly.

2. Where a person presents a petition, praying for the revocation of letters issued to an executor or administrator; and any of the facts set forth in the petition are made, by the provisions of this chapter, sufficient to entitle the same person to present a petition praying for the removal of a testamentary trustee; the petitioner may pray for a decree removing the person complained of in both capacities, and for a citation accordingly.

In either case, proceedings upon the petition for the resignation or removal, as the case requires, of the testamentary trustee, and for the judicial settlement of his account, may be taken, as prescribed in this chapter, in connection with, or separately from, the like proceedings upon the petition for the revocation of the letters, as the surrogate directs.

Source.—Former § 2819; section new as originally inserted in Code of Civ. Proc.

Application and effect.—The statute recognizes the possible existence of the office of executor and testamentary trustee in the same person. *Hurlburt v. Durant*, 88 N. Y. 121; *Matter of Starr*, 2 Dem. 141. Who is not a testamentary trustee within the meaning of this section. *Oliver v. Frisbie*, 3 Dem. 22.

The surrogate has jurisdiction over administrators as such, and over testamentary trustees. *Matter of Baker*, 26 Hun 626. The section provides that persons who have acted both as testamentary trustees and as executors may obtain relief in both positions, by bringing a single proceeding for that purpose. *Tilden v. Fiske*, 4 Dem. 357.

§ 2641. Application of this chapter.

The provisions of this chapter apply to a trust created by the will of a resident of the state, or relating to real property, situated within the state, without regard to the residence of the trustee, or the time of the execution of the will.

Source.—Former § 2820; section new as originally inserted in Code of Civ. Proc.

Purpose.—Trust estates, as contra-distinguished from estates in the hands of executors or administrators, fall under the jurisdiction of the surrogate only if testamentary and embracing realty, or if testamentary but concerning personalty, provided only that they are created by the will of a resident. Testamentary trusts alone are included, and then only if the situs of the trust corpus is here when the

trust goes into effect. *Matter of Hoyt* (1916), 103 Misc. 614, 170 N. Y. Supp. 846.

This section should not be construed as limiting the specific provision of § 2639 that this section shall not affect any executor or trustee named in a will executed before this section takes effect. In *re Michels' Estate* (1916), 160 N. Y. Supp. 520.

ARTICLE 3.

APPOINTMENT AND QUALIFICATION OF GENERAL, ANCILLARY AND TESTAMENTARY GUARDIANS, AND GUARDIANS BY DEED; FILING AND EXAMINING GUARDIANS' ANNUAL ACCOUNTS.

- | | |
|--|--|
| <p>§ 2642. Guardian by judicial appointment and approval.</p> <p>2643. Power of court to appoint guardians.</p> <p>2644. Jurisdiction to appoint general guardian.</p> <p>2645. Petition for appointment of general guardian of infant; by whom made.</p> <p>2646. Petition for appointment of general guardian for infant; contents.</p> <p>2647. Who shall be cited; discretion of surrogate.</p> <p>2648. Hearing.</p> <p>2649. Decree appointing general guardian; term of office.</p> <p>2650. Qualification of general guardian of property.</p> <p>2651. Limited and restrictive letters of guardianship.</p> <p>2652. Idem; of general guardian of person.</p> | <p>§ 2653. Appointment of general guardian by supreme court.</p> <p>2654. Application for ancillary letters to foreign guardians.</p> <p>2655. Proceedings thereupon.</p> <p>2656. Effect of such letters.</p> <p>2657. Will or deed containing appointment to be proved, et cetera, and recorded.</p> <p>2658. Guardian by will or deed; qualification, letters, et cetera.</p> <p>2659. Appointment of successor.</p> <p>2660. Guardian to file annual inventory and account.</p> <p>2661. Affidavit to be annexed thereto.</p> <p>2662. Annual examination of guardian's accounts.</p> <p>2663. Proceedings, when account defective, et cetera.</p> <p>2664. Surrogate may direct as to infant's maintenance.</p> |
|--|--|

§ 2642. Guardian by judicial appointment and approval.

A general guardian is one appointed by the supreme, or surrogate's court, for an infant, either over or under fourteen years of age.

A guardian by will is one appointed by the will of a father or mother in accordance with the provisions of the domestic relations law and of section 1745 of the code of civil procedure, who has duly qualified pursuant to the provisions of this article.

A guardian by deed is one appointed by the deed of a father or mother in accordance with the provisions of the domestic relations law, who has duly qualified pursuant to the provisions of this article.

The term "guardian" as used in this chapter applies to all such guardians, except ancillary guardians.

Source.—New.

Revisers' note.—Heretofore there has been no definition of the several kinds of guardians.

Guardianship, where marriage is annulled.—Where a husband obtains a decree annulling his marriage upon the ground that his wife was a lunatic, and further declaring that a child of the marriage is the legitimate child of the husband who is awarded custody, he may appoint a guardian of his child by last will and testament, although the mother is still living. *Matter of Tombo* (1914), 164 App. Div. 392, 149 N. Y. Supp. 688.

§ 2643. Power of court to appoint guardians.

The surrogate's court has the like power and authority to appoint a general guardian of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, eighteen hundred and forty-six. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian of the prop-

erty only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act.

Source.—Former § 2821; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 6, first clause; L. 1870, ch. 341; L. 1871, ch. 708.

Revisers' note.—The plan of the revision of this subject is to make no distinction between general and temporary guardian or in the form of the application. Therefore the following sections may be repealed: 2822, 2823, 2824, 2825, 2826, 2827, 2828, 2829, and their provisions rewritten into the following new sections.

References.—Guardians in socage, Domestic Relations Law, § 80; appointment of guardian by parents, and the powers and duties of such guardian, Domestic Relations Law, §§ 81, 82; duties and liabilities of all general guardians, Domestic Relations Law, § 83; guardianship of married women, Domestic Relations Law, § 84. See cases cited under such sections in Birdseye, Cumming and Gilbert's Cons. Laws Annotated (2d Ed.).

In general.—The authority respecting the appointment of a general guardian conferred by this section is as extensive as that which was formerly exercisable by the chancellor. *Derickson v. Derickson*, 4 Dem. 295; *Matter of Camp*, 126 N. Y. 377. But this section does not give to surrogates the general authority over infants and their estates that was formerly exercised by the chancellor. *Matter of Bolton*, 159 N. Y. 129.

A general guardian for an infant may be appointed even if the parents are living. *Goodman v. Alexander*, 165 N. Y. 289. But when the parents are living, a guardian should not be appointed unless the parents are unfit to control the children or have interests adverse to the minors. *Matter of Barre*, 5 Redf. 64.

The surrogate may use an intelligent discretion as to the person to be intrusted with the custody of a minor. *Matter of Meech*, 1 Connolly 535, 7 N. Y. Supp. 257. The appointment of a guardian is governed solely by the best interests of the infant. *Matter of Annan*, 74 Hun 19, 26 N. Y. Supp. 258.

Application by the father, a drunkard, that the guardian be ordered to advise him of all matters affecting the infant's estate, see *Matter of Lindley*, 1 Connolly 500, 9 N. Y. Supp. 291.

The power of the surrogate to appoint guardians is the same that the chancellor had when his office was abolished in the year 1846, and the surrogate is to be controlled by the equitable canon which controlled the chancellor under like circumstances. The surrogate may in a proper case appoint other than the parent as the guardian of the person or the estate of an infant. While courts of law have no power to take the custody of an infant away from the father, it is different with the surrogate under the statute. In *re Lamb's Estate* (1912), 139 N. Y. Supp. 685.

The surrogate is bound by the principles prevailing in the former court of chancery. *Matter of Saulles* (1917), 101 Misc. 447, 167 N. Y. Supp. 445.

Discretion of court in determining rights of father.—Where, upon the application of a father to be appointed guardian of his five-year-old daughter who is maintained and wholly supported by him, it appears that petitioner while a naturalized citizen of the United States was married to the mother of said infant; that, by decree of divorce granted by a court of competent jurisdiction in the German Empire for the mutual adultery of the parties no formal award of the custody of said infant was made; and that the mother is now the wife of an alien, the surrogate, in the exercise of the discretion vested in him to act for the best interests of the infant, will appoint the father alone guardian, the order to provide for some access to the infant on the part of the mother. *Matter of Wagner* (1912), 75 Misc. 419, 135 N. Y. Supp. 678.

Infant of tender years.—Where the surrogate appointed as guardian of an infant of five years, his uncle by marriage who was forty-one years old instead of his maternal grandfather who was sixty-five, both being respectable people and financially well able to care for the child, it was held that the appointment would not be interfered with, especially as is the natural course of events the grandfather would become incompetent to care for the child until he became of age. *Matter of Burt* (1915), 167 App. Div. 620, 152 N. Y. Supp. 1078.

Infant in possession of testamentary guardians.—An order of the supreme court, dismissing an application by a father for a writ of habeas corpus to obtain the possession of his infant son who was in the custody of guardians appointed by his mother's will, who had subsequently received letters of guardianship from the surrogate, issued *ex parte*, without the notice required, did not fix the status of the infant and determine that its present and future custody should remain in the hands of such guardians. Said order dismissing the father's writ did not deprive the surrogate, upon proper application and upon due notice, of the statutory power to appoint another general guardian. *Matter of Lee* (1916), 176 App. Div. 141, 161 N. Y. Supp. 1100.

Concurrent jurisdiction.—The power granted is concurrent with the jurisdiction of the supreme court, and the court which first acquires jurisdiction should be protected in its exercise of its jurisdiction. *Matter of Saulles* (1917), 101 Misc. 447, 167 N. Y. Supp. 445.

§ 2644. Jurisdiction to appoint general guardian.

Where an infant has no guardian, a surrogate's court has jurisdiction to appoint a general guardian of an infant's person, or property, or of both, in the following cases:

1. Where the infant is a resident of that county, or has sojourned in that county for at least one year immediately preceding the application.

2. Where the infant is not a resident of the state, but has property, real or personal, situated in that county.

Source.—Former §§ 2822 and 2827. § 2822, as amended by L. 1909, ch. 231; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 4; L. 1870, ch. 59; L. 1871, ch. 32, § 2827 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 5.

Revisers' note.—In this new section have been combined parts of several sections, §§ 2822, 2827.

The idea in rewriting the first several sections is to consolidate the sections which separately provide for appointment for infants under and over 14.

No temporary guardian will hereafter exist. The only use of the division was to enable the infant to change his guardian on arriving at 14. We now provide that that can be done at any time, for good reasons.

Jurisdiction of supreme court over infants not limited by Code. *Matter of White*, 40 App. Div. 165, 57 N. Y. Supp. 862, aff'd 160 N. Y. 685.

Where the residence of an infant has been fixed by its parents in another state it cannot be changed in contemplation of law, after the parent's death, except by a guardian, so as to make the infant a resident of a county in New York state. *Matter of Daniels*, 71 Hun 195, 24 N. Y. Supp. 506; *Maas v. German Sav. Bank*, 73 App. Div. 524, 77 N. Y. Supp. 256, aff'd 176 N. Y. 377.

§ 2645. Petition for appointment of general guardian of infant; by whom made.

A petition for the appointment of a general guardian of the person, or property, or both, of an infant over the age of fourteen years must be made by the infant, except that such a petition may be made by any person where such infant is of unsound mind or refuses to make such petition, and in the judgment of the surrogate it is necessary or proper that such a guardian should be appointed.

A petition for the appointment of a general guardian of the person, or property, or both, of an infant under the age of fourteen years may be made by any person in behalf of such infant.

Source.—Same as for § 2644, *supra*.

§ 2646. Petition for appointment of general guardian for infant; contents.

A petition for the appointment of a general guardian of an infant shall set forth:

1. The full name, residence and date of birth.

2. The names of the father and mother and whether or not they are living, and if living, their place of residence; the name and address of the person with whom such infant resides; and the names and addresses of the nearest next-of-kin of full age residing in the county, if both father and mother are dead.

3. Whether the infant has had, at any time, a guardian appointed by will or deed, or an acting guardian in socage, or a guardian of the person appointed pursuant to section eighty-six of the domestic relations law.

4. The estimated value of the personal property, and of the annual income from any other personal property or real estate, to which the infant is or will be entitled.

5. The facts upon which the jurisdiction of the court depends.

6. If either parent is living and there are reasons why the parent should not be appointed such guardian, the reasons therefor.

7. If the petitioner be a non-resident married woman, and the petition relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence, and must set forth the name and residence of such husband.

8. The petition may set forth the reasons why a person named therein would be a proper and suitable person to be appointed such general guardian.

Source.—Former §§ 2822, 2823 and 2827. § 2822, as amended by L. 1909, ch. 231; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 4; L. 1870, ch. 59; L. 1871, ch. 32. § 2823 (see L. 1870, ch. 34; L. 1871, ch. 708). § 2827 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 5.

§ 2647. Who shall be cited; discretion of surrogate.

Upon presentation of the petition, a citation to show cause why the application should not be granted shall be issued as follows:

1. To the parent or parents, who are within the state and whose residences therein are known, or if there be none, to the grandparents who are within the county.

2. To the person having the care and custody of the infant, or with whom he resides.

3. If the application is made on behalf of an infant over fourteen years of age by any person on the infant's refusal to make such application, to the infant.

4. If the application is made by a married woman, to her husband only.

But no citation shall be necessary to a parent who has abandoned the infant, or is deprived of civil rights, or divorced from the petitioner because of his or her adultery, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child; or in case the petitioner is a married woman to a husband who has abandoned her, or is deprived of civil rights, or divorced because of his adultery, or adjudged to be insane or an habitual drunkard.

The surrogate must inquire and ascertain as far as practicable, what relatives of the infant reside in his county or elsewhere, and with whom the infant resides; and he may in his discretion cite any relative or class of relatives to show cause why the appointment should not be made.

Source.—Former §§ 2823 and 2825. § 2823 (see L. 1870, ch. 34; L. 1871, ch. 708). § 2825 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 6.

Revisers' note.—This section combines parts of §§ 2823, 2825. Provision in case parent is a nonresident, unknown or has abandoned, is new, and is taken in part from § 111 of Domestic Relations Law.

§ 2648. Hearing.

Where a citation is not issued, or upon the return of a citation, the surrogate must inquire into all the facts and circumstances regarding the infant, his condition in life and surroundings, and also must ascertain as nearly as practicable the value of his personal property or income from personal property and of the rents and profits of his real property.

Source.—Former §§ 2825 and 2829. § 2825 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 6, lost sentence. § 2829 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 6, in part.

§ 2649. Decree appointing general guardian; term of office.

If the surrogate is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person, or of his property, or of both, he must make a decree accordingly. The same person may be appointed general guardian of both the person and the property of the infant, or the guardianship of the person and of the property may be committed to different persons. The surrogate may, in his discretion, appoint a person other than the father or mother of the infant, or other than the person nominated by the petitioner.

The term of office of a general guardian so appointed expires when the infant attains the age of twenty-one years.

Source.—Former §§ 2821 and 2828. § 2821 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 6, first clause; L. 1870, ch. 341; L. 1871, ch. 708. § 2828 originally revised from R. S., pt. 2, ch. 8, tit. 3, § 10.

The right of father to be appointed is paramount, and this natural right should not be denied him unless it clearly and unequivocally appears that the best interests of the infant demand the appointment of some one else; in the last analysis the court must be governed by a consideration of what is for the best interests of the child. *Matter of Munn* (1917), 101 Misc. 171, 167 N. Y. Supp. 443.

§ 2650. Qualification of guardian of property.

Before letters of guardianship of an infant's property are issued by the surrogate's court, the person appointed must take an official oath as prescribed by law and execute to the infant, and file in the surrogate's office his bond, with at least two sureties, in a penalty, fixed by the surrogate, not less than twice the value of the personal property, and of the rents and profits of the real property, and of the annual income receivable by him from any funds of which the general guardian will not have possession, conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust, and that he will, in all things, render a just and true account of all moneys and other properties received by him, and the application thereof, and of his guardianship, whenever required so to do, by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property, and of the rents and profits of the real property, or such annual income receivable by him, for the term of three years.

Where the property of the infant does not exceed the sum, or value, of two thousand dollars, as shown by the petition, the surrogate, may, in his

discretion, make an order dispensing with such bond wholly or partly, and directing that the guardian collect and receive the moneys and property of his ward jointly with a person designated in the order, and that all such moneys and other property, so far as same are conveniently capable of deposit, shall be deposited in the name of such guardian, subject to the order of the surrogate, with such bank, savings bank, trust company, or safe deposit company as shall be designated in such order, and shall be withdrawn or removed only on the order of the surrogate.

The letters issued thereupon shall contain the substance of the order.

The cost of the safe deposit box shall be a county charge.

Amended by L. 1914, ch. 520; L. 1915, ch. 642, in effect May 14, 1915.

Source.—Former § 2830, as amended by L. 1881, ch. 535; L. 1892, ch. 559; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 8.

Revisers' note.—Penalty of the bonds not changed here as in administration, as the reason for reducing the bond does not apply to a guardian.

Application of section.—The provisions of this section apply to guardians appointed by law. *Matter of Huebsch* (1914), 87 Misc. 566, 151 N. Y. Supp. 377.

Bond required.—An application for the issuance of letters of guardianship of an infant entitled to a legacy or distributive share under \$2,000, without security pursuant to § 2650, will be denied on the ground that said section is in hopeless conflict with § 2739 which the court will follow. *Matter of Hirschfeld* (1914), 88 Misc. 399, 151 N. Y. Supp. 846.

Where letters of guardianship are applied for pursuant to an appointment contained in a will, and the estate of the minor is less than \$2,000, it has been held that in the county of the Bronx the petitioner is not required to give a bond but must comply with the provisions affecting guardians of such estates in such county contained in this section. *Matter of Huebsch* (1914), 87 Misc. 566, 151 N. Y. Supp. 377.

Upon the settlement of an action brought on behalf of an infant, the court will not direct payment of the proceeds, less attorney's fees, to the infant's general guardian appointed by the surrogate without a bond. *Haug v. Hewitt* (1914), 87 Misc. 67, 150 N. Y. Supp. 236.

General guardian made to give a bond, see *Davison v. Tams*, 30 Misc. 156, 63 N. Y. Supp. 828. When the bond required by § 2746 must be given in addition to the bond required by this section, see *Matter of Miller*, 29 Misc. 672, 61 N. Y. Supp. 243; *Matter of Mills*, 61 N. Y. Supp. 243.

An application for an order dispensing with security by the guardian of an infant will be denied. *Matter of Kaufman* (1916), 93 Misc. 408, 158 N. Y. Supp. 134.

Action to enforce the liability of the sureties on the bond of a guardian. See *Van Zandt v. Grant*, 67 App. Div. 70, 73 N. Y. Supp. 600, aff'd 175 N. Y. 150.

Funds under control of supreme court.—A fund acquired by the settlement of an action brought in the supreme court for personal injuries to an infant must remain under the control of said court which is in duty bound to see that the fund is conserved or, if necessary, applied under its direction for the benefit of the infant, and the petition of his general guardian appointed by the surrogate's court without bonds that said fund be turned over to him and another, for the avowed purpose of enabling petitioner to apply to the surrogate's court for the withdrawal of part of the funds to pay for medical attendance and "other expenses" of said infant, will be denied. *Benson v. Siemons* (1915), 92 Misc. 509, 156 N. Y. Supp. 1.

Payment to guardian only.—Payment by an insurance company of the amount of a policy due the infants by a check drawn to the order of the guardian individually and as general guardian, without including the name of the person designated in the order to serve jointly with the general guardian, is no defense in an action for the amount of the policy. *Duncan v. Mutual Life Insurance Co.* (1917), 99 Misc. 280, 164 N. Y. Supp. 97.

§ 2651. Limited and restrictive letters of guardianship.

In a case where a guardian of an infant is named or appointed, and it appears to be impracticable to give a bond sufficient to cover the whole amount of the infant's personal property, the surrogate may, in his discretion, accept security, approved by him, not less than twice the amount of the particular portion of the infant's property which the guardian will be

authorized under the letters to receive; and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant, until the further order of the surrogate, on additional further satisfactory security.

Source.—Former § 2830, as amended by L. 1881, ch. 535; L. 1892, ch. 559; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 8.

§ 2652. *Id.*; of general guardian of person.

Before letters of guardianship of an infant's person are issued by the surrogate's court, the person appointed must take the official oath, as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate, and with or without sureties, as to the surrogate seems proper; conditioned that the general guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate's court.

Source.—Former § 2831; section new as originally inserted in Code of Civ. Proc.

§ 2653. Appointment of general guardian by supreme court.

Where the supreme court, or any court other than the surrogate's court, appoints a general guardian of an infant's person, or property, or both, a certified copy of the order or decree appointing such guardian and of the bond or undertaking given by such guardian shall be filed by him in the surrogate's court of the county in which the infant resides, or if such infant be a non-resident, of the county in which such infant has property real or personal, and a minute thereof made and indexed in the book kept by the surrogate in which orders or decrees appointing guardians are entered. A guardian so appointed shall be subject to all the duties and liabilities of a general guardian specified in this title:

Source.—New.

Revisers' note.—In some counties the supreme court is constantly appointing guardians, especially in negligence cases, and now no record thereof is to be found in the surrogate's office.

This section has no application to bonds, decrees or orders made by the supreme court prior to September 1, 1914. Matter of Littmann (1914), 88 Misc. 403, 150 N. Y. Supp. 607.

§ 2654. Application for ancillary letters to foreign guardians.

1. Where an infant, who resides without the state, and within the United States, is entitled to property within the state, or to maintain an action in any court thereof, a guardian of his property, who has been appointed by a court of competent jurisdiction, within the state or territory where the ward resides, and has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property, of the ward, may present, to the surrogate's court having jurisdiction, a petition, setting forth the facts, and particularly whether or not there are any debts due or to become due from the infant to a resident of this state, and that the security given is sufficient in amount to cover the property sought to be obtained through such letters, and that the court had juris-

diction of the infant, and prayer for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed and has given the security required in this section, which must be authenticated in the mode prescribed in section forty-five of the decedent estate law, for the authentication of records and papers, upon an application for ancillary letters testamentary, or ancillary letters of administration. Such petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

2. Where an infant, who resides without the state, and within a foreign country is entitled to personal property within the state, or to maintain an action, or special proceeding in any court thereof respecting such personal property, a guardian of his property, authorized to act as such within the foreign country where the ward resides, may apply to the surrogate's court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of such infant and the person so authorized must present to the surrogate's court having jurisdiction a petition setting forth the facts and such additional allegations regarding debts and security as required in subdivision one of this section, and praying for ancillary letters of guardianship on the personal estate of such infant. The petition must be accompanied with the exemplified copies of the records and other papers showing the appointment of such foreign guardian, or where such foreign guardian has not been appointed by any court, with other proof of his authority to act as such guardian within such foreign country, and also with proof that pursuant to the laws of such foreign country, such foreign guardian is entitled to the possession of the ward's personal estate. Exemplified copies of the records, where used pursuant to this subdivision, must be authenticated by the seal of the court, or officer, by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate, under the principal seal of the department of foreign affairs, or the department of justice of such country, attested by the signature or seal of a United States consul. Such petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

Source.—Former § 2838, as amended by L. 1889, ch. 263; L. 1892, ch. 576; L. 1897, ch. 492; L. 1909, ch. 65; originally revised from L. 1870, ch. 59, § 1, in part.

Revisers' note.—The new matter is intended to give better protection to creditors, and more information to the court, as such letters have always been issued without bonds. See new § 2656.

In general.—The courts of this state will not recognize foreign general guardians. *West v. Gunther*, 3 Dem. 386. Letters of guardianship issued to a father by the court of another state while the infant resided in a county of this state for nearly a year; not within the provisions of this section. *Griffin v. Saarsfield*, 2 Dem. 4.

Petition by an infant residing in another

state for the appointment of a general guardian, see *Johnson v. Borden*, 4 Dem. 36. Petition for ancillary letters of guardianship verified by the guardian's attorney, when sufficient, see *Matter of Whittemore*, 1 Connolly 155, 9 N. Y. Supp. 296. When a petition sworn to in another state is duly verified, see *Matter of Wisner*, 3 Dem. 11.

§ 2655. Proceedings thereupon.

Where the surrogate is satisfied upon the papers presented, as prescribed in the last section, that the case is within that section, and that it will be for the ward's interest that ancillary letters of guardianship should be issued to the petitioner, he may make a decree granting ancillary letters accordingly. Such a decree may be made without a citation, or a citation may issue to such persons as the surrogate thinks proper, to show cause why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must direct that any debts appearing to be due or owing from the infant to residents of this state be paid or security given therefor.

Source.—Former § 2839, as amended by L. 1892, ch. 576; originally revised from L. 1870, ch. 59, § 1, in part.

Revisers' note.—Information as to debts, loosely provided for in this section, must by the terms of § 2654 be furnished by the petitioner, and must bind him.

In general.—Ancillary guardian appointed a general guardian,—requirement as to additional bond, see *Hunt's Estate*, 44 N. Y. Supp. 1088. Action by guardian in his own name regarding ward's personality, see *Bunce v. Bunce*, 27 Abb. N. C. 61, 14 N. Y. Supp. 659.

When ancillary guardian not to receive

award granted in condemnation proceedings, see *Matter of Department of Public Parks*, 89 Hun 529, 35 N. Y. Supp. 332.

Joint letters.—There is no provision in the code that authorizes the issuance of joint ancillary letters of guardianship. *Matter of Breese* (1915), 92 Misc. 650, 156 N. Y. Supp. 267.

§ 2656. Effect of such letters.

Ancillary letters of guardianship are issued as prescribed in the last section, without security except as provided in that section and without an oath of office. If issued in a case provided for in subdivision one, of section 2654, they authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property of the ward; to dispose of them in like manner as a general guardian of the property appointed as prescribed in this article; to remove them from the state, and to maintain or defend any action or special proceeding in the ward's behalf. If issued in a case provided for in subdivision two, of section 2654 such ancillary letters of guardianship authorize the person to whom they are issued to demand and receive the personal property of the ward, and to dispose of it in like manner as a guardian of property appointed as prescribed in this article, and to maintain or defend any action or special proceeding respecting such personal property in the ward's behalf. But in neither case do such letters authorize such ancillary guardian to receive from a resident guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a surrogate's court, money or other property belonging to the ward, in a case where letters have been issued to a guardian of the infant's property, from a surrogate's court of a county within the state, upon an allegation that the infant was a resident of that county, except by the special direction made upon good cause shown, of the surrogate's court from which the principal letters were issued, or unless the principal letters have been duly revoked.

Source.—Former § 2840, as amended by L. 1889, ch. 263; originally revised from L. 1870, ch. 59, § 1, in part.

§ 2657. Will or deed containing appointment to be proved, etc., and recorded.

A person shall not exercise, within the state, any power or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the state, and dying after this chapter takes effect, unless the will has been duly admitted to probate, and recorded in the proper surrogate's court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the state, executed after this chapter takes effect, unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded, within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment; and if a guardian is afterward duly appointed by a surrogate's court, the presumption is conclusive.

Source.—Former § 2851; originally revised from L. 1877, ch. 206, §§ 4-7, in part.
Revisers' note.—See Dom. Rel. L., § 81, and Code of Civ. Proc., § 1745.

Jurisdiction of appointment of testamentary guardian.—There is no direct provision that a testamentary guardian must be appointed by the surrogate's court which enters the decree of probate of the will in which such guardian is nominated; this section is not to be construed to that effect, but in compliance with § 2514 an application for the appointment of such a guardian should be made to the surrogate's court of the county by which decedent was appointed the general guardian of the infant's person and estate. Matter

of Magilton (1917), 98 Misc. 490, 164 N. Y. Supp. 745.

Deed in effect at death of grantor.—Under this section and § 2658 a deed executed by the surviving parent of certain infants granting guardianship of them without bond can take effect only at the death of the grantor and her application for the grant of letters of guardianship to the grantees named in the deed will be denied. Matter of Gibbs (1916), 96 Misc. 537, 160 N. Y. Supp. 686.

§ 2658. Guardian by will or deed; qualification, letters, etc.

Where a will, containing the appointment of a guardian, is admitted to probate, or a deed is recorded as provided in the foregoing section, the person appointed guardian must, within thirty days thereafter, qualify by taking and filing his oath of office, and a bond as fixed by the surrogate, unless contrary to the express provision of the will or deed, and by filing a petition or affidavit setting forth the facts which entitle him to so qualify and receive letters; except that a trust company so named, instead of filing such oath and bond, shall file a consent to accept such appointment duly executed and acknowledged; otherwise he is deemed to have renounced the appointment. But the surrogate, either before or after the expiration of thirty days, may extend the time so to qualify, upon good cause shown, for not more than three months. A person appointed guardian by will or deed may, at any time before he qualifies, renounce the appointment by a written instrument, acknowledged, or approved, and duly certified, and filed in the surrogate's office.

Source.—Former § 2852; originally revised from L. 1877, ch. 206, §§ 4-7, in part.

Revisers' note.—Security required from all such guardians in such sum as the surrogate fixes. The theory that because a testator appoints a trustee or guardian, he should not give security, should be abandoned.

General section on objections to grant of letters (new § 2566) made to apply, and that portion repealed here.

Application and effect.—Does not apply to wills proved prior to September 1, 1890; *Geoghegan v. Foley*, 5 Redf. 501. Appointment of guardian to take effect upon the happening of a contingency, application of section. *Estate of Constantine*, 16 Civ. Pro. Rep. 262, 5 N. Y. Supp. 554. Guardians required to take oath. *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372.

Letters of testamentary guardianship denied an alien non-resident. *Matter of Zeller*, 25 Misc. 137, 54 N. Y. Supp. 926;

Matter of Welsh, 50 App. Div. 189, 63 N. Y. Supp. 737.

Failure to issue letters; effect upon surrender of life insurance policy by husband named as guardian in a will. *Foley v. Mutual Life Ins. Co.*, 64 Hun 63, 18 N. Y. Supp. 615, aff'd 138 N. Y. 333.

Filing bond.—This section does not make the filing of a bond a prerequisite to the issuance of letters in all cases. *Matter of Huebach* (1914), 7 Misc. 566, 151 N. Y. Supp. 377.

§ 2659. Appointment of successor.

Where no guardian appointed by will or deed remains in office on account of resignation, removal, or death, a general guardian may be appointed by the surrogate's court, with all the powers conferred by the will or deed and with the effect prescribed in section 2563 of this chapter; unless such an appointment would contravene the express terms of the will or deed.

Source.—Former § 2860; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—Change extends the power to appoint successor when more than one testamentary guardian was appointed and all have died, etc.

§ 2660. Guardian to file annual inventory and account.

A guardian of an infant's property must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remain under his control, file in the surrogate's court the following papers:

1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a list of the articles or items, remaining in his hands; a statement of the manner in which he has disposed of each article or item, not remaining in his hands; and a full description of the amount and the nature of each investment of money, made by him.

2. A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account.

3. The names and residences of the sureties on his bond; if natural persons whether they are living; and whether the security of the bond has become impaired.

4. The guardian of an infant's property may be required by the surrogate, with the annual account of the infant's property, to produce for examination by the surrogate, all securities or evidences of deposit or investment, which he has relating to the disposition of the estate of the infant.

Amended by L. 1917, ch. 212, in effect Sept. 1, 1917. The amendment added the last paragraph.

Source.—Former §§ 2842 and 2855. § 2842, as amended by L. 1913, ch. 533; originally revised from L. 1837, ch. 460, § 57, in part. § 2855, as amended by L. 1896, ch. 61; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—The amendment now includes all guardians.

Proceeds of insurance policy.—Where a guardian paid out of his own funds the amount necessary to revive a policy of insurance upon the life of his ward, which had lapsed at the time he was appointed by the surrogate, and was not in terms payable to any specific person, he cannot be called to account by the surrogate for the amount of the policy received and claimed as his individual estate. *Matter of Wolfe* (1912), 75 Misc. 454, 136 N. Y. Supp. 333.

§ 2661. Affidavit to be annexed thereto.

With the inventory and account, filed as prescribed in the last section, must be filed an affidavit, which must be made by the guardian, unless for good cause shown in the affidavit, the surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner, in which he has disposed of the same, and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount, and nature of each investment made by him, since his appointment, or since the filing of the last annual inventory, and account, as the case requires; and that he does not know of any error or omission in the inventory or account, to the prejudice of the ward.

Source.—Former § 2843; originally revised from L. 1837, ch. 460, parts of §§ 57 and 58.

§ 2662. Annual examination of guardian's accounts.

In the month of February of each year and thereafter until completed, the surrogate must, for the purpose specified in the next section, examine or cause to be examined, under his direction, all inventories and accounts of guardian filed since the first day of February of the preceding year. The examination may be made by the clerk of the surrogate's court, or by a person specially appointed by the surrogate to make it, who must, before he enters upon the examination, subscribe and take before the surrogate, and file with the clerk of the surrogate's court, an oath faithfully to execute his duties and to make a true report to the surrogate.

Source.—Former § 2844, as amended by L. 1881, ch. 535; originally revised from L. 1837, ch. 460, § 58, in part.

§ 2663. Proceedings, when account defective, etc.

If it appears to the surrogate, upon an examination made as prescribed in the last section, or by the report of such special examiner, that a guar-

dian of an infant's property, has omitted to file his annual inventory or account, or the affidavit relating thereto as prescribed in the last section but one; or if the surrogate is of the opinion, that the interest of the ward requires that the guardian should render a more full or satisfactory inventory or account; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper special guardian of the ward, for the purpose of filing a petition in his behalf, for the removal of the guardian, and prosecuting the necessary proceedings for that purpose. And in a like case where said special examiner has been appointed, the surrogate shall make an order appointing said examiner special guardian of such infant with authority to procure the filing of an amended account or a proper account, and to prosecute a proceeding for the removal of such guardian when necessary. The surrogate in all cases of examination or prosecution as aforesaid shall fix the fees and compensation of such special examiner and special guardian, and may in his discretion make an order charging them in whole or in part upon the guardian personally, the fund in his hands, or upon the county, in which latter case he shall certify the items thereof to the board of supervisors of the county or in the city of New York to the proper officers, and the same shall be audited and paid as other county or city charges.

Source.—Former §§ 2844 and 2845. § 2844, as amended by L. 1881, ch. 535; originally revised from L. 1837, ch. 460, § 58, in part. § 2845 originally revised from L. 1837, ch. 460, § 60.

Revisers' note.—The former provisions seemed to be inadequate to enforce the filing of an account. By appointing a special examiner and allowing some compensation, this important duty may be properly performed.

§ 2664. Surrogate may direct as to infant's maintenance.

Upon the petition of the guardian of an infant's person or property; or of the infant; or of any relative or other person in his behalf; the surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application, by the guardian of the infant's property, to the support and education of the infant, of such a sum as to the surrogate seems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal.

Source.—Former § 2846; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—By omitting "general" this section applies to guardians by will or deed. They are brought within it by § 2855, Code, which can now be repealed.

Effect of section.—Does not provide for the payment of a debt already incurred. *Welch v. Gallagher*, 2 Dem. 40. Confers no authority upon the surrogate as to the investment of infant's property, but is supervisory in character. *Matter of Bolton*, 159 N. Y. 129.

Disposition of income.—Surrogate's jurisdiction over application of income to infant's support not limited to cases where the demand for support is not disputed. *Matter of Kerwin*, 59 Hun 589, 14 N. Y. Supp. 353. No authority vested in a general guardian to refuse to make provision for a minor's support because the minor will not allow him to arbitrarily fix its

domicile. *Matter of Wentz*, 9 Misc. 240, 30 N. Y. Supp. 211. Application of income to infant's support and education, see *Norton v. Sillcocks*, 4 Dem. 145; *Allen v. Kelley*, 171 N. Y. 1; *Matter of Plumb*, 54 Hun 637, 7 N. Y. Supp. 596, aff'd 125 N. Y. 765.

Expenditure from principal.—Refusal to authorize an encroachment upon the corpus of the estate, see *Matter of Paton*, 7 Misc. 377, 28 N. Y. Supp. 160. The guardian has the burden of showing that an expenditure from the principal was necessary. *Matter of Wendell*, 32 Hun 545; *Matter of Bushnell*, 17 St. Rep. 813, 4 N. Y. Supp. 472.

Allowance of expenditures by father and general guardian before and after his appointment, see *Matter of Wright*, 22 St. Rep. 83, 4 N. Y. Supp. 343. Claim for allowance for support of infant, past or future, may be determined by surrogate. *Matter of Estate of Haslehurst*, 4 Misc. 366, 25 N. Y. Supp. 827; *Shepard v. Stebbins*, 17 St. Rep. 900.

Expenditures allowed a mother and general guardian of a daughter on a final accounting, see *Matter of Klunck*, 33 Misc. 267, 68 N. Y. Supp. 629; *Matter of Winsor*, 5 Dem. 340; *Estate of Ogg*, 20 St. Rep. 867, 4 N. Y. Supp. 341; *Voessing v. Voessing*, 4 Redf. 360. Claim for services rendered by guardian ad litem in looking after the ward's estate refused, where its validity has not been established, see *In re Stoehr's Estate*, 23 N. Y. Supp. 280.

Action to compel support.—A parent, as natural guardian, has no right to proceed against the executors for the purpose of compelling the application of the infant's

property to its support. *Quin v. Hill*, 6 Dem. 39.

Action to recover expenditures for support.—Action by executor in his individual capacity to recover for various necessities furnished an infant when he did not at any time have any money in his hands to which such infant was entitled, see *Johnson v. Weir*, 72 App. Div. 325, 76 N. Y. Supp. 76. Claims against an infant only recoverable by action. *Matter of Greenhalgh*, 45 St. Rep. 924, 18 N. Y. Supp. 748.

Party supporting infant under contract with the guardian may look to the guardian only, even after the ward attains his majority. *Nithercott v. Kelly*, 24 St. Rep. 171, 5 N. Y. Supp. 259; *Aldrich v. Moore*, 26 St. Rep. 964, 5 N. Y. Supp. 330. Contract between the general guardian of a stepdaughter and the stepfather for her support, see *Matter of Ackerman*, 116 N. Y. 654. Order of reference on a proceeding by a creditor to enforce a claim against an infant's estate. *Matter of Ry-lance*, 25 Misc. 283, 55 N. Y. Supp. 433.

TITLE III-A.

Funds of estates to be kept separate.

ARTICLE 1. Funds of estates to be kept separate.

ARTICLE 1.

FUNDS OF ESTATES TO BE KEPT SEPARATE.

§ 2664-a. Funds of estates to be kept separate.

Every executor, administrator, guardian or testamentary trustee shall keep the funds and property received from the estate of any deceased persons separate and distinct from his own personal fund and property. He shall not invest the same or deposit the same with any person, association or corporation doing business under the banking law or other person or institution, in his own name, but all transactions had and done by him shall be in his name as such executor, administrator, guardian or testamentary trustee.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Added by L. 1916, ch. 588, in effect Sept. 1, 1916.

TITLE IV.

Ascertaining assets and debts; payment of debts and legacies; powers and duties of executors and administrators; mortgage, lease or sale of real property for payment of debts, funeral expenses, expenses of administration, and to satisfy charges thereon, and for distribution.

- ARTICLE 1. Appointment of appraisers and making and returning inventory. Proceedings to discover property.
2. Presenting claims, their allowance, rejection and trial. Payment of debts, legacies and expenses. Sales of real estate by executors, administrators with the will annexed, and testamentary trustees under power contained in the will. Deposit of money or securities.
 3. Applying rents, and proceeds of mortgage, lease or sale of real estate to the payment of debts, funeral and administration expenses, and charges upon real estate. Sale for distribution, and conveyance in confirmation of title.

ARTICLE 1.

APPOINTMENT OF APPRAISERS, AND MAKING AND RETURNING INVENTORY, PROCEEDINGS TO DISCOVER PROPERTY.

- | | |
|---|--|
| <p>§ 2665. Appointment of appraisers and making inventory.</p> <p>2666. Appraisal in different places; appraisal of newly discovered property.</p> <p>2667. Contents of inventory.</p> <p>2668. Return of inventory.</p> <p>2669. Return of inventory; how compelled.</p> <p>2670. Exemption for benefit of family.</p> | <p>§ 2671. Proceedings to compel set-off of exempt property.</p> <p>2672. What shall be deemed assets.</p> <p>2673. Assets; debts due from executor to testator; effect of discharge by will.</p> <p>2674. Apportionment of rents, annuities and dividends.</p> <p>2675. Proceedings to discover property withheld.</p> <p>2676. Trial and decree.</p> |
|---|--|

§ 2665. Appointment of appraisers and making inventory.

On the application of an executor or administrator, an order must be entered in the surrogate's court appointing two disinterested appraisers, as often as may be necessary, to appraise the personal property of a deceased person. The executor or administrator, within three months after qualifying and after giving at least five days' notice personally or by mail to the legatees or next of kin, residing in the county of the decedent, and posting a notice in three public places of the town, or city where he resided, specifying the time and place at which the appraisement will be made, must make a true and perfect inventory of all the personal property of the decedent. Before making the appraisement, the appraisers must take and subscribe an oath, to be inserted in the inventory, that they will truly, honestly and impartially appraise the personal property exhibited to them, according to the best of their knowledge and ability. They must in the presence of such of the parties interested as attend, estimate and appraise the property exhibited to them, and set down each article separately with the value thereof in dollars and cents, distinctly, in figures opposite to the articles respectively.

Amended by L. 1916, ch. 624, in effect May 20, 1916.

Source.—Former § 2711, as amended by L. 1881, ch. 535; L. 1893, ch. 686; L. 1901, ch. 195; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 1-5, by amendment of 1893.

Manner of appraisal.—The surrogate has no power to direct appraisers as to the manner in which they shall value property. *Matter of McCaffrey*, 50 Hun 371, 3 N. Y. Supp. 96. An appraisal consists not only of a statement of the assets, but of an appraisal by appraisers. They can make no appraisal unless the assets are exhibited to them. *Matter of Robbins*, 4 Redf. 144.

An appraisement of the personal property of a decedent, made without the previous posting of notice thereof, is invalid,

vitiates the inventory, and entitles the appraisers to no fees. *Salomon v. Heickel*, 4 Dem. 176.

As to rights of legatees where appraisers of personal property of an estate failed to have their fees taxed by the surrogate pursuant to this section (former § 2711), as amended, but the executor paid them upon the delivery of the inventory, see *Matter of Harriott*, 145 N. Y. 540.

Section cited.—In *re Long's Estate* (1916), 161 N. Y. Supp. 449.

§ 2666. Appraisal in different places; appraisal of newly discovered property.

Should any of the personal property to be inventoried be in different or distant places, the same appraisers may complete such inventory in any place where such property may be, and may adjourn the appraisal to such place; or, upon application duly made, the surrogate may appoint other appraisers to make the inventory of such unappraised property, and the same notice of such appraisal shall be given as for the local appraisal except the posting of notices.

If personal property not mentioned in any inventory come to the possession or knowledge of an executor or administrator, he must cause the same to be duly appraised, and an inventory thereof to be returned within one month after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of a first inventory.

Source.—Former §§ 2711 and 2714. § 2711, as added by L. 1893, ch. 686, and amended by L. 1901, ch. 195; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 1-5; L. 1873, ch. 225; § 2714, as added by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 11, 14, 24.

Revisers' note.—Parts of former §§ 2711, 2714 combined and rewritten. Time for returning further inventory shortened in line with the idea of consuming less time in the settlement of an estate.

§ 2667. Contents of inventory.

The inventory must contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money belonging to the deceased, known to the executor or administrator and of all debts owing by such executor or administrator to the deceased whether discharged by the will or not, with the name of the debtor in each security, the date, the sum originally payable, the amount due at decedent's death and the sum which, in the judgment of the appraisers, is collectible on each security; and of all moneys belonging to the deceased, which have come to the hands of the executor or administrator.

Source.—Former § 2714, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 11, 14, 24.

Statements in inventory prima facie evidence of value. *Matter of Maacke*, 13 Misc. 368, 35 N. Y. Supp. 109; *Matter of Shipman*, 82 Hun 108, 31 N. Y. Supp. 571. Partnership interest to be noted without specific inventory of partnership assets. *Thompson v. Thompson*, 1 Bradf. 24.

An unverified list of a decedent's assets cannot be treated as an inventory, within the meaning of the statute. *Loesche v. Griffin*, 3 Dem. 358.

Debt of an executor, etc., due estate.—It is the duty of an executor, indebted to his testator when he died, if solvent at any time before his final accounting, to

pay, as an individual, the debt to himself as executor. *Matter of David*, 44 Misc. 337, 89 N. Y. Supp. 927. An administrator is properly chargeable in his account with any balance due by him to the decedent. *Matter of Georgi*, 21 Misc. 419, 47 N. Y. Supp. 1061. As to interest on an administrator's debt to his intestate, see *Matter of Davis*, 37 Misc. 326, 75 N. Y. Supp. 493.

As to assets in the hands of one named executor before the death of his testatrix, see *Matter of Brintnall*, 40 Misc. 67, 81 N. Y. Supp. 250.

§ 2668. Return of inventory.

Duplicates of the inventory must be made and signed by the appraisers, one of which must be retained by the executor or administrator, and the other filed in the surrogate's office within three months from the date of the letters. On returning such inventory, the executor or administrator must take and subscribe an oath, indorsed upon or annexed to the inventory, stating that the inventory is in all respects just and true, that it contains a true statement of all the personal property of the deceased which has come to his knowledge, and particularly of all money belonging to the deceased, and of all just claims of the deceased against him, according to the best of his knowledge. Any one executor or administrator, on the neglect of the others, may return an inventory; and the executor or administrator so neglecting shall not thereafter interfere with the administration or have any power over the personal property of the deceased; but the executor or administrator so returning the inventory shall have the whole administration, until the delinquent return, and verify an inventory in accordance with the provisions of this article.

Source.—Former § 2715, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 15, 16, 23.

§ 2669. Return of inventory; how compelled.

A creditor, coexecutor or coadministrator, or person interested in the estate may present to the surrogate's court a petition showing that an executor or administrator has failed to return an inventory, or a sufficient inventory, within the time prescribed by law therefor. If the surrogate is satisfied that the executor or administrator is in default, he must make an order requiring the delinquent to return the inventory, or a further inventory, or in default thereof, to show cause at a time and place therein specified, why he should not be removed or punished. On the return of the order, if the delinquent has not filed a sufficient inventory, the surrogate may revoke his letters, or issue a warrant of arrest against him, or which the proceedings are the same as on a warrant issued for disobedience to an order, as prescribed in article one of title twelfth of chapter seventeenth of this act. A person committed to jail on the return of a warrant of arrest issued as prescribed in this section, may be discharged by the surrogate or a justice of the supreme court, on his paying and delivering, under oath, all the money and other property of the decedent, and all papers relating

to the estate under his control, to the surrogate, or to a person authorized by the surrogate to receive the same.

Source.—Former § 2716, as amended by L. 1893, ch. 686. The amendment of 1893 consolidated former §§ 2715 and 2716. § 2715 was originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 17, 18. § 2716 was originally revised from same title, § 22.

Revisers' note.—"Attachment" changed to "arrest" to conform to the article mentioned. Power also given to remove, which would be useful.

Application.—Section does not change the authority of a surrogate, but only makes special provision for what had been adjudged to be a necessary implication of authority. *Matter of McIntyre*, 4 Redf. 489. It establishes the only method of procedure for compelling an executor or administrator to return an inventory. *White v. Lewis*, 3 Dem. 170. Statute does not contemplate interference by legatees or next of kin of a decedent with the action which executors and administrators, aided by appraisers, are required to take. *Vogel v. Arbogast*, 4 Dem. 399.

Petition; sufficiency.—Only a creditor, or a person interested in the estate of a decedent, can compel his executors to file an inventory. *Matter of Huntington*, 39 Misc. 477, 80 N. Y. Supp. 220. An allegation that one is an adopted daughter of an intestate is not conclusive on the surrogate in an application to compel the filing of an inventory. *Matter of Comins*, 9 App. Div. 492, 41 N. Y. Supp. 323.

Petition refused where it appears that the estate has been settled out of court, and that all the beneficiaries have received their shares and released the executor. *Matter of Wagner*, 119 N. Y. 28.

Creditors.—In order to entitle one to proceed under this section as a creditor of a decedent, against the executor or administrator of the latter to compel the filing of an inventory, he must either distinctly declare himself to be such a creditor, or

set forth facts showing that he is entitled to proceed in that capacity. *Pendel v. Waite*, 3 Dem. 261. An alleged creditor, whose claim is disputed, is entitled to the order for an inventory, although the issue as to the indebtedness of the estate is one which the surrogate's court has no jurisdiction to determine. *Creamer v. Waller*, 2 Dem. 351. As to remedy for the enforcement of a claim, see *Matter of Campbell*, 96 App. Div. 561, 89 N. Y. Supp. 569.

Person interested.—By virtue of subdivision 11 of § 2768 an allegation of interest is sufficient although it is disputed, and consequently a petition to compel the filing of an inventory will be granted although the administratrix claims that the petitioner has assigned his interest in the estate. In *re Long's Estate* (1916), 161 N. Y. Supp. 459.

If the petitioner desires information as to the character of the various items of the estate, he may apply for the filing of an inventory. *Matter of Gillender* (1917), 98 Misc. 521, 162 N. Y. Supp. 955.

Agent of creditor.—While under this section the creditor of an estate or a person interested therein may maintain a proceeding to compel the representative to file an inventory, it may not be instituted by a mere agent of the creditor. *Matter of Lowenthal* (1911), 148 App. Div. 487, 132 N. Y. Supp. 994.

§ 2670. Exemption for benefit of family.

If a person having a family die, leaving a widow or husband, or minor child or children, the following articles shall not be deemed assets, but must be included and stated in the inventory of the estate as property set off to such widow, husband or minor child or children:

1. All house-keeping utensils, musical instruments, sewing machine and household furniture used in and about the house and premises, fuel and provisions, and the clothing of the deceased, in all not exceeding in value five hundred dollars.

2. The family bible, family pictures and school-books, used by or in such family, and books not exceeding in value fifty dollars, which were kept and used as part of the family library.

3. Domestic animals with their necessary food for sixty days, not exceeding in value one hundred and fifty dollars.

4. Money or other personal property not exceeding in value one hundred and fifty dollars.

Such property so set apart shall be the property of the surviving husband

or wife, or of the minor child or children if there be no surviving husband or wife. No allowance shall be made in money or other property under subdivisions one, two and three if the articles mentioned therein do not exist.

Source.—Former § 2713, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 9, 10; L. 1842, ch. 157, § 2; L. 1867, ch. 782, § 13.

Revisers' note.—This section has been unchanged so long that it was thought advisable to make radical changes. The amount of exempt property is greatly increased, but in very small estates it will really work no change. In moderate and large estates the amount is none too large.

Title to exempt property given to surviving husband or wife, as division of it, according to part of section repealed, has been almost impossible in practice.

Reference.—Similar property exempt from levy and sale under execution, Code Civ. Pro., § 1390.

Construction of section as to articles not deemed assets of the estate of a decedent. *Matter of Sprague*, 41 Misc. 608, 85 N. Y. Supp. 303. Transfer tax is not leviable upon the exemptions given a widow under this section. *Matter of Page*, 39 Misc. 220, 79 N. Y. Supp. 382.

When a decedent is not the absolute owner of personal property enough to enable the appraisers to set apart for the widow all that she is entitled to under this section, they may set apart for her use the decedent's interest in articles of which he was part owner. *Matter of Hallenbeck*, 195 N. Y. 143, overruling *Baucus v. Stover*, 24 Hun 114, and modifying 119 App. Div. 757.

The legislature did not intend to give the widow the value in money of any of the articles mentioned and described in subdivisions 1, 2, 3, 4, as exempt, and unless her husband owned those articles at his death she gets nothing under those subdivisions. *Matter of Perry*, 38 Misc. 167, 77 N. Y. Supp. 271; *Baucus v. Stover*, 24 Hun 109, rev'd on other grounds, 89 N. Y. 1. *Contra*, *Matter of Williams*, 31 App. Div. 617, 52 N. Y. Supp. 700; *Matter of Hemburg*, 37 Misc. 454, 75 N. Y. Supp. 933.

Right to exemption.—A widow who is sole executrix of her husband's estate, with a life interest therein, is entitled to have the exemptions allowed by this section set off on the judicial settlement of her accounts. *Matter of Warner*, 53 App. Div. 565, 65 N. Y. Supp. 1022.

A widow is not entitled to have the wearing apparel and ornaments of her husband set off as exempt. *Matter of Griffith*, 49 Misc. 405, 100 N. Y. Supp. 215.

Where a testator dies leaving no minor child, but adult children and a widow, and devises to her specific real estate in lieu of dower and of all statutory allowances, she, if she elects to take under the will, is not entitled to dower, and in view of her necessary waiver of all statutory allowances is not entitled to her quarantine nor to the exemptions of this section, but need not waive her distributive share in the

personalty. *Matter of Mersereau*, 38 Misc. 208, 77 N. Y. Supp. 329.

Allowances to widow should not be limited to what she might consume personally, but should include what might be consumed by the family of the deceased as constituted at the time of his death. *Matter of Griffith*, 49 Misc. 405, 100 N. Y. Supp. 215.

The payment of \$300 to a widow in lieu of articles specified in subdivisions 3 and 4 will be disallowed, where payments to her of \$400 for mourning apparel and sustenance, and \$150 under subdivision 5 have been credited to the executor. *Matter of Weaver*, 53 Misc. 244, 104 N. Y. Supp. 475.

No allowance should be made in lieu of articles enumerated in subdivision 4 where no such articles belonged to the decedent and those in use in the household belong to the widow. *Matter of Griffith*, 49 Misc. 405, 100 N. Y. Supp. 215. An allowance cannot be made to the widow for fuel and provisions pursuant to subdivision 3 where the decedent was not possessed of such fuel and provisions at the time of his death. *Matter of Stiles*, 64 Misc. 658, 120 N. Y. Supp. 714.

Where the articles directed to be set apart for the widow do not exist, the appraisers may set off an equivalent in money. *Matter of Berns*, 52 Misc. 426, 103 N. Y. Supp. 167.

Money set apart in lieu of articles specified may be subject to claims for funeral expenses. *Matter of Berns*, 52 Misc. 426, 103 N. Y. Supp. 167.

Money equivalent to the value of the article specified in the first four subdivisions of this section may not be set off as exempt. *Matter of Campbell*, 48 Misc. 278, 96 N. Y. Supp. 768.

When title vests absolutely.—As to when title to a portion of property vests absolutely in widow. *Crawford v. Nassoy*, 173 N. Y. 163, rev'g 55 App. Div. 433, 67 N. Y. Supp. 108. Where the articles in subdivisions 1, 2, 3, 4, are not in existence when a decedent dies, his widow will be allowed their value in money, and where she has died before accounting as one of his administrators the right will vest in her administratrix. *Mat-*

ter of Hulse, 41 Misc. 307, 84 N. Y. Supp. 220.

Exemption under subdivision 4 allowed. Matter of Shanley (1916), 95 Misc. 427, 160 N. Y. Supp. 733.

Property exempt cannot be considered in determining whether a surviving husband is a person interested in the estate, within the meaning of § 2569, so as to entitle him to petition for the revocation of letters of administration. In re Mack's Estate (1917), 164 N. Y. Supp. 590.

Household furniture, etc.—A piano is household furniture within subdivision 4. Allen's Estate, 36 Misc. 398, 73 N. Y. Supp. 750. Subdivision 5 is mandatory, and the appraisers have no discretion except as to the nature of the property. Matter of Bidgood, 36 Misc. 516, 73 N. Y. Supp. 1061. The appraisers, when the total value of the household furniture is less

than \$150, cannot make up the balance with farm animals and other property. Matter of Griffin, 118 App. Div. 515, 103 N. Y. Supp. 345.

Surviving husband.—Money allowance refused a surviving husband where articles of his wife's estate exempt from inventory were not in existence when she died. Matter of Keough, 42 Misc. 387, 86 N. Y. Supp. 807. The clothing and ornaments of a deceased wife should not be set aside for the husband, but belong to her estate under this section. Whiting's Estate, 19 Misc. 85, 43 N. Y. Supp. 969.

The widow of a testatrix cannot receive an allowance of money in lieu of the articles specified in subdivisions 1, 2 and 4, where the articles are not part of the estate. Matter of Baird, 126 App. Div. 439, 110 N. Y. Supp. 708.

§ 2671. Proceedings to compel set-off of exempt property.

Where an executor or administrator has failed to set apart property for a surviving husband, wife or child, as prescribed by law, the person aggrieved may present a petition to the surrogate's court, setting forth the failure and praying for a decree, requiring such executor or administrator to set apart the property accordingly; or, if it has been lost, injured or disposed of, to pay the value thereof, or the amount of the injury thereto, and that he be cited to show cause why such a decree should not be made. If the surrogate is of the opinion that sufficient cause is shown, a citation shall issue accordingly. In a proper case, the decree may require the executor personally to pay the value of the property, or the amount of the injury thereto.

Source.—Former § 2724, as amended by L. 1881, ch. 535, and L. 1893, ch. 686. Former §§ 2720 and 2721 were consolidated by the amendment of 1893. §§ 2720 and 2721 were new as originally inserted in Code of Civ. Proc.

Application of section.—Section does not change the nature of a proceeding to obtain the statutory exemptions from that of a quasi legal proceeding to an equitable proceeding governed by the ten years' statute of limitations. Matter of Campbell, 96 App. Div. 561, 89 N. Y. Supp. 569. As to when title to a portion of property vests absolutely in a widow, see Crawford v. Nassoy, 173 N. Y. 163.

Allowance.—The objection that the claim

for an allowance can be made only by the widow personally, overruled. Matter of Hulse, 41 Misc. 307, 84 N. Y. Supp. 220. As to the surrogate's power to make an allowance to the estate of a widow of an allowance she was entitled to during her lifetime, see Matter of Warner, 53 App. Div. 565, 65 N. Y. Supp. 1022.

Allowance to husband's executors of \$150 from his wife's estate granted. Matter of Pearce, 53 Misc. 216, 104 N. Y. Supp. 469.

§ 2672. What shall be deemed assets.

The following shall be deemed assets and go to the executors or administrators, to be applied and distributed as part of the personal property of the testator or intestate, and be included in the inventory:

1. Leases for years; lands held by the deceased from year to year; and estates held by him for the life of another person.

2. The interest remaining in him, at the time of his death, in a term of years after the expiration of any estate for years therein, granted by him or any other person.

3. The interest in lands devised to an executor for a term of years for the payment of debts.

4. Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support.

5. The crops growing on the land of the deceased at the time of his death.

6. Every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered.

7. Rent reserved to the deceased which had accrued at the time of his death.

8. Debts secured by mortgages, bonds, notes or bills; accounts, money, and bank bills, or other circulating medium, things in action, and stock in any corporation or joint-stock association.

9. Goods, wares, merchandise, utensils, furniture, cattle, provisions, moneys unpaid on contracts for the sale of lands, and every other species of personal property not hereinafter excepted. Things annexed to the freehold, or to a building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of this section. The right of an heir to any property, not enumerated in this section, which by the common law would descend to him, is not impaired by the general terms of this section.

Source.—Former § 2712, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 6-8.

Insurance moneys constitute a separate fund devoted exclusively to the payment of the deficiencies arising after all the assets of the estate have been applied upon the debts, while the surplus, if any, is to be returned to the widow. *Matter of Thompson*, 184 N. Y. 36.

Leasehold interest.—A tenant's leasehold interest in land is personal property, and is taxable under the transfer tax act. *Matter of Althaus*, 63 App. Div. 252, 71 N. Y. Supp. 445, aff'd 168 N. Y. 670. It seems that a mining lease owned by the testator, but not bequeathed, goes to the executor and not to the heir. *Abbey v. Wheeler*, 85 Hun 226, 32 N. Y. Supp. 1069. Leasehold from Seneca Nation is real estate. *Matter of McKay*, 33 Misc. 520, 68 N. Y. Supp. 925.

A perpetual lease is real property. *Matter of Vivanti*, 63 Misc. 618, 118 N. Y. Supp. 665.

Leases for years are deemed assets and go to the personal representatives for distribution as a part of the personal estate of the deceased. *Schmidt v. Stoss* (1913), 207 N. Y. 731.

Leases for years and all rights thereunder are to go to and belong to the personal representative, and this includes covenants contained in such instruments whether running with the land or otherwise. The owner of the lease carries with it, of necessity, the power to enforce the same for the benefit of the estate. It follows therefore that the administrator when

owning a lease containing an option for the purchase of land, is entitled to exercise that option for the benefit of the estate, and upon refusal of the lessors to comply with their covenant, is empowered, in her representative capacity, to maintain an action for its enforcement. *Walker v. Bradley* (1915), 153 N. Y. Supp. 686.

Crops.—An agreement by the testator to have his farm worked on shares by another held not to be a lease and that the products were assets for the executors and not rent for the heirs. *Matter of Strickland*, 10 Misc. 486, 32 N. Y. Supp. 171.

Rent.—The accrued rent goes to the executors or administrators. *Jay v. Kirkpatrick*, 26 Misc. 550, 57 N. Y. Supp. 473. An undivided interest in house rent due at the time of the death of the intestate is an asset of his administration. *Matter of Foulds*, 35 Misc. 171, 71 N. Y. Supp. 473.

Debts.—An executor, although insolvent at the time of his appointment is bound to account for a debt due from him, and should be charged therewith, on settlement of his accounts, as for so much money in his hands. *Baucus v. Stover*, 89 N. Y. 1; *Freeman v. Freeman*, 4 Redf. 211. Legatee's debt to testator is an asset of the estate, and is a satisfaction of the legacy to its extent. *Matter of Foster*, 15 Misc. 175, 37 N. Y. Supp. 36.

Contracts for sale of lands.—Moneys unpaid on contracts for the sale of lands are deemed assets. *Ritchie v. Bennett*, 35 App.

Div. 68, 54 N. Y. Supp. 379; *Murdock v. Kelly*, 62 App. Div. 562, 71 N. Y. Supp. 152; *Matter of Ashback* (1918), 103 Misc. 147, 169 N. Y. Supp. 1058.

Effect of equitable conversion.—Where the effect of the provisions of the will is to create a fund of the whole residuary estate, there being an equitable conversion of the real estate, the rents and profits and proceeds of sale are legal assets

in the hands of the executor for which he is bound to account as personal estate. *Smith v. A. D. Farmer Type Founding Co.*, 16 App. Div. 438, 45 N. Y. Supp. 192. A direction to sell all the testator's real and personal property is an equitable conversion of the real into personal, and the whole estate is to be regarded as personal. *Hatch v. Bassett*, 52 N. Y. 359.

§ 2673. Assets; debt due from executor to testator; effect of discharge by will.

The naming of a person executor in a will does not operate as a discharge or bequest of any just claim due or to become due which the testator had against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payment of debts and legacies, and among the next of kin as part of the personal property of the deceased. The discharge or bequest in a will of a debt or demand of the testator against an executor named therein, or against any other person, is not valid as against the creditors of the deceased; but must be construed only as a specific bequest of such debt or demand; and the amount thereof must be included in the inventory and, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, must be paid in the same manner and proportion as other specific legacies.

Source.—Former § 2714, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 11, 14, 24.

Revisers' note.—See *Matter of Burdick*, 79 Misc. 167. Executor may owe a debt not yet due, pay a legacy to himself, and go into bankruptcy.

This section taken from former § 2714.

When a debt is due from the executor to the estate it is the duty of the court which gives consideration to his accounts to see that it is applied to the legatee who happens to be the accounting party. It is not a mere question of legal offset, but of equitable lien and right of retainer and

the right depends upon the principle that the executor is not entitled to his legacy while he retains a portion of the estate distributable to others. *Matter of Burdick* (1913), 79 Misc. 168, 140 N. Y. Supp. 582.

§ 2674. Apportionment of rents, annuities and dividends.

All rents reserved on any lease made after June seventh, eighteen hundred and seventy-five, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or the determination of his or her interest, after making allowance and deductions on account of charges on such

rents, annuities, dividends and other payments. Every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, becomes due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form parts, must be collected and recovered by the person or persons who, but for this section, or chapter five hundred and forty-two of the laws of eighteen hundred and seventy-five, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made. or to any sums made payable in policies of insurance of any description.

Source.—Former § 2720, as added by L. 1881, ch. 535, and L. 1893, ch. 686; revised from L. 1875, ch. 542, §§ 1-3.

Application and scope.—The provision relative to apportionment forbids a severance of a cause of action for a month's rent. *O'Neill v. Morris*, 28 Misc. 613, 59 N. Y. Supp. 1075.

Where a testator devises the use of his residuary estate to his widow for life, she is entitled to rents and interest which became payable after his death, and no apportionment of them, as of the death of the testator, should be made between the widow and the remaindermen. *Matter of Franklin*, 26 Misc. 107, 56 N. Y. Supp. 858.

As to apportionment of dividends on

stock, see *Matter of Kane*, 64 App. Div. 566, 72 N. Y. Supp. 333. Apportionment of the income of a trust, accruing during a part of a year, see *Matter of Young*, 23 Misc. 223, 50 N. Y. Supp. 402.

A purchaser at a partition sale subject to existing tenancies and a hold-over lease is entitled to an apportionment of the rent collected in advance and to be paid such amount thereof as covered the part of time subsequent to the date when the deed was to be delivered. *Sacandaga Realty Corporation v. Henes* (1916), 173 App. Div. 785, 157 N. Y. Supp. 689.

§ 2675. Proceeding to discover property withheld.

An executor or administrator may present to the surrogate's court from which letters were issued to him, a petition setting forth on knowledge, or information and belief, any facts tending to show that money or other personal property which should be delivered to the petitioner, or included in an inventory or appraisal, is in the possession, under the control or within the knowledge or information of a person who withholds the same from him; or refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, and praying an inquiry respecting it, and that the respondent may be ordered to attend the inquiry and be examined accordingly, and to deliver the property if in his control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the surrogate is satisfied, on the papers so presented, that there are reasonable grounds for the inquiry, he must make an order accordingly, which may be made returnable forthwith, or at a future time fixed by the surrogate, and may be served at any time before the hearing. Service thereof must be made by

delivery of a certified copy thereof to the person or persons named therein and the payment, or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in surrogate's court.

Source.—Former § 2707, as amended by L. 1893, ch. 686, and L. 1903, ch. 526. Former §§ 2706 and 2707 were consolidated by the amendment of 1893. § 2706 was originally revised from L. 1870, ch. 359, § 7; L. 1870, ch. 394, § 1, in part. § 2707 was new as originally inserted in Code of Civ. Proc.

Application of section.—Former §§ 2707, 2708 and 2709 (present §§ 2675, 2676), are intended to authorize a summary mode of discovering and reaching property of a deceased party in the hands of third parties; they are not intended to create a procedure to collect debts. *Matter of Stewart*, 77 Hun 564, 28 N. Y. Supp. 1048; *Matter of Carey*, 11 App. Div. 289, 42 N. Y. Supp. 346; *Matter of Knittel*, 5 Dem. 371; *Matter of Nay*, 6 Dem. 346. All the executors or administrators should be parties to the proceeding. *Matter of Slingerland*, 36 Hun 575, rev'g 3 Dem. 1. The proceeding herein authorized is to secure information as to the decedent's assets. The petitioner is not required to show that he can recover the assets. *Matter of Krisfeldt*, 49 Misc. 32, 98 N. Y. Supp. 299.

A bank holding moneys deposited by a decedent cannot be required to pay the same over to an administrator by such summary proceeding, the position of the bank being merely that of a debtor. *Matter of White*, 119 App. Div. 140, 103 N. Y. Supp. 868.

Proceedings for the recovery of papers should be dismissed where the person having possession claims a lien thereon for services rendered by him as an attorney-at-law. *Matter of McGuire*, 106 App. Div. 131, 94 N. Y. Supp. 97. Application of an administrator for the discovery and delivery of the personal property of a deceased person denied. *Matter of Harriman*, 50 Misc. 245, 100 N. Y. Supp. 481; *Matter of Higgins* (1915), 91 Misc. 387, 154 N. Y. Supp. 670.

Purpose and application of remedy.—Its purpose is inquisitorial. Its aim is a discovery which will bring the decedent's assets within the executor's dominion. It does not reach a case where the executor has gained dominion, and the only question is whether he has exercised his dominion rightfully. *Matter of Heinze* (1918), 224 N. Y. 1.

The object of the statute is to provide a summary means of discovery and in case of a mere naked possession of decedent's property to compel delivery thereof to the legal representative. The delivery of such property cannot be directed unless it conclusively appears as a matter of law that the claim of title by the respondent is not well founded. The power of the surrogate to direct delivery of property where the proceeding is simply an examination and not a trial should be exercised with the greatest caution and a

proceeding cannot be brought for the purpose of obtaining an accounting or of collecting a debt. *Matter of Lowen* (1916), 95 Misc. 421, 160 N. Y. Supp. 778.

Property held by temporary administrator.—The fact that the legislature has authorized a proceeding by executors or administrators for the discovery of property, and has conferred authority on the surrogate to require the delivery of personal property to them where their right to the immediate possession thereof is not controverted, does not show that a temporary administrator is entitled to hold the property until delivery is so ordered. *People ex rel. Avery v. Purdy* (1913), 155 App. Div. 607, 140 N. Y. Supp. 614.

Not a proceeding to try title.—A discovery proceeding under this section is not a proceeding designed to try out questions of title between conflicting claimants. *Matter of Videgaray* (1918), 184 App. Div. 381, 170 N. Y. Supp. 874.

Power of surrogate.—The determination of the question whether a citation should or should not be issued under this section is for the surrogate to decide, and it cannot be delegated to any of his subordinates. *Mauran v. Hawley*, 2 Dem. 396. If the surrogate is satisfied that there are reasonable grounds for the inquiry, a citation must issue. *Mead v. Sommers*, 2 Dem. 296.

Where in a proceeding to discover property of a decedent, brought under this section, it appears that there are questions of fact involved affecting the petitioner's right to possession, the surrogate has no jurisdiction to pass upon the matter without the consent of the parties. *Matter of Lehmann* (1914), 85 Misc. 654, 148 N. Y. Supp. 1051.

Petition.—The allegations on the part of the petitioner may be exclusively on information and belief, without disclosing the sources or grounds thereof. The only prerequisite to the issuing of a citation is the satisfaction of the surrogate that there are reasonable grounds for the inquiry. *Walsh v. Downs*, 3 Dem. 202. Information or knowledge alleged to have been derived by an attorney from a deceased client, but which in fact was obtained from other sources, is not privileged under § 835 of the Code. *Matter of King v. Ashley*, 179 N. Y. 281.

Where the papers upon which a decree was rendered are imperfect or ambiguous, the facts may be examined sufficiently to determine whether the decree was purely

personal or one touching the administration. *Power v. Speckman*, 126 N. Y. 354.

Answer.—Where a party alleges that he is entitled to possession by virtue of a lien upon, or special property in, the property in question, his answer should state the facts necessary to sustain the allegation. *Metropolitan Trust Co. v. Rogers*, 1 Dem. 365. A discovery under former §§ 2707-2710 (now §§ 2675, 2676), cannot be defeated by an answer of possession; the information must be closed. *Matter of O'Brien*, 34 Misc. 436, 69 N. Y. Supp. 1022, aff'd 65 App. Div. 282, 72 N. Y. Supp. 1001. As to what answer does not require a dismissal of a proceeding for the examination of a party as to property of a decedent. *Matter of Peyser*, 35 App. Div. 447, 54 N. Y. Supp. 832. As to insufficient answer. *Estate of Hastings*, 6 Dem. 423, 2 N. Y. Supp. 22.

A bank which from time to time had custody of assets deposited by decedent as security for loans can be required to inform the executor as to what those assets were. *Matter of Richardson*, 31 Misc. 666, 66 N. Y. Supp. 94. An award of \$50 costs, against an unsuccessful respondent in a contested special proceeding instituted under former § 2706, held a reasonable exercise of the surrogate's discretion. *De La-mater v. M'Caskie*, 5 Dem. 8.

Hearing proof and determination.—Where, in a proceeding under this section, the petition prays for an order for the

examination of a certain person upon an allegation that goods and chattels belonging to decedent are in her possession and control, and she by answer claims title and right of possession as surviving partner of a firm of which the decedent was a member, the court may take proofs of partnership and if a partnership is established, further proceedings must be dismissed. *Matter of Capria* (1915), 89 Misc. 101, 151 N. Y. Supp. 385.

In proceedings to discover property withheld, brought by an executor or administrator, where the answer alleges title to, or the right to possession of, the property, the surrogate has jurisdiction not only to hear the evidence but to determine the issue. *Matter of Schwartz* (1914), 87 Misc. 559, 151 N. Y. Supp. 374.

Where letters of administration on the estate of a Mexican citizen who died while residing in this state have been issued to a creditor by a surrogate's court in this state, the widow of the decedent residing in the foreign state (although it may be possible that she can claim American citizenship) is not entitled to be cited in a proceeding before the surrogate to discover property consisting of notes deposited with a bank in this state, which she claims upon the ground that she is entitled to letters of administration. *Matter of Videgaray* (1918), 184 App. Div. 381, 170 N. Y. Supp. 874.

§ 2676. Trial and decree.

If the person directed to appear submits an answer denying any knowledge concerning, or possession of, any property which belonged to the decedent in his lifetime, or shall make default in answer, he shall be sworn to answer truly all questions put to him touching the inquiry prayed for in the petition. If it appears that the petitioner is entitled to the possession of the property, the decree shall direct delivery thereof to him. If such answer alleges title to or the right to possession of any property involved in the inquiry, the issue raised by such answer shall be heard and determined and a decree made accordingly.

Source.—Former §§ 2709 and 2710. § 2709, as amended by L. 1893, ch. 686; L. 1903, ch. 526; the amendment of 1893 consolidated former §§ 2710-2712 without change; § 2710 was originally revised from L. 1870, ch. 394, §§ 3, 4; § 2711 was new as originally inserted in Code of Civ. Proc.; § 2712 was originally revised from L. 1870, ch. 394, § 5; the amendment of 1903 inserted the second, fifth and sixth sentences and struck out all the former provisions relating to security. § 2710, as amended by L. 1881, ch. 535; L. 1893, ch. 686; L. 1903, ch. 526; the amendment of 1893 consolidated former §§ 2713 and 2714. § 2713 was derived from L. 1870, ch. 349, § 6, and § 2714 from § 5 of that act; the amendment of 1903 superseded the former section.

Revisers' note.—With the provisions for jury trial of all questions in surrogate's court, this proceeding can be made of some effect and useful to determine questions of title.

Sections 2709 and 2710 combined, in substance, with new procedure.

If no issue as to title or right is raised, the examination proceeds. If such issue be raised, a trial is had.

Power of surrogate.—In such an inquiry the surrogate acts judicially, and is bound by the rules of evidence. *Tilton v. Ormsby*, 70 N. Y. 609. Surrogate may take evidence although an answer puts title in issue. *Matter of Gick*, 113 App. Div. 16, 98 N. Y. Supp. 961; *Matter of Packard*, 53 Misc. 163, 104 N. Y. Supp. 474; *Matter of Stein*, 60 Misc. 631, 113 N. Y. Supp. 1105.

Answer.—An answer inartificially drawn may entitle the respondent to a dismissal if the court can infer allegations of fact showing ownership or title to the possession of property. *Estate of Masterson*, 6 Dem. 460, 3 N. Y. Supp. 209. When a person cited interposes a written answer, duly verified, that he is the owner of property or entitled to the possession thereof by virtue of a lien thereon or special property therein, the surrogate must dismiss the proceeding. *Matter of O'Brien v. Baker*, 65 App. Div. 282, 72 N. Y. Supp. 1001. But see *Matter of Peyser*, 35 App. Div. 447, 54 N. Y. Supp. 832; *Riley v. Albany Savings Bank*, 36 Hun 513, aff'd 103 N. Y. 669. If the answer claims title to only a portion of the property it does not bar inquiry. *Estate of Elias*, 4 Dem. 139. As to whether an affidavit is an answer. *Estate of Elias*, 4 Dem. 139.

Waiver of section 839.—In a proceeding by a representative to discover property, the fact that the evidence is elicited by questions put by the surrogate does not change the rule as to waiver by person examined concerning personal transactions or communications with the deceased. *Kilhan v. Heinzerling*, 114 App. Div. 410, 99 N. Y. Supp. 1036.

Description of property.—Property described as "household furniture, jewelry, silverware, wearing apparel," is not sufficiently described to identify the chattels

and an order for their delivery could not be enforced if made. *Matter of Babcock* (1914), 85 Misc. 256, 147 N. Y. Supp. 168.

A trial by jury is not necessarily a part of a proceeding to discover property alleged to have been withheld from an executor or administrator, and unless a question of legal title arises in the course of the proceeding and such issue of title is triable by jury by constitutional right, the discovery must proceed in the first instance before the surrogate alone. Where the answer in such proceeding does not allege title in the respondent or right to possession of the property alleged to be withheld, but only that the third party claims an interest in or may be entitled thereto, no issue of title is raised under this section. *Matter of Silverman* (1914), 87 Misc. 571, 151 N. Y. Supp. 382.

Jurisdiction to try issues raised.—The trial of the issues raised by the petition and answers is exclusively within the jurisdiction of the supreme court. *Matter of Higgins* (1915), 91 Misc. 387, 154 N. Y. Supp. 670.

Necessity for examination of respondents.—Where upon the return of an order granted for the examination of respondents upon the petition of an administrator alleging that respondents have the custody, possession or control of a certain real estate mortgage which had been assigned by petitioner's intestate to one of the respondents and by him to the other respondents, both assignments being regular in form, the answers allege possession, custody and title in one of the respondents and set forth the transaction, means and sources of title with a full statement of the records thereof and place of recording, an examination of respondents is unnecessary. *Matter of Higgins* (1915), 91 Misc. 387, 154 N. Y. Supp. 670.

ARTICLE 2.

PRESENTING CLAIMS, THEIR ALLOWANCE, REJECTION AND TRIAL; PAYMENT OF DEBTS, LEGACIES AND EXPENSES; SALES OF REAL ESTATE BY EXECUTORS, ADMINISTRATORS WITH THE WILL ANNEXED AND TESTAMENTARY TRUSTEES UNDER POWER CONTAINED IN THE WILL; DEPOSIT OF MONEY AND SECURITIES.

- § 2677. Notice to creditors; affidavit of claimant.
2678. Effect of failure to present claim pursuant to notice.
2679. Determination of issues arising between representative and the estate; suspension of statute of limitations in certain cases.
2680. Effect of admission and allowance of claim or debt by representative.
2681. Rejected claim to be tried on judicial settlement; limitation of action by creditor.
2682. Payment of debts.
2683. Surrogate may authorize representative to compromise, or compound, or sell debt or claim.
2684. Sale of personal property for payment of debts or legacies.
2685. Surrogate's court may make direction as to the value, manner and time of sale of property.
2686. Proceeding to compel payment of funeral expenses.
2687. Proceeding to compel payment of debt, legacy or distributive share, or delivery of property.
2688. Payment of legacies.
2689. Petition to compel payment of legacy or delivery of property, et cetera, by a testamentary trustee.
- § 2690. Idem; proceedings upon return of citation.
2691. Decree for payment of legacy, et cetera, on giving security.
2692. Payment of expenses incurred by representative.
2693. Power and duty of executor before probate.
2694. Power to sell, mortgage or lease real estate may be executed by qualifying executors.
2695. Administrators with the will annexed; rights, powers and duties.
2696. Power to sell, mortgage or lease real estate may be executed by qualifying trustees or successors.
2697. Conveyance of real estate by executor or administrator to holder of contract of sale made by a decedent.
2698. Surrogate may direct as to custody, where coexecutors, et cetera, disagree.
2699. Money paid into court and securities taken; how disposed of.
2700. Deposit of securities may be ordered on revocation of letters.

§ 2677. Notice to creditors; affidavit of claimant.

The executor or administrator at any time after the granting of his letters, may insert a notice once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. In any county containing wholly within its boundaries a city of the first class or a city of the second class such notice may be inserted once in each alternate week for a period of twenty-six weeks. The executor or administrator may require satisfactory vouchers in support of any claim presented and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon and that there are no offsets against the same to the knowledge of the claimant.

Amended by L. 1919, ch. 479, in effect Sept. 1, 1919. The amendment of 1919 added the second sentence.

Source.—Former § 2718, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 34-37, 39.

Revisers' note.—With provision for jury trial, and judicial settlement at the end of the advertising for creditors, all claims can be tried on judicial settlement, and should

be so tried without a right to reference or any action in supreme court. See new §§ 2680, 2681.

Trial of claims provided for in the sections above named, where right to an action in another court is preserved with certain restrictions.

Publication of notice.—An executor is authorized to publish a notice once in each week for six months, requiring persons having claims against the decedent to exhibit them to his representative. *Matter of Bronner*, 30 Misc. 31, 62 N. Y. Supp. 1003.

Effect of notice.—Where an executor serves a notice under former § 2718 that he doubts the justice of a verified claim presented against the estate and offers to refer it, he is bound thereby, and is estopped from claiming that by said notice he had rejected the claim under § 1822. *Van Ness v. Kenyon* (1912), 75 Misc. 526, 135 N. Y. Supp. 802.

Action in equity to determine as to creditor.—The various statutory provisions relating to the administration of estates do not adequately protect holders of notes not due at the time of decedent's death and which will not become due for several years, where the personal representatives have rejected a claim therefor and there is danger that the estate will be dis-

tributed without paying or securing the claim, and an action in equity to declare plaintiff a creditor of the estate may be maintained; the validity of the notes once being established, however, the Code provisions are adequate. *Bankers Surety Co. v. Meyer* (1912), 205 N. Y. 219.

Waiver of defect of verification of claim.—Although executors have the right to require the presentation of a claim where neither of them raises any objection on the ground that the claim is unverified, but both consider it and act upon it without requiring the affidavit of the claimant, any defect in the form of presentation is waived. *Matter of Dorland* (1917), 100 Misc. 236, 166 N. Y. Supp. 616.

Debt.—This section uses the word "debt" in its broader significance and in the sense of claim as appears from the section following where the word "claim" is used with reference to the same subject matter and in which the words "claim or debt" are twice used. *Matter of Brace* (1918), 105 Misc. 178, 173 N. Y. Supp. 636.

§ 2678. Effect of failure to present claim pursuant to notice.

If a claim against a deceased person be not presented to the executor or administrator within six months from the first publication of the notice to creditors, or, if no notice be published, within one year from the date of issue of letters, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such claim was presented.

Source.—Former § 2718, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 34-37, 39.

Revisers' note.—Rewritten from former § 2718. This ought to bring about prompt presentation of all claims

Claim not presented in time.—If the creditor fails to present his claim in time the administrator is not chargeable with assets he may have paid in satisfaction of debts or may have distributed. *Olmstead v. Latimer*, 9 App. Div. 163, 41 N. Y. Supp. 44; *Rosen v. Ward*, 96 App. Div. 262, 89 N. Y. Supp. 148. As to suit on claim not presented within six months from the first publication of notice to creditors, see *Matter of Gill*, 42 Misc. 457, 87 N. Y. Supp. 252. As to when a creditor is en-

titled to compel an accounting by an administratrix, although the estate has been distributed. *Matter of Blum*, 83 App. Div. 161, 82 N. Y. Supp. 491.

Interest on an unliquidated claim against an estate should only be allowed from the time it is presented to the executors. *Jackson v. Byrne*, 130 App. Div. 364, 114 N. Y. Supp. 888.

Section cited.—*Matter of Brace* (1918), 105 Misc. 178, 173 N. Y. Supp. 636.

§ 2679. Determination of issues arising between representative and the estate; suspension of statute of limitations in certain cases.

On the judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties, re-

specting property alleged to belong to the estate, but to which the accounting party lays claim individually; or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must be tried and determined in the same manner as any other issue arising in the surrogate's court. From the death of the decedent until the first judicial settlement of the account of the executor or administrator, the running of the statute of limitations against a debt due from the decedent to the accounting party, or any other cause of action in favor of the latter against the decedent, is suspended, unless the accounting party was appointed on the revocation of former letters issued to another person, in which case the running of the statute is so suspended from the grant of letters to him until the first judicial settlement of his account. After the first judicial settlement of the account of an executor or administrator, the statute of limitations begins again to run against a debt due to him from the decedent, or any other cause of action in his favor against the decedent.

Source.—Former § 2731, as amended by L. 1893, ch. 686, and L. 1895, ch. 595. Former §§ 2739 and 2740 were consolidated by the amendment of 1893. § 2739 was originally revised from R. S., pt. 2, ch. 6, tit. 3, § 33; L. 1837, ch. 460, § 37. § 2740 was originally revised from L. 1837, ch. 460, as amended by L. 1868, ch. 594.

Revisers' note.—This section deals almost wholly with matters between the representative and the estate, but the words now cut out in the second sentence seemed to bring in other issues; by their omission the whole section deals with the one subject.

Any form of denial which shows that there is objection to the allowance of the claim of an executor or administrator against the estate is sufficient to constitute a "contest" requiring the trial of the issue by the surrogate's court. Matter of Brommer (1918), 105 Misc. 336, 173 N. Y. Supp. 200.

Claim of accounting party.—An executrix having a personal claim against the estate of decedent has an adequate legal remedy at law under this section. *Starbuck v. Farmers' Loan & Trust Co.*, 28 App. Div. 308, 51 N. Y. Supp. 8. An executor having an individual claim against his testator's estate is bound to establish it by legal evidence in the same manner as any other claimant. *Matter of Arkenburgh*, 58 App. Div. 583, 69 N. Y. Supp. 125; *Matter of Stevenson*, 86 Hun 325, 33 N. Y. Supp. 493.

It seems, while as a general rule an administrator may not retain from money in his hands the amount of a debt due him from the intestate, until it has been legally established and allowed, he may do so if all the persons interested in the estate assent thereto. *Ledyard v. Bull*, 119 N. Y. 62. An executor cannot pay himself. *Matter of Gardner*, 5 Redf. 14.

A claim against the estate of a testator presented by his executor should not be allowed where the sole proof in support thereof is a copy of such claim verified by the executor. *Matter of Smith*, 75 App. Div. 339, 78 N. Y. Supp. 130. The decision of a surrogate's court in respect to a claim made by an executor is a bar to a subsequent action in the supreme court to enforce the claim. *Sexton v. Sexton*, 64

App. Div. 385, 72 N. Y. Supp. 213, *aff'd* 174 N. Y. 510.

One cannot be allowed as executor, water meter charges which were a lien upon property of his testator at the time when the latter conveyed it to him, as the executor in paying these charges after the testator's death was, in effect, paying charges on his own property. *Matter of Mertens*, 39 Misc. 512, 80 N. Y. Supp. 376.

On an accounting by an executor, the surrogate may determine whether property transferred to him by the testatrix, his mother, shortly before her death belonged to the estate or to the executor. *Matter of Archer*, 51 Misc. 260, 100 N. Y. Supp. 1095.

A claim of an executrix, the sister of a testatrix, for nursing her during the last four years of her life must be closely scrutinized and clearly supported, and especially where the testatrix who had money in hand had never made the claimant any payment whatever on account of the alleged services. *Matter of Warner*, 39 Misc. 432, 79 N. Y. Supp. 363.

If, upon an application to compel an administrator to include in the inventory filed by him certain articles alleged to belong to the estate, the administrator claims title individually to the property, the surrogate must dismiss the proceeding and leave the question of title to be determined upon the final judicial settlement of the administrator's account. *Matter of Goundry*, 57 App. Div. 232, 68 N. Y. Supp. 155.

A surrogate has jurisdiction to determine an issue raised by objections to executors' accounts, that they had failed to

account for certain personal property alleged to have belonged to the testatrix at the time of her death, ownership of which was claimed by one of said executors. The fact that there are two accounting executors, only one of whom lays claim to the property in dispute, should not deprive the court of jurisdiction which it would possess in case that one were the only executor. *Matter of Watson* (1915), 215 N. Y. 209.

Where the executrix of an estate is also a claimant, she is bound to plead the statute against her own claim, so far as the same is applicable thereto. *Matter of Brown* (1912), 77 Misc. 507, 137 N. Y. Supp. 978.

Mortgages given an executor by a testator on property of which he died seized are not claims which the executor must establish upon the judicial settlement of his account by proof, nor are such mortgages assailable therein by objectors to the account upon the ground of fraud, or otherwise than by a direct equitable action between the parties. *Matter of Eadie*, 39 Misc. 117, 78 N. Y. Supp. 967.

As to claims against an estate by the accounting party, see also *Matter of Ryder*, 129 N. Y. 640; *Neilley v. Neilley*, 89 N. Y. 352; *Shakespeare v. Markham*, 72 N. Y. 400; *Boughton v. Flint*, 74 N. Y. 476; *Matter of O'Neill*, 49 App. Div. 414, 63 N. Y. Supp. 291; *Matter of Sunderlin*, 74 Hun 219, 26 N. Y. Supp. 358; *Matter of Kellogg*, 39 Hun 275, aff'd 104 N. Y. 648; *Schreyer v. Holborrow*, 28 Hun 468; *Matter of Neil*, 35 Misc. 254, 71 N. Y. Supp. 840; *Matter of Van Buren*, 19 Misc. 373, 44 N. Y. Supp. 357; *Zapp v. Miller*, 3 Dem. 266. Surrogate's court has not the power to allow the claim of a general guardian against his ward for legal services. *Matter of Tyndall*, 48 Misc. 39, 96 N. Y. Supp. 222.

Claim against accounting party.—It seems to be proper for a surrogate in a decree which charges an executor with a debt due from him, to specify the charge thus made separately, so as to protect his rights. *Baucus v. Stover*, 89 N. Y. 1. A surrogate is without power to set aside a disputed assignment of a distributive share to an administrator on accounting. *Matter of Randall*, 152 N. Y. 508. As to liability of executor to account for securities received from his testatrix, see *Matter of Mitchell*, 36 App. Div. 542, 55 N. Y. Supp. 725, aff'd 161 N. Y. 654. As to liability of executor for extra compensation paid to them by a corporation in which they are officers and hold stock as executors, see *Matter of Schaefer*, 65 App. Div. 378, 73 N. Y. Supp. 57, aff'd 171 N. Y. 686. As to an action by executors and trustees against a co-executor and trustee, see *Simpson v. Simpson*, 44 App. Div. 492, 60 N. Y. Supp. 879. As to issue of ownership between an executor claiming as an individual and his co-executors, see *Matter of Freligh*, 42 Misc. 11, 85 N. Y. Supp. 830. As to overpayment by administrator with will annexed, see *Skillin v. Central Trust Co.*, 80 App. Div. 206, 80 N. Y. Supp. 188.

The phrase, "property alleged to belong to the estate," means property which is deemed assets as defined in § 2672. *Matter of Thompson*, 184 N. Y. 36.

If the executor fails in his duty to collect assets he may be charged on the judicial settlement of his accounts in the surrogate's court, wherein a person interested in the estate may have questions of fact determined by a jury. *Morris v. Morris* (1916), 172 App. Div. 719, 158 N. Y. Supp. 361.

Section cited.—*Matter of Drummond* (1917), 100 Misc. 78, 83, 165 N. Y. Supp. 78.

§ 2680. Effect of admission and allowance of claim or debt by representative.

Wherever upon any accounting or judicial settlement of an account, the executor or administrator admits and allows a claim or debt against the deceased, other than his own claim, or has theretofore in writing admitted or allowed such a claim or debt, the validity of such claim or debt shall be thereby established.

When such a claim or debt has been so admitted or allowed, or a judgment against the executor or administrator has been obtained, whether either has been paid or not, any party adversely affected thereby may file objections thereto and may show that the claim or debt was fraudulent or negligently allowed, or paid, or that the judgment was obtained by fraud, negligence or collusion. If the surrogate shall sustain the objections in a case where the claim or judgment has not been paid, the claim shall be deemed to be rejected by the accountant at the time of such determination, and the time between the presentation of the claim, or the commencement of the action where the claim was not presented, and the time of such de-

termination shall not be a part of the time limited in this act for commencing an action thereon.

Source.—New.

Revisers' note.—This new section makes the allowance of the claim of some value, and fixes its standing as a valid claim unless proof is made as in a case where a judgment has been obtained. If a claim has been paid, and the objections are sustained, the representative will be surcharged—if payment has not been made, the claim will stand as rejected.

Application.—*Matter of Dorland* (1917), 100 Misc. 236, 166 N. Y. Supp. 616.

The recovery of a judgment on a claim establishes the claim upon the accounting but any party adversely affected thereby may file objections thereto and may attack the judgment on the ground that it was fraudulently or negligently obtained. *Dennison v. Snyder* (1916), 98 Misc. 44, 162 N. Y. Supp. 271.

Amendment in the revision as to the presentation and allowance of claims has necessarily affected the application of decisions rendered under the former sections. The following cases are of interest and many of them applicable to the present law.

Establishment of claim.—Public policy requires that claims against the estates of dead men shall be established by very satisfactory evidence. *O'Neill v. Barry*, 20 App. Div. 121, 46 N. Y. Supp. 752. Knowledge on the part of an executor and an oral demand does not satisfy the statute, but a written demand must be made stating the nature of the claim and its amount. *Niles v. Crocker*, 88 Hun 312, 34 N. Y. Supp. 761.

Methods of establishing claims rejected by executors or administrators of estates. *Clark v. Scovill*, 191 N. Y. 8, aff'g 116 App. Div. 923, 101 N. Y. Supp. 1116.

The provision requiring the claim to be supported by an affidavit that no payments have been made thereon and that there are no offsets against the same to the knowledge of the claimant does not establish that the amount of the claim is the sum remaining unpaid after deducting existing offsets or counterclaims. *Osborne v. Parker*, 66 App. Div. 277, 72 N. Y. Supp. 894.

The rule that silence of a debtor after receiving a bill raises a presumption that liability is admitted does not apply in the case of executors to whom a bill is presented for services rendered to the testator during his lifetime. *Coombs v. Joerg*, 125 App. Div. 615, 110 N. Y. Supp. 6.

Where a claim has been admitted by an executor or administrator, the debt is

deemed established and has practically the force of a judgment. *Beebe v. Prime* (1917), 99 Misc. 668, 166 N. Y. Supp. 56.

The burden is not on a claimant to show that his claim against a testator has not been paid, where he presented it to the executor verified in conformity to § 2677, certifying that no payment had been made thereon, but the defense of payment must be shown affirmatively by the executor. *Matter of Rowell*, 45 App. Div. 323, 61 N. Y. Supp. 382.

This section requires that the objectant shall state the facts upon which the conclusion of fraudulent or negligent allowance of the claim is based, and does not authorize a mere allegation that the objectant has no knowledge or information sufficient to form a belief. *Matter of Brommer* (1918), 105 Misc. 336, 173 N. Y. Supp. 200.

Allowance of claim.—This section prohibits the surrogate from adjudicating upon a disputed claim, but does not, either expressly or by implication, deprive him of the right to decide whether or not a claim has been rejected or allowed, and where, upon competent and sufficient evidence, he decides it was admitted and allowed he may properly direct its payment. *Matter of Miles*, 170 N. Y. 75.

The terms "presentation" and "allowance" of claims have a well-defined legal signification. *Matter of Brown*, 60 Misc. 35, 112 N. Y. Supp. 599.

Allowance by executor is *prima facie* establishment of validity, and it is incumbent on the person attacking its validity to establish it, though the claim has not been paid. *Matter of Warrin*, 56 App. Div. 414, 67 N. Y. Supp. 763. A claim for services, presented against an estate, which covers a long period of time and is unsupported by written evidence, should be carefully scrutinized and should only be allowed when established by satisfactory evidence relating both to the extent and value of the services. *Matter of Hart v. Tuite*, 75 App. Div. 323, 78 N. Y. Supp. 154.

§ 2681. Rejected claim to be tried on judicial settlement; limitation of action of creditor.

If the executor or administrator doubts the justice or validity of any claim presented to him, he shall serve a notice in writing upon the claimant

that he rejects said claim, or some part of it, which he specifies. Unless the claimant shall commence an action for the recovery thereof against the executor or administrator within three months after the rejection, or, if no part of the debt is then due, within two months after a part thereof becomes due, said claimant, and all the persons claiming under him, are forever barred from maintaining such action, and in such case said claim shall be tried and determined upon the judicial settlement.

Amended by L. 1915, ch. 644, in effect Sept. 1, 1915.

Source.—§ 1822, as amended by L. 1882, ch. 309; L. 1895, ch. 595; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 38.

Revisers' note.—This former § 1822 amended and inserted in this chapter. Original section to be repealed.

See amended § 1836 as to costs.

This section now makes a shorter statute of limitations, and will force more rapid action in settling claims.

[As indicated in the revisers' report it was intended to repeal former § 1822 and to amend former § 1836. However, neither of these sections is affected, in terms, by this revising act (L. 1914, ch. 443) as finally passed.—Ed.]

A surrogate has jurisdiction under §§ 2510, 2681, upon the judicial settlement of an estate, to hear and determine a rejected claim which is in effect that the testator at his death had or should have had property which he was obligated to transmit by his will to the claimant. *Matter of Coombs* (1918), 185 App. Div. 312, 173 N. Y. Supp. 58.

This section impliedly repeals § 1822. *Carpenter v. Newland* (1915), 92 Misc. 596, 156 N. Y. Supp. 438.

The word "shall" in the last clause of said section is a word of permission enlarging rather than restricting the claimant's rights, but, assuming that the provision is mandatory, it only applies where the claimant assumes the initiative in prosecuting his claim and does not deprive him of the right to interpose a counterclaim under § 506 when an executor or an administrator becomes an actor. *Carpenter v. Newland* (1915), 92 Misc. 596, 156 N. Y. Supp. 438.

The true meaning of this section as it existed on July 20, 1915, is that where a written consent is not filed an action on the claim is barred after three months from its rejection; but in such case the claim is to be tried and determined on the judicial settlement. *Matter of Messing* (1916), 95 Misc. 11, 160 N. Y. Supp. 218.

Rejection of claim otherwise than in writing is of no effect. *Matter of Dorland* (1917), 100 Misc. 236, 166 N. Y. Supp. 616.

Where a temporary administrator has rejected the claim of a creditor of the estate, the creditor can sue the administra-

tor by permission of the surrogate. *Matter of DeRidder* (1918), 183 App. Div. 657, 170 N. Y. Supp. 765.

Proper exhibition of claim.—Where in an action to recover moneys loaned to a decedent during his lifetime it is shown that his executor regularly advertised for the presentation of claims against the estate, and the plaintiff, although he did not present a formal verified proof of claim, did present statements showing that his claim was for money loaned, with interest, and thereafter a consultation was had, at which the plaintiff and an attorney and the executor and his attorney were present and at which plaintiff exhibited his original contract with the decedent and an agreement of compromise was made subject to the approval of the surrogate and said claim was thereafter rejected when the surrogate refused to allow the compromise, the claim was sufficiently exhibited to the executor and an action thereon is barred by the expiration of the statute of limitation. *Diehl v. Becker* (1919), 186 App. Div. 16, 174 N. Y. Supp. 100.

Under § 1835 an administrator who does not act in bad faith in reference to a claim and who unsuccessfully defends an action thereon is not liable individually for the costs, but the costs must be paid out of the estate. *Sabsevitz v. Gabrilowitz* (1914), 148 N. Y. Supp. 615.

Three months' limitation provided by this section does not apply to a claim rejected by a temporary administrator. *Matter of DeRidder* (1918), 183 App. Div. 657, 170 N. Y. Supp. 765.

§ 2682. Payment of debts.

Every executor and administrator must proceed with diligence to pay the debt of the deceased according to the following order:

1. Debts entitled to a preference under the laws of the United States and the state of New York.

2. Taxes assessed on property of the deceased previous to his death.
3. Judgments docketed, and decrees entered against the deceased according to the priority thereof respectively.
4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.

Preference shall not be given in the payment of a debt over other debts of the same class, except those specified in the third class. A debt due and payable shall not be entitled to a preference over debts not due. The commencement of a suit for the recovery of a debt or the obtaining a judgment thereon against the executor or administrator shall not entitle such debt to preference over others of the same class. Debts not due may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. An executor or administrator shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the surrogate; and it shall not have preference over others of the same class. Preference may be given by the surrogate to rents due or accruing on leases held by the testator or intestate at the time of his death, over debts of the fourth class, if it appear to his satisfaction that such preference will benefit the estate of the testator or intestate.

Source.—Formr § 2719, as addd by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 27-30, 33; L. 1847, ch. 80, §§ 1, 2, as amended by L. 1893, ch. 100.

Revisers' note.—A recent decision gives the state preference in certain cases.

Application.—Cullen v. Walah (1917), 179 App. Div. 9, 166 N. Y. Supp. 233.

In general.—The executor must proceed with diligence to pay debts of the deceased. Matter of Miner, 39 Misc. 605, 80 N. Y. Supp. 643. As to the power of a surrogate to approve a settlement of a controversy between administrators and a person claiming to have been a partner of their decedent, see Matter of Gilman, 82 App. Div. 186, 81 N. Y. Supp. 713, 92 App. Div. 462, 87 N. Y. Supp. 128; aff'd 178 N. Y. 606.

Remedy of creditors after distribution.—The creditors are entitled to payment of their claims out of the estate of a decedent, and when his property has been distributed to his widow and next of kin or legatees before the payment of all claims, the creditors have a right of action for the amount thus distributed. City of New York v. United States Trust Co., 78 App. Div. 366, 79 N. Y. Supp. 1010; aff'd 178 N. Y. 551.

Property subject to payment of debts.—An article specially bequeathed is not to be sold for payment of debts until the personality is exhausted. Matter of Mansfield, 10 Misc. 296, 31 N. Y. Supp. 684. A bequest accepted in lieu of dower should not be subjected to payment of debts of the estate. Dunning v. Dunning, 82 Hun 462, 31 N. Y. Supp. 719; aff'd 147 N. Y. 686.

A claim for unpaid alimony accrued at the death of a decedent is payable out of his estate. Matter of Brace (1918), 105 Misc. 178, 173 N. Y. Supp. 636.

Preferred claim.—As to what constitutes

a preferred claim, see Matter of Stanton, 41 Misc. 278, 84 N. Y. Supp. 46.

Taxes.—This section in terms applies only to debts of decedents, and therefore only refers to taxes which are such debts, and collectible by distraint of the debtor's chattels by the tax collector, or by other proceedings against him, and which are therefore valid claims against the executor or administrator. Lauby v. Gill, 42 Misc. 334, 86 N. Y. Supp. 718. As to when executors of a deceased owner of realty and personalty, in the city of New York, are protected in paying taxes thereon as having become debts of the deceased, see Matter of Hoffman, 42 Misc. 90, 85 N. Y. Supp. 1082.

The provision requiring executors to pay the decedent's debts and the taxes assessed against him previous to his death does not include an assessment for street improvements, which is merely a charge against the property, and not also a personal debt of deceased, and therefore a devisee takes the land subject to the lien therefor. Matter of Hun, 144 N. Y. 472.

Where an executor has paid taxes levied upon real estate previous to the death of his decedent he is entitled, upon a sale of the premises in partition, to reimbursement therefor from the proceeds of sale. Krueger v. Schlenger, 19 Misc. 221, 43 N. Y. Supp. 305.

The common-law right of the state to a preference in payment from the estate of the decedent still exists, except as taken away by express provision of statute. Mat-

ter of Niederstein (1912), 154 App. Div. 238, 138 N. Y. Supp. 952.

Judgments.—The word "prior" in reference to a judgment defined. *Matter of Townsend*, 83 Hun 200, 31 N. Y. Supp. 409. Preference not to be given in the payment of a debt over debts of the same class, except judgments docketed against the decedent. *Little Falls Nat. Bank v. King*, 53 App. Div. 541, 65 N. Y. Supp. 1010.

A judgment against an administratrix in her representative capacity is not entitled to priority of payment over the claims of creditors to whom debts of the same class are due which have not been reduced to judgment. *Sortorelli v. Ezagni*, 64 Misc. 116, 118 N. Y. Supp. 46.

The preference given to judgment creditors is absolute, and the rule in equity for marshalling assets of a copartnership which provides that partnership creditors should first look to the partnership assets, and individual creditors to the separate estates of the partners, does not apply to the payment of a judgment recovered against a deceased partner. *Matter of Blackford*, 35 App. Div. 330, 54 N. Y. Supp. 972. The provision giving preference to judgments affords no rule for any other case than as specified and cannot be applied by analogy to estates of lunatics. *Matter of Wing*, 83 Hun 284, 31 N. Y. Supp. 941.

A judgment for costs recovered against a plaintiff administratrix is not a debt of the intestate nor is the judgment creditor a creditor of the estate within the meaning of this section. *Matter of Mahoney*, 37 Misc. 472, 75 N. Y. Supp. 1056.

Claims prior to judgments.—Where an intestate left no personal property, and the only money in the hands of the administrator comes from the sale of decedent's real estate, the administrator must first pay therefrom "reasonable expenses connected with the administration;" second, the reasonable funeral expenses so far as the remainder of the money in his hands will pay the same, and any money then remaining must be applied in the order directed by this section, except that the lien of the attorney of the judgment creditor of the deceased in the amount established by the decree for the sale of decedent's real estate must be paid with interest before any of the proceeds of sale are applied as provided by subdivision 3. *Matter of Tierney* (1914), 88 Misc. 347, 151 N. Y. Supp. 972.

Contracts.—Executors may lawfully pay out of an estate the amount due on a contract for the purchase of land executed by the testator, which land has been devised by him. *Matter of Davis*, 43 App. Div. 331, 60 N. Y. Supp. 315. As to whether a contract to furnish tuition for an entire year made by one who dies before the expiration of such term is such an engagement as the executor of decedent's will is bound to fulfill, *quaere*. *Gilman v. Wilber*, 1 Dem. 547. As to power of surrogate to approve a settlement of a controversy between administrators and a person claiming to have been a partner of their decedent, see *Matter of Gilman*, 82 App. Div. 186, 81 N. Y. Supp. 713, rev'g 39 Misc. 762, 81 N. Y. Supp. 713.

The word "debts" as used in this section includes not only debts within the strict legal meaning of that word existing at time of death but also claims then existing which have thereafter become debts within the strict legal meaning of the word by allowance or adjudication. *Matter of Brace* (1918), 105 Misc. 178, 173 N. Y. Supp. 636.

Debt or claim of executor.—The executor cannot satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the surrogate, and it is not entitled to preference over others of the same class. *Steinway v. Bernuth*, 59 App. Div. 261, 69 N. Y. Supp. 1146. The surrogate has jurisdiction of an application by an administrator to establish a claim in his own favor against his intestate's estate. *Matter of Marcellus*, 165 N. Y. 70.

Debts barred by limitation.—Executors have no power to use assets of the estate for the payment of debts of the testator which were barred by limitations at his death. *Hamlin v. Smith*, 72 App. Div. 601, 76 N. Y. Supp. 258.

A widow's claim for unpaid alimony is payable last, without preference in the class. *In re Casserly* (1918), 170 N. Y. Supp. 841.

§ 2683. Disputed or unsettled debt or claim may be compromised, compounded or sold.

Upon the application of an executor, administrator, guardian or testamentary trustee, the surrogate may, for good cause shown, authorize the compromising or compounding of any debt, claim or demand, due or to become due, which it is necessary to settle, adjust or liquidate in connection with the settlement of an estate or fund; and the selling at public auction, on such notice as the surrogate prescribes, of any uncollectible, stale or doubtful debt or claim belonging to the estate or fund; but any

party interested in the final settlement may show on such settlement that such debt or claim was fraudulently compromised or compounded.

Source.—Former § 2718, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 27-30; L. 1847, ch. 80, §§ 1, 2, as amended by L. 1893, ch. 100.

§ 2684. Sale of personal property for payment of debts or legacies.

An executor or administrator may sell the personal property of the deceased at any time for the payment of debts, or legacies, or for making distribution. The sale may be public or private, and may be on credit not exceeding one year, with approved security. Articles not necessary for the support and subsistence of the family of the deceased, or not specifically bequeathed, must be first sold; and articles so bequeathed must not be sold until the residue of the personal estate has been applied to the payment of debts.

Source.—Former § 2717, as added by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 25, 26.

Revisers' note.—The parts omitted rewritten into first four lines. No reason why New York should be excepted.

Application.—*Matter of Heinze* (1918), 224 N. Y. 1.

Executors are not compelled to resort to this section for authority to sell choses in action belonging to their testator's estate. *Huck v. Kraus*, 50 Misc. 428, 99 N. Y. Supp. 490.

As to proof of debts and payment from personalty. *Hallock v. Hallock*, 79 App. Div. 508, 80 N. Y. Supp. 61; *Matter of Werle* (1915), 91 Misc. 398, 155 N. Y. Supp. 262.

Selling assets of estate on credit.—The assets of an estate must be sold for cash, and if sold on credit the executor or administrator will be held personally liable for all losses and expenses that may occur by reason of such sale. *Matter of Woodbury*, 13 Misc. 474, 35 N. Y. Supp. 485. An executor has no right to sell on credit except for the payment of debts and legacies. *Matter of Woodbury*, 13 Misc. 474, 35 N. Y. Supp. 485.

The approved security which an executor is required to take upon a sale on credit consists only of national and state bonds and mortgages on real estate, and does not include notes, stocks, or bonds, and must be approved by the surrogate before it is

accepted. *Matter of Woodbury*, 13 Misc. 474, 35 N. Y. Supp. 485.

Right of testator to limit power of sale. The general executorial power of sale of personal property for purposes of distribution may doubtless be limited by the testator, and wherever it is apparent from the language of a will that the testator intended that his personal property should be distributed in kind among the legatees, the executor will not be permitted to sell such property and distribute the proceeds. *Matter of Titus* (1914), 86 Misc. 375, 148 N. Y. Supp. 359.

Marshalling assets.—The rule for the marshalling of the assets of a decedent's estate for the payment of debts of a decedent, in the absence of express testamentary direction to the contrary, is as follows: First, the personal estate, and of this (a) the personal estate not bequeathed; (b) the personal estate generally bequeathed; (c) the personal estate specifically bequeathed; and second, the real estate, and of this property which has descended to the heirs at law; (b) that which is generally devised, and (c) that which is the subject of a special devise. *Duck v. McGrath* (1914), 160 App. Div. 488, 145 N. Y. Supp. 1033.

§ 2685. Surrogate's court may make direction as to the value, manner and time of sale of property.

Whenever the assets of an estate consist of real property which an executor is authorized to sell, or of personal property which it is necessary or proper to sell, and the value of the same is uncertain or is dependent upon the time and manner of sale thereof, the executor or administrator may apply by petition to the surrogate having jurisdiction of the settlement of the estate, for advice and direction as to the propriety, price, manner and time of sale thereof. If the surrogate, in his discretion, entertains

the application, notice of such application shall be given to all persons interested or to such persons as the surrogate by order directs to have notice, in such manner as the surrogate shall prescribe. The surrogate shall inquire into the facts and circumstances and may hear the opinions of witnesses as to the value of such property and as to the best manner and time of sale thereof, and may give such advice and direction as shall seem to him for the best interest of the parties. A substantial compliance with the authorization so given shall relieve the said executor or administrator from any charge or objection that the said estate or persons interested suffered a loss on account of the time or manner of sale or the price realized.

Source.—New.

Revisers' note.—This is a new provision drawn to meet conditions often arising which usually result in a loss to the estate through fear of the sale being attacked on accounting.

Service of citation.—Where in a proceeding for the sale of a decedent's real estate the surrogate directs that notice of the application to all persons interested shall be given by the issuance of a citation, service thereof must be made strictly in accordance with §§ 2525, 2526, and a provision of the order directing the issuance of the citation that it be served personally or by mail in the manner pre-

scribed by §§ 796, 797, is not authorized. *Matter of Smart* (1916), 93 Misc. 402, 157 N. Y. Supp. 143.

Where the nature and condition of a large, complicated business is beyond the knowledge and experience of the surrogate, an application for his direction and advice will be denied. *In re Schleif's Estate* (1918), 169 N. Y. Supp. 814.

§ 2686. Proceeding to compel payment of funeral expenses.

Every executor or administrator shall pay, out of the first moneys received, the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased. If the same be not paid within sixty days after the grant of letters testamentary or of administration, the person having a claim for such funeral expenses may present to the surrogate's court a petition praying that the executor or administrator may be cited to show cause why he should not be required to make such payment. If upon the return of the citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, and that the executor or administrator admits the validity of the claim or claims and the reasonableness of the amount thereof, the surrogate shall make an order directing the payment of the same, or of such part thereof as he may specify, within ten days thereafter. If the executor or administrator files an answer setting forth the facts, and therein disputes the validity of the claim or claims, or the reasonableness of the amounts thereof, the surrogate shall direct that the claim or claims so disputed be heard upon the judicial settlement of the accounts of such executor or administrator. If it shall appear that no money has come into the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application or applications showing that since such dismissal the executor or administrator has received money belonging to the estate. At any time after three months from the date of the former order, if no answer was filed disputing such claim, a further application may be made by petition stating the facts upon which the belief of the petitioner that there are moneys in the hands of such executor or adminis-

trator applicable to the payment of his claim, is based. Upon such further application the issuance of the citation shall be in the discretion of the surrogate. If upon any accounting it shall appear that an executor or administrator has failed to pay a claim for funeral expenses, the amount of which has been fixed and determined by the surrogate, as above set forth, or upon such accounting, he shall not be allowed for the payment of any debt or claim against the decedent until said claim has been discharged in full; but such claim shall not be paid before expenses of administration are paid.

Source.—Former § 2729, as added by L. 1893, ch. 686, and amended by L. 1901, ch. 293. Former §§ 2733-2735, 2741 were consolidated by L. 1893, ch. 686. § 2733 was new as originally introduced in Code of Civ. Proc. § 2734 was originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 54, 55. § 2735 was originally revised from R. S., pt. 2, ch. 6, tit. 3, § 54. § 2741 was originally revised from R. S., pt. 2, ch. 6, tit. 3, § 56.

Revisers' note.—See 75 Misc. 79-97.

Part of former § 2729, rewritten. If the claim is disputed it ought not to be tried until all interested parties are in court, hence, in such case, trial is postponed until judicial settlement.

Remedy not exclusive.—*O'Connor v. Dorney* (1916), 97 Misc. 596, 163 N. Y. Supp. 394.

Funeral expenses, as to, see *Matter of Reynolds*, 124 N. Y. 338; *Patterson v. Patterson*, 59 N. Y. 574; *Matter of Kalbfleisch*, 78 App. Div. 464, 79 N. Y. Supp. 651; *Matter of Kipp*, 70 App. Div. 567, 75 N. Y. Supp. 589; *Kittle v. Huntley*, 67 Hun 617, 22 N. Y. Supp. 519; *Laird v. Arnold*, 42 Hun 136; *Matter of Franklin*, 26 Misc. 107, 56 N. Y. Supp. 858; *Matter of Howard*, 3 Misc. 170, 23 N. Y. Supp. 836; *Matter of Beach*, 1 Misc. 27, 22 N. Y. Supp. 1079; *Chalker v. Chalker*, 5 Redf. 480; *Campbell v. Purdy*, 5 Redf. 434; *Matter of Miller*, 4 Redf. 302; *Matter of Luckey*, 4 Redf. 95; *Matter of Rooney*, 3 Redf. 15; *Matter of Erlacher*, 3 Redf. 8; *Matter of Mount*, 3 Redf. 9; *Matter of Hooney*, 5 Dem. 285; *Quin v. Hill*, 4 Dem. 69; *Allen v. Allen*, 3 Dem. 524; *Zapp v. Miller*, 3 Dem. 266; *Tickel v. Quinn*, 1 Dem. 425; *Barter v. Hawksworth* (1918), 102 Misc. 242, 169 N. Y. Supp. 475.

Reasonable funeral expenses.—Whether the contract with the undertaker was express or not, or whether the recovery here is sought on the theory of an assumpsit, the surrogate has no power to direct executors to pay other than reasonable funeral expenses. The undertaker's remedy would seem to be to resort to the supreme court on the express contract. The conditions of life of the deceased and the size of his estate are always factors in determining what are reasonable funeral ex-

penses. In *re Crawford's Estate* (1913), 144 N. Y. Supp. 565.

Determination of reasonableness of funeral expenses.—In a proceeding against an administratrix to compel the payment of funeral expenses it appeared that the decedent died and the expenses were incurred before the enactment of the surrogate's code of 1914 by which subd. 3 of § 2729 was amended and renumbered § 2686, but the proceeding was commenced after said amendment took effect. It was held that under these circumstances the proceeding was governed by this section and not by said subdivision 3 of said § 2729 prior to amendment; that, as § 2686 provides that if the answer disputes the reasonableness of the amount of the claim for funeral expenses the surrogate shall direct that the claim so disputed be heard upon the judicial settlement of the account of such administrator, the court has no power now to decide the matter nor take any proof upon it, but must direct that the claim so disputed be heard upon the judicial settlement of the account of the administratrix. *Matter of Lucas* (1915), 92 Misc. 85, 155 N. Y. Supp. 1017.

Defendant must be under obligation to pay.—Plaintiff must allege facts from which the court can find or infer an obligation on the part of the defendant to pay for the services rendered and materials furnished by the plaintiff. *O'Connor v. Dorney* (1916), 97 Misc. 596, 163 N. Y. Supp. 394.

Section cited.—*Matter of Young* (1915), 92 Misc. 633, 157 N. Y. Supp. 494.

§ 2687. Proceeding to compel payment of debt, legacy or distributive share, or delivery of property.

Where the executor or administrator has not begun the publication of the notice to creditors to present their claims, and three months have elapsed since the probate of the will or grant of letters of administration, or where

such publication has been completed, any creditor of the deceased having a claim which has not been rejected, or any person entitled to a specific bequest, or to a legacy or other pecuniary provision under a will, or to a distributive share of an estate, may present to the surrogate's court a petition setting forth the facts and praying that the executor or administrator be cited to show cause why he should not pay said claim or pay or satisfy such bequest, legacy or distributive share.

Upon the return of such citation the executor or administrator may reject such claim, or show good and sufficient cause why he should not pay such claim, or pay or satisfy such bequest, legacy or distributive share in whole or in part.

The surrogate may dismiss such petition, or direct immediate payment or satisfaction thereof in whole or in part, or upon receiving a bond as provided in section twenty-six hundred and eighty-eight of this chapter.

Amended by L. 1918, ch. 121, in effect April 3, 1918. The amendment of 1918 inserted the words "or where such publication has been completed" in lines 3 and 4.

Source.—Former § 2722, as amended by L. 1893, ch. 686; L. 1911, ch. 434. The amendment of 1903 consolidated former §§ 2717 and 2718. § 2717 was originally revised from R. S., pt. 2, ch. 6, tit. 5, § 18, in part. § 2718 was new as originally inserted in Code of Civ. Proc.

Revisers' note.—Former § 2722 is to be repealed because with a judicial settlement possible in about six months, or at the end of a year at the longest, the provision for application for payment of debt seems useless,—application for an accounting should be made. Every representative should advertise for claims, but as some will not, this section has been written to afford relief in such cases, and incidentally in cases where specific property has not been delivered.

If the representative sees fit not to advertise for claims, he ought to be ready to pay any just claims at the end of three months.

The following cases were decided under the former law, but have some application to the new practice prescribed by the revision.

Scope and application.—The apparent object of the statute is to enable creditors to obtain payment of their claims in whole or in part in advance of the settlement of the estate. *Matter of Miner*, 39 Misc. 605, 80 N. Y. Supp. 643. The language of the section does not limit its operation to original creditors, and an assignee of a claim is entitled to proceed thereunder. *Matter of Moderno*, 63 Hun 261, 17 N. Y. Supp. 781.

The discretion vested in a surrogate's court, to dismiss a proceeding, brought by a creditor of a decedent to direct the payment of his claim by the executor, may be exercised whenever it appears that the validity of the petitioner's claim has not been conceded or established. *Matter of Stevenson*, 77 Hun 203, 28 N. Y. Supp. 362.

An application, pursuant to this section, to direct the payment of a legacy or distributive share in the estate of a decedent, is a special proceeding which must be commenced by petition and citation. *Matter of Moran*, 58 Misc. 488, 111 N. Y. Supp. 640.

As to application of statute of limitations, see *Matter of Warner*, 39 App. Div. 91, 56 N. Y. Supp. 585; *Matter of Warner v. Bartle*, 22 Misc. 488, 50 N. Y. Supp. 940.

Jurisdiction of surrogate.—The surrogate

cannot pass upon the validity of a judgment in foreclosure, or the sufficiency of the complaint or defenses, which could have been there interposed where the parties were properly brought into court. *Glacius v. Fogel*, 88 N. Y. 434. Surrogate's decree against executors should be reversed when there is no proof as to their possession of funds of the estate and no decision or finding by the surrogate. *Matter of Sherwood*, 75 App. Div. 342, 78 N. Y. Supp. 186.

As to when executors, in setting aside a fund and paying over the income, act as such and not as trustees, and the jurisdiction of the surrogate's court in respect thereto, see *Matter of Underhill*, 35 App. Div. 434, 54 N. Y. Supp. 967, *aff'd* 158 N. Y. 721.

Petition.—The petition must be filed within the time in which actions of a similar character are required to be commenced in courts of common law or equity. *Cole v. Terpenning*, 25 Hun 482; *House v. Agate*, 3 Redf. 307.

Citation.—As to citation, see *Rank v. Camp*, 3 Dem. 278; *Peyser v. Wendt*, 2 Dem. 221; *Beekman v. Vanderveer*, 3 Dem. 221; *Hitchler's Estate*, 21 Misc. 417, 47 N. Y. Supp. 1069.

Answer.—In a proceeding by a judgment creditor to enforce payment of a debt, the acceptance of an unverified answer is a waiver of an objection thereto. *Matter of Corbett*, 90 Hun 182, 35 N. Y. Supp. 945. If an executor files a verified answer deny-

ing the validity or existence of the claim, the surrogate cannot adjudicate it, but he may decide whether or not a claim has been rejected or allowed, and if he decides that it was admitted and allowed, he may properly direct its payment. *Matter of Miles*, 170 N. Y. 75, rev'g 61 App. Div. 562, 71 N. Y. Supp. 71. The filing of a petition by a creditor and of an answer thereto by the executor denying the validity of a claim is not equivalent to the filing of the written consent required by § 1822. *Holly v. Gibbons*, 176 N. Y. 520.

Where the executor denies that a claimant is the person who comes within the description of residuary legatee and devisee, the surrogate has no authority to try the question. *Fiester v. Shepard*, 92 N. Y. 251. The surrogate cannot decree distribution of assets held by an ancillary administrator, where the latter's answer alleges that decedent's heirs claim that the distributee is indebted to the estate in excess of his distributive share, and also alleges that he has no interest in the assets. *Matter of Dunn*, 39 App. Div. 510, 57 N. Y. Supp. 444. As to what is not a defense to an application by a beneficiary for the payment of interest accrued upon a trust fund, see *Matter of Muller*, 25 App. Div. 269, 50 N. Y. Supp. 786.

A denial by executors of the incorporation of an alleged corporate legatee under their testator's will requires the surrogate, under this section, to dismiss the petition of such legatee asking that the executors account and pay over the legacy to it. *Matter of Young Men's Christian Assn.*, 22 App. Div. 325, 47 N. Y. Supp. 854. When upon a petition for the payment of a legacy, the claim is alleged by the executor to be released and to be invalid, the surrogate is without jurisdiction. *Matter of Hammond*, 92 Hun 478, 36 N. Y. Supp. 1074.

As to the form and effect of the answer, see also *Matter of Dunn*, 39 App. Div. 510, 57 N. Y. Supp. 444; *Matter of Y. M. C. A.*, 22 App. Div. 325, 47 N. Y. Supp. 854; *Matter of Corbett*, 90 Hun 182, 35 N. Y. Supp. 945; *Muller's Estate*, 25 App. Div. 269, 50 N. Y. Supp. 786; *Matter of Alexander*, 83 Hun 147, 31 N. Y. Supp. 411; *Lambert v. Craft*, 98 N. Y. 342; *Matter of M'Cauley*, 94 N. Y. 574; *Cuthbert v. Jacobson*, 2 Dem. 134; *Hall v. Dusenbury*, 4 Dem. 181; *Koch v. Alker*, 3 Dem. 148; *Fiester v. Shepard*, 92 N. Y. 251; *Mumford v. Coddington*, 1 Dem. 27; *Smith v. Murray*, 1 Dem. 34; *Hurburt v. Durant*, 88 N. Y. 121; *Steinle v. Oechsler*, 5 Redf. 312; *Estate of Codrey*, 5 Dem. 453; *Budlong v. Clemens*, 3 Dem. 145; *Matter of McClouth*, 9 Misc. 385, 30 N. Y. Supp. 274; *Matter of Hedding Meth. Epis. Church*, 35 Hun 315; *Matter of Scheidler*, 75 Hun 185, 27 N. Y. Supp. 7, aff'd 142 N. Y. 668; *Riggs*

v. Cragg, 89 N. Y. 479; *Matter of Stevenson*, 77 Hun 203, 28 N. Y. Supp. 362; *Matter of Peterson*, 62 Misc. 161, 116 N. Y. Supp. 286.

Claims, payment of.—The surrogate cannot order the payment of a claim created by the executor. His jurisdiction is only as to claims against deceased. *Bulkley v. Staats*, 4 Redf. 524. The claim which can be directed paid by the surrogate under this section is a liquidated claim undisputed. *Matter of Walker*, 70 App. Div. 263, 74 N. Y. Supp. 971. A claim neither admitted nor rejected, cannot be ordered paid. *Matter of Von der Lieth*, 25 Misc. 255, 55 N. Y. Supp. 428.

The surrogate may order the payment of the claim if it is undisputed and established, but mere lapse of time after presentation does not make it undisputed and established, since the executor may dispute it in the proceeding, and when properly disputed the surrogate's court is without jurisdiction to determine its merits. *Matter of Clauss*, 16 App. Div. 34, 44 N. Y. Supp. 805; *Matter of Pierson*, 19 App. Div. 478, 46 N. Y. Supp. 557.

As to kind of claims, see *Bulkley v. Staats*, 4 Redf. 524; *Hall v. Dusenbury*, 38 Hun 125; *Walker's Estate*, 70 App. Div. 263, 74 N. Y. Supp. 971; *Matter of Clauss*, 16 App. Div. 34, 44 N. Y. Supp. 805; *Matter of Pierson*, 19 App. Div. 478, 46 N. Y. Supp. 557; *Matter of Marcellin*, 25 Misc. 260, 55 N. Y. Supp. 425; *Matter of Gall*, 47 App. Div. 490, 62 N. Y. Supp. 420; *Collier v. Rutledge*, 136 N. Y. 621; *Matter of Conway*, 5 Dem. 290.

Judgments.—As to power of surrogate in case of judgments, see *Archer v. Furniss*, 4 Redf. 88; *Glacius v. Fogel*, 88 N. Y. 434; *McNulty v. Hurd*, 72 N. Y. 518; *Willis v. Sharp*, 115 N. Y. 396.

Part payment of legacy.—The section makes no provisions for the payment of a part of a legacy, except where there are not sufficient funds to pay all and there has to be an abatement of legacies. In such case the decree may direct payment of the proportional part, if the facts are agreed upon; but, where they are in dispute they can only be ascertained on an accounting, which cannot be had in a proceeding under this section. *Matter of Mansfield*, 7 Misc. 383, 28 N. Y. Supp. 394.

Where petition contains jurisdictional facts necessary to compel filing of an account, the matter will be disposed of accordingly. In *re Kuehn's Estate* (1918), 169 N. Y. Supp. 876.

This section, under the amendment of 1914, gives no absolute right to the legatee to enforce payment after three months; but refers the matter to the discretion of the surrogate. *Matter of Brooklyn Trust Co.* (1917), 179 App. Div. 262, 166 N. Y. Supp. 513.

§ 2688. Payment of legacies.

No legacy shall be paid by an executor, or administrator with the will annexed, before the completion of the publication of notice to creditors if such notice be published, or if none be published before the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will or by a decree on an accounting to be sooner paid. Bequests of specific articles of property, other than securities representing money, may be delivered at any time in the discretion of the executor. Whenever a legacy is directed by the will to be sooner paid, or specific property is bequeathed, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or the value of the articles so delivered, with interest thereon or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the will, under which such legacy is paid, be denied probate on appeal or otherwise that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto.

Source.—Former § 2721, as added by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 43-45.

Revisers' note.—Provision for judicial settlement at expiration of notice, makes legacies payable then.

Last part omitted as first part of section changes the rule.

Application.—Matter of Brooklyn Trust Co. (1917), 179 App. Div. 262, 166 N. Y. Supp. 513.

In general.—An agreement between legatees and executors in compromise of a contest over a will, construed and sustained. *Beardsley v. McCutcheon*, 25 App. Div. 409, 49 N. Y. Supp. 535. The surrogate may compel a sale of the real estate by directing payment of a legacy. *Matter of Travis*, 10 Misc. 298, 31 N. Y. Supp. 686, aff'd 85 Hun 420, 32 N. Y. Supp. 887.

Where the legatees under a will to obtain the speedy enjoyment and immediate possession of his property willfully murders the testator, he cannot take any of the property as heir. *Riggs v. Palmer*, 115 N. Y. 506.

Legacies, when payable.—Legacies are not payable until the end of a year. *Matter of Stanton*, 41 Misc. 278, 84 N. Y. Supp. 46. The statute prohibits the payment of a legacy before the expiration of a year from the time of granting letters testamentary unless the will directs its payment sooner. *Matter of Bronner*, 30 Misc. 31, 62 N. Y. Supp. 1003.

When the amount of an insurance policy passes to the legatee named in the will of the assured and may be recovered by such legatee, an action therefor brought within one year is not premature. *Leon-*

ard v. Harney, 63 App. Div. 294, 71 N. Y. Supp. 546.

A specific legacy vests in the legatee on the death of the testator, but an executor has a right to reduce it to possession and hold it for a year after letters testamentary issue and until it is apparent that it is not necessary for the payment of debts or expenses of administration; he must then turn it over to the legatee with its earnings and increase. *Matter of Utica Trust & Deposit Co.* (1911), 148 App. Div. 525, 133 N. Y. Supp. 145.

Money received by an executrix who was also legatee and beneficiary of a trust under the will, held to be applied on the legacy, that being most beneficial to the estate. *Stevens v. Melcher*, 80 Hun 514, 30 N. Y. Supp. 625.

A legacy to widow which is charged upon the real estate shares equally with the others. It is not entitled to preference. *McCorn v. McCorn*, 100 N. Y. 511. A neglect by the appraisers to set apart the statutory allowance to the widow may be corrected on the accounting. *Matter of Maack*, 13 Misc. 368, 35 N. Y. Supp. 109; *Matter of Hildebrand's Estate*, 1 Misc. 245, 23 N. Y. Supp. 148.

Prior payment upon giving bond.—The fact that executors for the purpose of avoiding a contest of a will have turned

over to a remainderman a portion of the assets of the estate upon a bond of herself and husband to refund will not render such bond void as against public policy, in an action by an executor to recover thereon, after he has been required to appropriate other assets to the payment of the legacy. *Moss v. Cohan*, 158 N. Y. 240.

Interest.—A bequest in trust with a direction that the income shall be applied to the use of a person for life does not entitle the legatee to interest from the time of decedent's death, where the estate was not invested at the time of such death so as to be productive of income, and the executors received none during the year following the granting of letters testamentary. *Matter of O'Hara*, 19 Misc. 254, 44 N. Y. Supp. 222. But where there is a bequest of the income of moneys held in trust interest runs from the death of the testator, and the rule relative to legacies does not apply. *Matter of Stawfield*, 64 Hun 277, 18 N. Y. Supp. 913, aff'd 135 N. Y. 292. As to disposition of interest during minorities where there must be an abatement, see *Lyons v. Steinhardt*, 37 Misc. 628, 76 N. Y. Supp. 241.

Legacies payable out of a trust estate upon death of life tenant begin to draw

interest at the termination of the life estate. *Matter of Hussey*, 67 Misc. 32, 124 N. Y. Supp. 426. Interest begins on rent upon the legacy from the time when it is payable. *Matter of Rutherford*, 196 N. Y. 311.

Interest on general legacies should run from year after the date on which letters testamentary were issued to the date of payments. *Matter of Juilliard* (1918), 103 Misc. 178, 169 N. Y. Supp. 1079.

Interest at the legal rate should be allowed upon legacies constituting a fractional part of the estate. *Matter of Tilden* (1918), 105 Misc. 342, 172 N. Y. Supp. 811.

Rights of infant.—The father of an infant has no right, as natural guardian, to receive a legacy bequeathed to the infant. *Whitlock v. Whitlock*, 1 Dem. 160.

Where a lapsed legacy was paid by executor with consent of the beneficiaries under the will, held that an infant and his guardian had no power to give a valid consent, and the executor must be charged with the infant's share. *Matter of Tatum*, 34 Misc. 25, 69 N. Y. Supp. 501, aff'd 61 App. Div. 513, 70 N. Y. Supp. 634, aff'd 169 N. Y. 514.

§ 2689. Petition to compel payment of legacy or delivery of property, etc., by a testamentary trustee.

Where a person is entitled, by the terms of the will, to the payment of money, or the delivery of personal property, by a testamentary trustee, he may present to the surrogate's court a petition, setting forth the facts which entitle him to the payment or delivery, and praying for a decree, directing payment or delivery accordingly; and that the testamentary trustee and all other persons whose rights or interests would be affected by the decree may be cited to show cause, why such a decree should not be made. If the petitioner is so entitled, only upon the happening of a contingency, or after the expiration of a certain time, he must show in his petition, that his right to the money or other property has become absolute.

Source.—Former §§ 2804 and 2806; sections new as originally inserted in Code of Civ. Proc.

Relief afforded.—A proceeding by a beneficiary under a will to compel a substituted trustee to pay a certain amount on account of income accrued, should be brought under this section, which prescribes the sole method for obtaining relief. *Matter of McQuade* (1913), 157 App. Div. 344, 142 N. Y. Supp. 493.

Sufficiency of petition, see *Matter of Martin*, 27 Misc. 416, 59 N. Y. Supp. 374. Petition for a decree for the payment of an amount claimed by a beneficiary under a will held sufficient. *Matter of Odell*, 52 Hun 88, 4 N. Y. Supp. 859.

Interest and income.—Petitioner entitled to the interest on the trust fund a portion of which was in the hands of the trustee.

Matter of McCarter, 94 N. Y. 558. Disposal of income under direction in will to apply net income of a fund for an infant's support, see *Matter of McCormick*, 40 App. Div. 73, 57 N. Y. Supp. 548.

Where fund is held by executors as trustees, an application to compel payment must be made under this section. *Matter of Underhill*, 35 App. Div. 434, 54 N. Y. Supp. 967, aff'd 158 N. Y. 721.

Support of minor.—When the trustee should be directed to apply a certain sum from the income to the support and education of a minor, see *Matter of Sherrer*, 24 Misc. 351, 53 N. Y. Supp. 714.

Neglect or fraud.—Petition under this section charging executor with neglect, etc.

Estate of James Riley, 4 Misc. 338, 24 N. Y. Supp. 309. As to fraud, see Matter of Valentine, 1 Misc. 491, 23 N. Y. Supp. 259.

Payment of legacy.—Application to compel an executor to pay a legacy; where such relief may prejudice others they should be given a hearing. *Beekman v. Vanderveer*, 3 Dem. 221.

Payment to assignees.—Application by beneficiaries for payment of a trust income to their assignees; court will not act until all beneficiaries are cited. *Matter of Foster*, 30 Misc. 573, 63 N. Y. Supp. 1102.

Sale of realty.—Before a decree compelling an executor to sell realty for payment of debts may be made, a citation must be issued to the persons whose rights must be affected. *Bennett v. Crain*, 41 Hun 183.

Allowance for support of infants.—Upon an application by the father of two infants, as guardian, for an annual allowance for their support and maintenance, the court must take into consideration the circumstances of the father, and his petition must allege that he is unable to maintain said children. *Matter of Brown* (1913), 80 Misc. 4, 141 N. Y. Supp. 193.

Whether the claim of a beneficiary is valid where he seeks to have the testamentary trustees pay the entire income of

a trust fund to him will not be determined by the surrogate on an application for the payment of a debt or legacy. In *re Akin's Estate* (1914), 145 N. Y. Supp. 1105.

Injunction restraining accounting pendente lite.—Where the beneficiary of a trust fund has brought an action in supreme court to remove the trustee and for an accounting, an injunction issued on said action restraining an accounting by the trustee in the surrogate's court pendente lite, but providing that the trustee shall not be prevented from disbursing the income from the trust estate, only permits the disbursement of income as to which there is no question, and where the answer of the trustee in the surrogate's court shows that the income is less than the charges against it, the surrogate cannot make a determination that there is income which should be distributed. *Matter of Robinson* (1913), 156 App. Div. 363, 141 N. Y. Supp. 470.

Pendency of accounting proceedings.—An application for delivery of part of a share in an estate may be granted during the pendency of accounting proceedings. *Matter of Kent* (1915), 92 Misc. 113, 155 N. Y. Supp. 383.

§ 2690. Id.; proceedings upon return of citation.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties, and must make such a decree in the premises, as justice requires. In a proper case, the decree may require the testamentary trustee, who is unable to deliver personal property to which the petitioner is entitled, to pay the value thereof.

Source.—Former § 2805; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—In line with the enlarged jurisdiction of the court it would seem wise to prevent the dismissal of the proceeding, but let the surrogate determine under his general jurisdiction what relief shall be granted.

Answer.—Answer of trustee denying validity or legality of claim, see *Matter of McCarter*, 94 N. Y. 558. Answer in a proceeding to compel payment of a legacy which fails to contain both a specific denial of the validity of petitioner's claim and an affirmative allegation setting forth the uncertain nature of it is defective. *Estate of James Riley*, 4 Misc. 338, 24 N. Y. Supp. 309. As to sufficiency of answer not denying in specific terms the validity or legality of petitioner's claim, but in substance denying same, see *Matter of Stevens*, 20 Misc. 157, 45 N. Y. Supp. 908.

Dismissal in part.—Where petition prays for general relief, and verified answers are filed by testamentary trustees, the surrogate may require an intermediate accounting and dismiss as to the remainder. *Matter of Odell*, 52 Hun 88, 4 N. Y. Supp. 859. Petition should not be dismissed where facts are not set forth in the answer show-

ing that the claim is doubtful. *Matter of Foster*, 37 Misc. 581, 75 N. Y. Supp. 1067.

Hearing before surrogate.—This section and § 2689 relating to a proceeding to compel a testamentary trustee to pay over moneys to beneficiaries entitled thereto, do not contemplate a proceeding in the nature of an accounting, and where the answer of the trustee indicates a doubt as to the validity of the claim, the surrogate cannot proceed to take proofs and make a determination, but should dismiss the petition without prejudice to an action for an accounting. *Matter of Robinson* (1913), 156 App. Div. 363, 141 N. Y. Supp. 470.

Motion denied.—A motion by a beneficiary under a will, based on the report of a referee for a decree requiring the substituted trustee to pay a certain amount on account of accrued income, should be denied without prejudice to the making of

a new application under this section. *Matter of McQuade* (1913), 157 App. Div. 344, 142 N. Y. Supp. 493.

Distribution prior to final accounting.—

It is not necessary that the payment of legacies and distributive shares of an estate wait upon the final settlement of an executor's or trustee's account. The law favors an early distribution, and where,

from any cause, the final distribution is delayed and a partial distribution can be made without prejudice to the rights of the creditors or to the executor or trustee provision is made for such partial distribution pending the outcome of a proceeding for the final judicial settlement of the account. *Matter of Kent* (1916), 173 App. Div. 563, 159 N. Y. Supp. 627.

§ 2691. Decree for advance payment of legacy, etc., on giving security.

Whenever a person who will be entitled to the payment or satisfaction of any testamentary provision, or distributive share, is in actual need of the same or of some part thereof for his support or education, he may present to the surrogate's court his petition setting forth the facts, and thereupon, in the discretion of the surrogate, a citation may issue to the executor, administrator or testamentary trustee to show cause why the prayer of the petition should not be granted. If it appears on the return of the citation, that the amount of money and the value of the other property in the hands of the respondent applicable to the payment of debts, legacies and expenses, exceeds, by at least one-third the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim, and of all legacies or distributive shares of the same class; and that the payment or satisfaction of any testamentary provision or distributive share, or some part thereof, is necessary for the support or education of the petitioner, whether adult or infant, or of his family, the surrogate may, in his discretion, make a decree directing payment or satisfaction accordingly, on the filing of a bond, as provided in section 2688 of this title.

Source.—Former § 2723, as amended by L. 1893, ch. 686; former § 2719, renumbered by the amendment of 1893; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 82, 83.

Revisers' note.—Reference made to adult so that the section could not be construed as applying only to a minor. His family also included.

Former § 2733 rewritten, and made similar to new § 2688 as to bond requirement.

There are now the following provisions:

Application for payment of debt, legacy, etc., after three months, if no notice to creditors is being published, and there is sufficient property, and the right is undisputed.

Compulsory payment at the termination of advertisement for creditors, or at the end of a year, with right to deliver property before that time at the discretion of the executor, or upon giving bond.

Compulsory payment by a testamentary trustee when due.

Discretionary advancement for support, either with or without bond.

Showing insufficient.—An application for an advance payment on a legacy denied because (1) the moving papers do not show that the husband has not sufficient means to support and maintain the legatee; (2) it does not conclusively appear that the income which petitioner is receiv-

ing from the estate is insufficient for her support, and (3) there is no fund indefeasibly vested in her from which the advancement asked for can be made. *Matter of Kohler* (1915), 91 Misc. 462, 154 N. Y. Supp. 958.

§ 2692. Payment of expenses incurred by representative.

An executor, administrator, guardian or testamentary trustee may pay from the funds or estate in his hands, from time to time, as shall be necessary, his legal and proper expenses of administration necessarily incurred by him, including the reasonable expense of obtaining and continuing his

bond and the reasonable counsel fees necessarily incurred in the administration of the estate. Such expenses and disbursements shall be set forth in his account when filed, and settled by the surrogate.

Source.—New.

Revisers' note.—In theory now many payments of such character must be made from personal funds, although in practice, they are not. It is better to authorize the common practice.

See *Matter of Doscher* (1914), 165 App. Div. 193, 151 N. Y. Supp. 76.

Reasonableness of funeral expenses.—It is the duty of an administratrix to pay the reasonable funeral expenses of her decedent, and where in her verified account she alleges that the charges therein for necessary expenses are correct the account must prevail so far as it is supported by vouchers, unless it is impaired by proof. *Matter of Viles* (1914), 86 Misc. 170, 149 N. Y. Supp. 121.

Expense of maintaining testator's household for reasonable time.—Executors have a reasonable time after the death of their testatrix in which to break up her domestic establishment and discharge her servants, and within that limit disbursements incurred in the course of such breaking up will be allowed them upon their accounting. *Matter of Watson* (1914), 86 Misc. 588, 148 N. Y. Supp. 902.

The public administrator of Bronx county is entitled to pay his proper expenses of administration necessarily incurred by him subject to review when his final accounts are settled by the surrogate; the preparation of letters and other documents in typewritten form and the employment of a stenographer for that purpose have become such well recognized practices in business and in the practice of the law as to amount almost to a necessity; the propriety of granting such allowances rests in the sound discretion

of the court and each case must necessarily be decided upon its own peculiar facts; and the general rule is not violated by allowing the item charged for stenography and typewriting. *Matter of Hammer* (1916), 94 Misc. 547, 160 N. Y. Supp. 191.

Counsel fees; personal services.—Where an attorney has been retained by a trustee to resist an application for his removal and has been successful therein, but his services have no contract relation to the property of the estate, the court has no jurisdiction either at law or in equity to decree that the payment for such personal services rendered to the trustee shall be a charge upon either the principal or income of the estate. *Jessup v. Smith* (1915), 170 App. Div. 605, 156 N. Y. Supp. 553.

Counsel fees not taxable costs.—Though counsel fees paid by an executor or administrator for services rendered are properly included in his account as items of disbursements, they are not taxable as costs. *Matter of Bush* (1919), 106 Misc. 227, 174 N. Y. Supp. 653.

Lien for counsel fees.—An attorney who performs services for an executor or administrator of an estate does not have a lien upon the general assets of the estate for the value of his services. *In re Norton's Estate* (1916), 162 N. Y. Supp. 215; *In re O'Connor's Estate* (1917), 162 N. Y. Supp. 957.

§ 2693. Power and duty of executor before probate.

An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary are granted, except to pay funeral charges, nor to interfere with such estate in any manner further than is necessary for its preservation.

Source.—Former § 2613, as added by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 5, 15, 16, 22.

Power of executor before qualifying.—An executor before qualifying has power to take such action as is necessary for the preservation of the estate. *Hull v. Cartledge*, 18 App. Div. 54, 45 N. Y. Supp. 450; *Matter of Marcellus*, 165 N. Y. 70; *Matthews v. American Central Ins. Co.*, 9 App. Div. 339, 41 N. Y. Supp. 304. An executor may pay funeral charges before he qualifies. *Riley v. Waller*, 22 Misc.

63, 48 N. Y. Supp. 535; *Patterson v. Buchanan*, 40 App. Div. 493, 58 N. Y. Supp. 179. As to executor's control of railroad stock of testator before letters testamentary were issued. *Matter of Mitchell*, 36 App. Div. 542, 55 N. Y. Supp. 725, *aff'd* 161 N. Y. 654.

Payment of funeral expenses. *Barter v. Hawksworth* (1918), 102 Misc. 242, 169 N. Y. Supp. 475.

§ 2694. Power to sell, mortgage or lease real estate may be executed by qualifying executors.

Where any power to sell, mortgage or lease real estate or any interest therein, is given to executors as such, or as trustees, or as executors and trustees, and any of such persons named as executor shall neglect to qualify, then all sales, mortgages and leases under said power made by the executors who shall qualify shall be equally valid as if the other executors or trustees had joined in such sale.

Source.—Former § 2642, as amended by L. 1883, ch. 401; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 9-12.

Sale by assignee for benefit of creditors.—Where executors have not been given power to carry on the business of their decedent, an application by their assignee for the benefit of creditors for the approval of the court of his sale of the real estate of the decedent will be denied. *Matter of Praetz* (1914), 87 Misc. 128, 150 N. Y. Supp. 221.

Power of surviving executor or trustee to sell.—Where power to sell is given to two or more executors or trustees *ratione officii*, and one resigns or is removed before the power has been fully executed, the remaining executors or trustees may validly execute the power. *Striker v. Daly* (1916), 175 App. Div. 620, 162 N. Y. Supp. 527.

§ 2695. Administrators with the will annexed; rights, powers and duties.

Where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators with such will have the rights and powers, and are subject to the same duties, as if they had been named as executors in the will.

Where power to mortgage, lease or sell real estate is given by a will to an executor or trustee, an administrator with the will annexed or a successor trustee may execute such power in any case where the original executor or trustee could execute the same, unless contrary to the express provisions of the will.

Source.—(First sentence) former § 2613, as added by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 2, §§ 5, 15, 16, 22.

Revisers' note.—The last sentence added to change the confusion arising from the many cases holding that a discretionary power of sale does not pass to an administrator C. T. A. or successor trustee. First sentence taken from former § 2613.

§ 2696. Power to sell, mortgage or lease real estate may be executed by qualifying trustees or successors.

Where any power to sell, mortgage or lease real estate or any interest therein, are given to trustees, and any of such persons named as trustees shall neglect to qualify, then all sales, mortgages and leases under said power made by the trustee or trustees who shall qualify shall be equally valid as if the other trustees had joined in such sale. Where a successor trustee has been appointed by the court, or is named in a will, he shall have the same power as to such real estate as the trustee or trustees had who were named in the will, unless the exercise of such power would be contrary to the express provision of the will.

Source.—New.

Revisers' note.—This section is in line with the last part of former § 2694, which relates to executors. The last sentence is added to obviate a constant difficulty arising where a successor is appointed.

§ 2697. Conveyance of real property by executor or administrator to holder of contract of sale made by a decedent.

Where a decedent dies seized of lands after he has made a contract for the conveyance thereof, his executor or administrator may make a deed reciting said contract and conveying the said lands. The executor or administrator, or the vendee, his heirs or assigns, may file a petition praying for the confirmation of the act of the executor or administrator in delivering the deed, or for a decree that the same be made and delivered or the executor or administrator may pray for the like relief in a petition for the judicial settlement of his account. In either case, a citation shall issue to all persons interested, and the court shall make such decree as justice requires. A deed delivered pursuant to this section, upon its confirmation by such decree, shall be effectual to convey all the right, title and interest in the said lands which the decedent had at his death.

Source.—Former § 2801-a, as added by L. 1908, ch. 502.

Revisers' note.—All after the new matter in this section to be repealed.

Where the deceased person has made a contract to convey real estate such contract and the money received under it is defined to be personal estate (§ 2672) and therefore the heirs or devisees as such have no interest in the property except that they hold legal title. There seems to be no good reason why the representative should not upon his own responsibility in a proper case execute a deed which will fulfill the contract of the deceased person as simply as he could discharge a mortgage. He must assume the responsibility that the contract is good and enforceable and that he gets all of the money due under it. The heirs or devisees have nothing but the naked legal title and we have ample precedent in the case of sheriffs, referees and receivers where the legislature has delegated the power to public officers to execute a conveyance of real property. The former section was so technical and expensive in its operation that in many actual cases people entitled to the deeds could not obtain them even though all of the interested parties consented, on account of the fact that the heirs were often scattered or incompetent to execute a deed.

§ 2698. Surrogate may direct as to custody, where co-executors, etc., disagree.

Where two or more co-executors or co-administrators disagree, respecting the custody of money or other property of the estate; or two or more testamentary trustees, or guardians of the property disagree, respecting the custody of money or other property, belonging to a fund or an estate which is committed to their joint charge; the surrogate may, upon the petition of either of them, or of a creditor or person interested in the estate, and proof, by affidavit, of the facts, make an order, requiring them to show cause, why the surrogate should not give directions in the premises. Upon the return of the order, the surrogate may, in his discretion make an order, directing that any property of the estate or fund be deposited in a safe place, in the joint custody of the executors, administrators, guardians, or testamentary trustees, as the case requires, or subject to their joint order; or that the money of the estate be deposited in a specified safe bank or trust company, to their joint credit, and to be drawn out upon their joint order.

Source.—Former § 2602; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—The last sentence [of former § 2602] is already covered by power to remove or to punish for contempt.

Purpose of section. *Chambers v. Cruikshank*, 5 Dem. 414. All executors have equal right to examine testator's books, etc.; order to show cause where right is refused. *Matter of Stein*, 33 Misc. 542, 68 N. Y. Supp. 993.

Disagreement.—Order for deposit of property in a bank or trust company is only granted where there is a disagreement of two or more executors, etc. *Guion v. Underhill*, 1 Dem. 302. Application granted upon the reasonable refusal of an executor to put estate funds within the control of his coexecutor. *Thompson v. Mott*, 1 Dem. 32.

Order discretionary.—Order directing joint control within discretion of surrogate. *Matter of Eisner*, 6 App. Div. 563, 39 N. Y. Supp. 718. Appellate court will not review surrogate's action unless there has been an abuse of discretion or a vio-

lation of justice. *Matter of Adler*, 30 Hun 481, 15 N. Y. Supp. 227.

Joint custody of assets.—Section held not to authorize the court to direct an accounting executor to communicate to the other executors information desired, and to execute assignments. *Matter of Frelich*, 42 Misc. 11, 85 N. Y. Supp. 830. Circumstances warranting surrogate in making an order under this section requiring funds of the estate to be deposited subject to the joint order of three executors, considered. *Matter of Hoagland*, 51 App. Div. 347, 64 N. Y. Supp. 920, *aff'd* 164 N. Y. 573.

§ 2699. Money paid into court and securities taken; how disposed of.

Where a statute requires the payment of money into, or the deposit of a security with the surrogate's court, or the deposit of a security for the payment of money with the surrogate, the same must be paid to or deposited with the county treasurer of the county or to the chamberlain of a city, to the credit of the beneficiary, or the estate, or of the special proceeding; unless the statute contains special directions for another disposition thereof. Each security so deposited with the county treasurer or chamberlain must be held and disposed of by him, subject to the direction of the surrogate's court; except that he must, unless otherwise so directed, collect the principal and interest secured thereby. All money collected by or paid to the county treasurer, or chamberlain as prescribed by this section, must be held, managed, invested and disposed of by him, in like manner as money paid into the supreme court in an action pending therein. The regulations contained in the general rules of practice as specified in subdivision 8 of section 4 of the state finance law, and the provisions of title third, of chapter eight of this act, apply to money paid to and securities deposited with the county treasurer, or chamberlain as prescribed in this section; except that the surrogate's court exercises, with respect thereto, or with respect to a security, in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the supreme court by section 747 of this act.

Source.—Former §§ 2537 and 2746. § 2537, as amended by L. 1888, ch. 339; L. 1908, ch. 183; L. 1909, chs. 3, 240; section new as originally inserted in Code of Civ. Proc. § 2746, as amended by L. 1886, ch. 358; L. 1900, ch. 554; L. 1909, ch. 65; L. 1911, ch. 328; L. 1913, ch. 10; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 80.

References.—Payment of money into court, and care and disposition thereof, Code Civ. Pro., §§ 743-754; deposit and investment of funds, Gen. Rules of Prac., No. 68.

In general.—Surrogate is no longer the actual custodian of the funds paid into his court, this section having abolished such anomaly. *People ex rel. Nash v. Faulkner*, 38 Hun 607. But see s. c., 107 N. Y. 477.

§ 2700. Deposit of securities may be ordered on revocation of letters.

When, upon the revocation of the letters of an executor, administrator or guardian, or the removal of a testamentary trustee, a decree shall be made in which such executor, administrator, guardian or testamentary trustee is personally charged with or directed to pay a sum of money upon a finding that he has made an unlawful investment or disposition of the estate or

fund in his hands, and the security or other instrument by which such investment or disposition is evidenced, or the property in the purchase of which such investment or disposition has been made, shall not be a part of the assets which his successor may be legally required to receive, the decree shall direct that such security or other instrument, or such property, if practicably capable of delivery under such direction, be forthwith deposited with a safe deposit company, authorized by law to do business as such, in such manner as to prevent the withdrawal of the same except upon the order of the surrogate.

Source.—New.

Revisers' note.—This new section enables the surrogate to retain control of the securities, and permit their sale only upon application of the proceeds upon the decree. Heretofore the representative could take the securities and never satisfy the decree.

ARTICLE 3.

APPLYING RENTS AND THE PROCEEDS OF MORTGAGE, LEASE OR SALE OF REAL ESTATE TO THE PAYMENT OF DEBTS, FUNERAL AND ADMINISTRATION EXPENSES, AND CHARGES UPON REAL ESTATE; SALE FOR DISTRIBUTION AND CONVEYANCE IN CONFIRMATION OF TITLE.

- | | |
|---|--|
| <p>§ 2701. When rents of real estate may be applied in the same manner as proceeds of mortgage, lease or sale.</p> <p>2702. What property subject to disposition for the payment of debts, funeral and administration expenses.</p> <p>2703. For what purposes real property is subject to disposition.</p> <p>2704. Sale to be refused if bond be given.</p> <p>2705. When and how real property may be mortgaged, leased or sold.</p> <p>2706. Trial and determination of claims and expenses; statute of limitations.</p> <p>2707. Order to mortgage, lease or sell.</p> <p>2708. Duty of executor or administrator to execute order after filing bond.</p> <p>2709. Order to be executed and report made.</p> | <p>§ 2710. Execution of order not affected by death, et cetera.</p> <p>2711. Execution of the order; decree of judicial settlement; conveyance to heirs.</p> <p>2712. Allowance on bid to creditor purchasing.</p> <p>2713. Provision for payment of undetermined claims and debts not yet due.</p> <p>2714. When conveyance not to affect purchaser or mortgagee from heir, et cetera.</p> <p>2715. Effect of conveyance of decedent's interest under contract.</p> <p>2716. Presumption where records have been removed.</p> <p>2717. Right of life tenant to be considered in sale.</p> <p>2718. Restitution from assets subsequently discovered.</p> |
|---|--|

§ 2701. When rents of real property may be received by the executor or administrator.

An executor or administrator may present a petition to the surrogate's court praying for leave to enter into possession of real property left by his decedent and to manage and control the same and receive the rents thereof. If from such *position it shall appear that a mortgage, lease or sale of such real property will be necessary unless the purposes specified in section 2703 of this title be otherwise fulfilled, a citation shall issue to all known persons within the state of New York who have the legal title to such real estate by descent or devise to show cause why the prayer of the petition should not be granted. Upon the return of the citation the surro-

* So in original.

gate may, in his discretion, grant the prayer of such petition upon such terms and conditions as justice shall require. The net rents so collected shall be held by the executor or administrator and be brought into court upon the judicial settlement of the account of such executor or administrator and there disposed of as provided in section 2711 of this title for the disposition of proceeds of mortgage, lease or sale of real estate.

Source.—New.

Revisers' note.—It has always worked out as an injustice to creditors that the heir or devisee should be able to collect rents for many months from real estate which equitably belonged to the creditors. It has also worked injustice to resident and competent part owners that their interests should be sold when a few months' rent would have discharged all the debts. Therefore, it has seemed to be wise and just, and within the power of the court, to authorize the representative to enter into possession of the real estate when all of it may eventually be required to be mortgaged, leased or sold, and to collect the rents and bring them into court upon his judicial settlement to be accounted for and applied as may be necessary. This plan will also put someone in charge of real estate owned by nonresidents, absentees or incompetents, where now no one has the right to collect the rents.

This section is intended to obviate the necessity of a sale and perhaps sacrifice of real estate. *Matter of Mahnken* (1917), 101 Misc. 175, 167 N. Y. Supp. 456.

Without the issuance of a citation the relief asked for cannot be granted, even though the facts are such as to justify an application. *Matter of Mahnken* (1917), 101 Misc. 175, 167 N. Y. Supp. 456.

Where executors may dispose of the real estate of their decedent under a valid

power contained in the will, the procedure prescribed by §§ 2701-2718 is neither necessary nor proper, and an application for an order directing a sale of said real estate will be denied. *Matter of Noe* (1916), 94 Misc. 60, 157 N. Y. Supp. 681.

Application by executor to impound rents should be commenced by issuance of a citation and not upon a petition and order to show cause. *In re Loew's Estate* (1918), 169 N. Y. Supp. 329.

§ 2702. Real property subject to disposition for the satisfaction of charges against the same and for distribution.

The real property, or interest in real property, of which a decedent died seized, may be disposed of as prescribed in this title; except where it is exempted from levy and sale by virtue of an execution as prescribed in title second of chapter thirteen of this act, or where it can be disposed of under a valid power contained in a will for the purpose of which the same might be disposed of under this title.

But no such property, or interest in property, shall be mortgaged, leased or sold under an order in surrogate's court to satisfy any claim, debt or demand, unless the proceeding therefor, or the proceeding in which such relief is asked, shall have been commenced within eighteen months from the date when letters first issued to an executor or administrator; provided, however, that in the event of the death or removal of an executor or administrator during the pendency of the proceeding, the time between the commencement of said proceeding and the commencement of a new proceeding by or against his successor in office shall not be deemed a part of the time limited herein.

Amended by L. 1917, ch. 684; L. 1918, ch. 317, in effect Sept. 1, 1918. The amendment of 1918 substituted the words "unless the proceeding therefor, or the proceeding in which such relief is asked, shall have been commenced" in lines 9 and 10, for the words "except in a proceeding for the judicial settlement of the accounts of an executor or administrator commenced by him, or any creditor or interested party."

Source.—Former § 2749, as amended by L. 1894, ch. 735; originally revised from R. S., pt. 2, ch. 6, tit. 4, § 2, subd. 4, §§ 20, 66; L. 1837, ch. 460, §§ 40-42; L. 1874, ch. 267.

Revisers' note.—As the proceeding now conforms to the principles of a power of sale, a change is made in the last part so that it cannot be used where there is a valid

power of sale. A debt or legacy may be "charged" on the real property, and an action be necessary to collect it.

The last part of the section limits the time of the "lien." By having a final judicial settlement the duration of the lien will be short.

A person who presents his claim within the eighteen months can require a judicial settlement; where the claim is not presented he must proceed against the heirs (§§ 1837, etc.).

Statute must be complied with.—It is the function of the administrators in a proceeding to mortgage the real estate of their testator, to safeguard the rights of creditors. The remedy is statutory and the statute must be strictly followed. *Matter of Reed* (1915), 214 N. Y. 383.

The jurisdiction of the surrogate's court, in respect to the disposition of real property, is defined by statute. *Matter of German Bank*, 39 Hun 181. As to exercise of jurisdiction under above section, see *Van Vleck v. Enos*, 88 Hun 348, 34 N. Y. Supp. 754. As to derivation of surrogate's power to sell real estate for the payment of debts, see *Matter of Mahoney*, 34 Hun 501.

Scope of section.—Surplus moneys, on a foreclosure of property subject to a power of sale to pay debts and funeral expenses, should be retained in supreme court, and proceedings under this title are not maintainable. *Matter of Coutant*, 24 Misc. 350, 53 N. Y. Supp. 713.

When real estate is to be made liable for debts of a deceased person, section has provided a fixed course to be followed. *Rousseau v. Bleau*, 60 Hun 259, 14 N. Y. Supp. 712; *Matter of O'Brien*, 39 App. Div. 321, 56 N. Y. Supp. 925. Property purchased with pension moneys by decedent may be sold. *Smith v. Blood*, 100 App. Div. 317, 94 N. Y. Supp. 667.

Expenses of administration, in the absence of personal assets, are payable from the proceeds of the sale of decedent's land for the payment of debts and funeral expenses. *Matter of Liscomb*, 60 Misc. 647, 113 N. Y. Supp. 941.

Decedent's debts.—There is no general power in the court to direct a sale for the payment of a decedent's debts aside from the statute. *Long v. Long*, 142 N. Y. 545.

A judgment against the executor for costs, when not a "debt" of the decedent. *Matter of Foley*, 39 App. Div. 248, 57 N. Y. Supp. 131. Simple contract debts, when not presumed paid. *Cunningham v. Whitford*, 74 Hun 273, 26 N. Y. Supp. 575.

Charge upon realty.—Inadequacy of the personality is not suggestive of an intent to charge the realty with payments of debts. *Matter of City of Rochester*, 110 N. Y. 159; *Turner v. Mather*, 86 App. Div. 172, 83 N. Y. Supp. 1013. When will includes power to sell for payment of debts a proceeding authorized by this section is not maintainable. *Matter of Gantert*, 136 N. Y. 106. Real property may be sold notwithstanding it is devised expressly

charged with the payment of debts. *Matter of Wood*, 70 App. Div. 321, 75 N. Y. Supp. 272.

Funeral expenses.—What is a reasonable charge for a suitable headstone allowable as part of the funeral expenses. *Matter of Shipman*, 82 Hun 108, 31 N. Y. Supp. 571. As to a monument, see *Matter of Smith*, 75 App. Div. 339, 78 N. Y. Supp. 130. Administrator liable in his representative capacity. *Patterson v. Buchanan*, 40 App. Div. 493, 58 N. Y. Supp. 179.

The expense of burial is recognized by statute as a direct charge against the estate and classed with the debts of the decedent in providing for their payment out of the realty. *Riley v. Waller*, 22 Misc. 63, 48 N. Y. Supp. 535. See *Matter of Cowin*, 10 Misc. 196, 31 N. Y. Supp. 426. Authority to direct the disposition of real estate for the payment of debts and funeral expenses was given by former § 2740 of the code. *Bennett v. Crain*, 41 Hun 183.

Where a husband pays the funeral expenses of a wife, which were directed to be paid by the wife's will, the husband's executor may recover the sum paid from the wife's estate. *Matter of Stadtmuller*, 110 App. Div. 76, 96 N. Y. Supp. 1101.

Legacies as charge upon land authorizing sale under this section, see *Hallock v. Hallock*, 79 App. Div. 508, 80 N. Y. Supp. 61.

Creditors.—The power of the surrogate's court to authorize a sale for creditors whose claims have not been specifically charged by devise upon any of an insolvent testator's real estate is not limited by this section. *Matter of Richmond*, 168 N. Y. 385; *Matter of O'Brien*, 39 App. Div. 321, 56 N. Y. Supp. 925.

Fraudulent conveyance void; how creditors should treat land of debtor at the debtor's death. *Harvey v. McDonnell*, 48 Hun 409, 1 N. Y. Supp. 83. Different remedies of a creditor against property of decedent. *Kingsland v. Murray*, 133 N. Y. 170. Creditor's right to resort to real estate must be asserted in statutory manner. *Hogan v. Kavanaugh*, 138 N. Y. 417. Creditor's remedy, where his claim is made a specific charge on the realty. *Little Falls Nat. Bank v. King*, 53 App. Div. 541, 65 N. Y. Supp. 1010.

Action brought under this section by a general creditor, see *Toch v. Toch*, 8 Misc. 145, 28 N. Y. Supp. 602, aff'd 81 Hun 410, 30 N. Y. Supp. 1003. See, generally, *Matter of Heroy*, 67 Hun 13, 21 N. Y. Supp. 685; *Matter of Campbell*, 66 App. Div. 478, 73 N. Y. Supp. 290.

Administrator.—A temporary administrator cannot, by virtue of his office, mort-

gage a decedent's realty. *Duryea v. Mackey*, 151 N. Y. 204. Proceedings by administration to sell land for payment of debts. *Stillwell v. Swarthout*, 81 N. Y. 109. Administrator can only sell decedent's real estate as provided in this title. *Matter of Sargent*, 42 App. Div. 301, 59 N. Y. Supp. 105.

Sale of real estate.—Sale of decedent's estate by a freeholder. A judgment not a lien at the time the proceeding was taken is not payable out of the proceeds. *Matter of McGee*, 65 App. Div. 460, 73 N. Y. Supp. 64. Devise of real estate without giving executor power to convey. *Dill v. Wisner*, 88 N. Y. 153. When executors may sell realty. *Cahill v. Russell*, 140 N. Y. 402. Order of sale of real estate. *Tehan v. Tehan*, 83 Hun 368, 31 N. Y. Supp. 961. Implied trust; power of sale. *Steinhardt v. Cunningham*, 130 N. Y. 293. Rights acquired by a person taking a mortgage after the decree dismissing the

proceedings is entered. *Olyphant v. Phyfe*, 48 App. Div. 1, 62 N. Y. Supp. 688, aff'd 166 N. Y. 630. See, generally, *Schneider v. McFarland*, 2 N. Y. 459; *Platt v. Platt*, 105 N. Y. 488; *Richmond v. Freeman's Nat. Bank*, 86 App. Div. 152, 83 N. Y. Supp. 632; *Matter of Pfohl*, 20 Misc. 624, 43 N. Y. Supp. 1086.

There is no limit of time within which the real property of a decedent may be sold for the payment of a legacy charged thereon, or for the purposes of distribution. *Matter of Goetzmann* (1916), 96 Misc. 377, 160 N. Y. Supp. 503.

Costs.—Costs recovered in an action against the surviving partner of the decedent will not be allowed. *Matter of Stowell*, 15 Misc. 533, 37 N. Y. Supp. 1127.

Statute of limitations.—Proceedings for sale of deceased debtor's realty—when barred by statute of limitations. *Mead v. Jenkins*, 27 Hun 570, aff'd 95 N. Y. 31.

§ 2703. For what purposes real property is subject to disposition.

The real property specified in section 2702 of this title may be mortgaged, leased or sold for any or all of the following purposes:

1. For the payment of the debts of the decedent, including judgment or other liens, excepting mortgage liens, existing thereon at the time of his death.

2. For the payment of his funeral expenses, including therein suitable church or other services, a burial lot and a headstone erected thereon.

3. For the payment of the reasonable expenses of administration as allowed by the surrogate.

4. For the payment of any transfer tax assessed upon the transfer of such property.

5. For the payment of any debt or legacy charged thereupon.

No mortgage, lease or sale shall be ordered for the purpose of any of the foregoing payments, if there be personal property applicable to the full payment and discharge thereof.

Such real property may also be sold:

6. For the payment and distribution of their respective shares to the parties entitled thereto, where any or all of said parties are infants, proven or adjudged incompetents, absentees, or persons unknown, whenever in his discretion the surrogate may so direct.

Source.—Same as for § 2702, *supra*.

Revisers' note.—Subd. 6 is inserted so that sale may be had on judicial settlement for distribution and so prevent partition.

Section 224 of the Tax Law provides for sale to pay transfer tax by means of this proceeding.

Expenses of administration are included because the executor or administrator is charged with the duty of making the sale, and he should have his expenses of procuring his appointment, advertising, inventory, etc.

There must be a representative, and he must administer on the estate in the interest of the creditors, therefore, his expenses must be paid.

See cases cited under preceding section.

The provisions are mandatory relating to sale for purpose of paying debts, notwithstanding the equitable jurisdiction conferred by § 2510. *Matter of Doyle* (1917), 180 App. Div. 398, 167 N. Y. Supp. 827.

Whereabout of heirs unknown.—Where the whereabouts of any of the heirs of a decedent are unknown, the surrogate in his discretion may direct a sale of the decedent's real property to pay a legacy charged thereon, the personal property being insufficient for that purpose. *Matter of Goetzmann* (1916), 96 Misc. 377, 160 N. Y. Supp. 503.

A suitable headstone is a part of the funeral expenses, to pay for which the real property may be ordered sold. *In re Williams* (1917), 165 N. Y. Supp. 716.

Proceeding under former § 2750.—A creditor is not prevented from instituting proceedings for the sale of decedent's real estate under former § 2750, by the provision excluding any "creditor by a mortgage which is a lien upon the decedent's real property," where it appears that prior to his institution of such proceeding he was such a creditor but had lost the security of the mortgage involuntarily and without fault. *Matter of Ries* (1918), 182 App. Div. 296, 169 N. Y. Supp. 426.

§ 2704. Sale to be refused if bond be given.

An order empowering an executor or administrator to mortgage, lease or sell shall not be granted if any of the persons interested in the estate or property execute and file in the surrogate's office a bond in such sum and with such sureties as the surrogate directs and approves, conditioned to pay all the charges against the same proved and allowed so far as the goods, chattels, rights and credits of the deceased are insufficient therefor, within such time as the surrogate may direct. Except that in a proper case the real estate may be sold for the purpose of distribution of the proceeds as provided in subdivision six of section 2703, notwithstanding the giving of such bond.

Source.—Former § 2765, as amended by L. 1885, ch. 213; L. 1894, ch. 735; L. 1904, ch. 750; section new as originally inserted in Code of Civ. Proc.

§ 2705. When and how real property may be mortgaged, leased or sold.

At any time after his appointment and qualification an executor or administrator may apply for an order to mortgage, lease or sell the real property of the decedent for any of the purposes specified in section twenty-seven hundred and three of this act by presenting a verified petition setting forth facts showing that the personal property left by the deceased is insufficient for the payment of the just demands and charges against the same, which petition shall contain a schedule of the funeral expenses and claims presented to and allowed by him, and upon presentation thereof a citation shall issue to, and be served upon all persons interested in the real estate of such decedent, or in any question raised with reference to the mortgage, lease or sale thereof; and upon a judicial settlement of the accounts of an executor or administrator, any party to the proceeding may allege and show by proof such facts and circumstances as are required to give the court jurisdiction to order the mortgage, lease or sale of the real property left by the deceased for any of the reasons specified in section twenty-seven hundred and three. The petition presented by the executor or administrator as above provided, or the petition and account filed in the proceeding for judicial settlement shall be sufficient proof of the facts therein stated unless an issue is raised as to any of such statements. If any person interested in such real estate, or in any question raised with reference to the mortgage, lease or sale thereof, is not a party to such judicial settlement, the surrogate, before proceeding further shall cause such person to be brought in by supplemental citation.

Amended by L. 1918, ch. 317, in effect Sept. 1, 1918. The amendment of 1918 materially changed this section.

Source.—New.

Revisers' note.—Instead of a separate proceeding with its attendant delay and expense, the mortgage, lease or sale is made a part of the judicial settlement when generally all interested parties are before the court. All of the questions arising can then be determined in one decree, and the rights and interests of all parties, both in the personal and real estate, can be properly protected.

It is only when the personal property is insufficient to pay the administration expenses that recourse may be had to the real estate. *Matter of Steele* (1916), 99 Misc. 180, 162 N. Y. Supp. 718.

§ 2706. Trial and determination of claims and expenses; statute of limitations.

If any claim, demand, charge, or expense set forth in such petition presented prior to an application for judicial settlement, or set forth in the account or presented on the judicial settlement is objected to by any party to the proceeding whose interest will be affected by its allowance or disallowance, such claim, demand, charge or expense shall be determined, notwithstanding its admission or allowance by the executor or administrator. Where a defense arises under the statute of limitations as to a claim so admitted or allowed the said claim shall be deemed to be rejected by the executor or administrator at the time of such objection, and the time between the presentation of the claim, or the commencement of an action where the claim was not presented, and the time of such objection shall not be a part of the time limited in this act for commencing an action thereon.

A judgment recovered against the executor or administrator upon a claim against decedent shall be prima facie evidence and proof of the claim against the real property of decedent, and the burden of disproving such judgment or of proving that the claim upon which it was rendered is invalid, or that the judgment was obtained by collusion, shall be upon the party disputing or objecting to the same.

Amended by L. 1918, ch. 317, in effect Sept. 1, 1918. The amendment of 1918 inserted the words "in such petition presented prior to an application for judicial settlement, or set forth" in lines 1 and 2.

Source.—(Last sentence) former § 2755, as amended by L. 1887, ch. 147; L. 1893, ch. 299; L. 1894, ch. 735; L. 1904, ch. 750; L. 1910, ch. 581; originally revised from R. S., pt. 2, ch. 6, tit. 4, §§ 8, 10; L. 1850, ch. 82, § 2.

Intervention by party having an unpaid claim. *Richmond v. Freeman's Nat. Bank*, 86 App. Div. 152, 83 N. Y. Supp. 632. Creditors may intervene for sole purpose of proving their claims and contesting other claims. *Matter of Campbell*, 66 App. Div. 478, 73 N. Y. Supp. 632; *Matter of Knapp*, 25 Misc. 133, 54 N. Y. Supp. 927; *Matter of O'Rourke*, 12 Misc. 248, 34 N. Y. Supp. 45.

Statute of Limitations.—On a creditor's application for an order directing land devised to be sold for debts, judgment creditors of the devisee may set up the statute of limitations as a defense. *Rayner v. Forden*, 23 Hun 264. Devisee can plead statute of limitations. *Butler v. Johnson*, 41 Hun 206, aff'd 111 N. Y. 204. Proceedings dismissed because of laches in moving them. *Matter of Barker*, 48 App. Div. 443, 62 N. Y. Supp. 859; *In re Baker*, 62 N. Y. Supp. 859; *Butler v. Johnson*, 41 Hun 206.

§ 2707. Order to mortgage, lease or sell.

If it shall appear that it is a proper case for the disposition of the decedent's real estate, as provided in this title, on account of deficiency of personal estate, the surrogate shall make an order reciting the determination made, the amount and general nature of the various claims and demands which have been admitted or proved, a description of the property

to be disposed of, and directing the executor or administrator to mortgage, lease or sell the whole or such part of the real property or interest therein, as the surrogate therein directs.

If it appears that one or more distinct parcels of which the decedent died seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

1. Property which descended to the decedent's heirs and which has not been sold by them.
2. Property so descended which has been sold by them.
3. Property which has been devised which has not been sold by the devisee.
4. Property so devised which has been sold by the devisee.

Where an order is made directing the sale of the property, or interest, for distribution only, the order shall fix and determine the rights and interests of the respective parties therein, and if a person entitled to an estate or interest in the property sold is made a party as a person unknown, the court must provide for the protection of his rights, as far as may be, as if he were known and had appeared.

The proceeds of the sale of any real property sold by judgment of another court, which directs said proceeds to be paid into the surrogate's court subject to its order, may be directed by such order of the surrogate to be paid to the executor or administrator to be brought into the account on such judicial settlement and disposed of in accordance with the decree made thereupon.

After making the order for mortgage, lease or sale, the surrogate shall adjourn the judicial settlement to await the proceedings taken under the order.

Source.—Former § 2757, as amended by L. 1904, ch. 750; L. 1911, ch. 435. Former §§ 2760-2763 consolidated by amendment of 1904; originally revised from R. S., pt. 2, ch. 6, tit. 4, §§ 15-20.

Revisers' note.—The order may do any one or all of three things: direct a mortgage, lease or sale on account of deficiency of personal estate, direct a sale for the purposes of distribution, or direct payment to the representative, of any proceeds already held by the court subject to the order of the surrogate court.

Right to credit purchaser with value of his interest in real estate.—Where an executor sells real estate to one to whom the interest of a devisee has been quit-claimed under a valid power of sale, he should demand the full purchase price and then distribute the money and not allow the purchaser the value of his assignor's interest. *Matter of Fagan* (1914), 86 Misc. 144, 149 N. Y. Supp. 217.

§ 2708. Duty of executor or administrator to execute order after filing bond.

Before proceeding to execute the order directing that property be mortgaged, leased or sold the executor or administrator must first execute and file with the surrogate his bond, with two or more sureties, to the people of the state in a penalty fixed by the surrogate, conditioned for the faithful performance of the duties imposed upon the principal by the order and for the accounting by the principal for all moneys received by him whenever he is required so to do by a court of competent jurisdiction; unless the order directs that the proceeds of sale or mortgage be paid by the purchaser or mortgagee to a bank or trust company to the credit of the executor or administrator, subject to the further order of the court.

Source.—Former § 2758, as amended by L. 1894, ch. 735; L. 1904, ch. 750; originally revised from R. S., pt. 2, ch. 6, tit. 4, § 13. All of this section was changed by the amendment of 1904; formerly contained, in part, in §§ 2765, 2766.

Revisers' note.—Instead of having the money paid to the representative, the order may direct its payment directly to a bank or trust company.

§ 2709. Order to be executed and report made.

The executor or administrator shall thereupon execute the order, subject to the approval of the court, and make a report of his proceedings thereunder. The surrogate may confirm or reject the mortgage, lease or sale, extend the order to other parcels, or require a re-execution of the order upon such terms and on such conditions as he may direct, and he may relieve a purchaser from his purchase in a case where he might be so relieved in the supreme court, on such terms as justice shall require.

Source.—New.

Revisers' note.—Many good lawyers hold the belief that the sale should be confirmed and this section provides for that. It brings the execution of the order before the court for ratification.

§ 2710. Execution of order not affected by death, etc.

The death removal, or disqualification, before the complete execution of the order, of all the executors or administrations does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters, as his predecessors might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes.

Source.—Former § 2760, as amended by L. 1885, ch. 213; L. 1904, ch. 750; the amendment of 1904 inserted former § 2770 for this section, which was originally revised from L. 1850, ch. 162.

§ 2711. Execution of the order; decree of judicial settlement; conveyance to heirs.

When the order has been fully executed, the executor or administrator shall file, on or before the adjourned day of the judicial settlement, a supplemental account setting forth his proceedings under the order, the amount of the proceeds of the sale, and his expenses incurred thereunder. The surrogate shall thereupon continue and complete such judicial settlement and make such a disposition of the funds in the hands of the executor or administrator as justice shall require; except that no decree of distribution or disposition of the proceeds shall be made in a proceeding commenced within six months from the grant of letters, until the time for the presentation of claims as fixed by a notice duly published has expired, or one year has expired since letters were first issued, and until all known creditors and persons interested who are not parties to the proceeding have been brought in or have appeared.

Where it not necessary or advantageous to mortgage, lease or sell the real property of the deceased or of the estate, the parties interested may prove upon any such judicial settlement who are the real and true owners of any property devised by said will, or who are the only heirs-at-law of said deceased and entitled to succeed to his real estate, and thereupon such

decree of judicial settlement may establish the rights and interests of the said parties and direct a conveyance to them by such executor or administrator according to their respective rights, in confirmation of their title thereto.

Amended by L. 1917, ch. 684, in effect Sept. 1, 1917.

Source.—New.

Revisers' note.—The last part of the section will accomplish much saving to interested parties, avoiding partition in many cases, and making a record title. The best time to determine who are the heirs-at-law is on judicial settlement when all the parties having the required knowledge are before the court.

§ 2712. Allowance on bid to creditor purchasing.

If, upon a sale for any purpose other than the distribution of the proceeds to the parties entitled thereto, a creditor of the decedent becomes the purchaser of any of the decedent's real property, the surrogate may, upon his application, direct the amount of his claim to be allowed, in the first instance, upon the purchase price; and such purchase shall only be required to pay the balance at the time of the sale. But, in case the proceeds of the decedent's real property shall be insufficient to satisfy the cost and expenses of administration and the debts and funeral expenses of the decedent, the purchasing creditor shall be allowed and credited, upon the judicial settlement of the accounts of the executor or administrator, only the amount he may be entitled to receive upon his claim and shall then pay the difference between the amount originally allowed and the amount he is entitled to receive. In case any purchaser has credit on his bid, as aforesaid, no deed shall be delivered to him until the judicial settlement of the accounts of the executor or administrator nor until he shall have paid the entire amount required under the provisions of this section.

Source.—Former § 2764, as added by L. 1894, ch. 735; L. 1904, ch. 750.

§ 2713. Provision for payment of undetermined claims and debts not yet due.

If any claim remains undetermined at the making of the decree, or any debt is not yet due and the party holding the same does not consent to its present payment, the decree shall direct that sufficient funds be retained by the executor or administrator to meet any such claim or demand when determined, or when payable, and provide for the distribution of any surplus of the amount so retained.

Source.—New.

Revisers' note.—This provides for a case mentioned in [former] § 2751 which will be repealed.

§ 2714. When conveyance not to affect purchaser or mortgagee from heir, etc.

A conveyance of real property, made pursuant to this title, does not affect, in any way, the title of a purchaser or mortgagee, in good faith and for value, from an heir or devisee of the decedent, unless letters testamentary or letters of administration, upon the estate of the decedent, were granted, by a surrogate's court having jurisdiction to grant them, upon a petition therefor, presented within two years after his death.

Source.—Former § 2777; originally revised from L. 1869, ch. 845, § 1, as amended by L. 1873, ch. 211.

Where an heir at law of a decedent gave a mortgage upon all his right, title and interest in the estate of decedent sold by his administrator for payment of debts and the mortgagee was not served with a citation in the proceeding to sell the land for payment of debts, the proceeding is defective and a motion made upon the judicial settlement of the account of the administrators to compel the purchaser to take title to the land will be denied, but the purchaser may not be granted affirmative relief. *Matter of Anderson* (1916), 95 Misc. 79, 160 N. Y. Supp. 509.

§ 2715. Effect of conveyance of decedent's interest under contract.

A conveyance of the decedent's interest in all the real property, held by him under a contract for the purchase thereof, operates as an assignment of the contract to the purchaser; and vests in him, his heirs and assigns, all the right, title and interest of all the persons entitled, at the time of the sale, in and to the decedent's interest in the real property.

A conveyance of the decedent's interest in a part only of the real property, held under such a contract, transfers to the purchaser all the decedent's right, title and interest in and to the part so sold; and all rights, which would be acquired thereto, by the executor or administrator, or by any person entitled, at the time of the sale, to the interest of the decedent therein, by perfecting the title to the property contracted for, pursuant to the contract. Upon fully complying with the contract, the purchaser has the same right to enforce performance thereof, with respect to the part conveyed to him; and the executor or administrator, or his assignee, has the same right to enforce performance, with respect to the residue, as the decedent would have had, if he were living. Any title acquired by the executor or administrator, or his assignee, with respect to the part not sold, must be held in trust for the use of the persons entitled to the decedent's interest; subject to the dower of the widow, if any.

Source.—Former §§ 2782 and 2783. § 2782 originally revised from R. S., pt. 2, ch. 6, tit. 4, § 69. § 2783 originally revised from R. S., pt. 2, ch. 6, tit. 4, §§ 74, 75.

§ 2716. Presumption where records have been removed.

Where the records of the surrogate's court have been heretofore, or are hereafter removed from one place to another, in either the same or another county or the records of such proceedings have been lost or destroyed and twenty-five years have elapsed after a sale or other disposition of real property, or of an interest in real property, as prescribed in this title, the due appointment of a guardian for each infant party to the special proceeding must be presumed, and can be disproved only by affirmative record evidence to the contrary.

Source.—Former § 2785, originally revised from L. 1850, ch. 82, §§ 1-3; L. 1869, ch. 260; L. 1872, ch. 92; L. 1878, ch. 129.

§ 2717. Right of life tenant to be considered in sale.

Where any party to the proceeding has an existing or inchoate right of dower, or where any party to the proceeding has a tenancy by curtesy, or an estate for life or for years in the real estate directed to be sold, the court must determine whether the interests of all the parties will be better pro-

tected, or a more advantageous sale can be made of such real estate by including the sale of such right or interest; and if the court shall so determine there may be included in the order a direction that such right or interest be sold; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. The regulations and provisions of article two, title one of chapter fourteen of this act, prescribing the rules of practice in relation to the right of dower, curtesy and estates for life, or for years in actions for the partition of real estate, so far as the same may be applicable, shall govern and control the disposition of moneys realized on such sale which shall belong to the owner of said right of dower, or tenant for life, or for years.

Source.—Former § 2800, as added by L. 1905, ch. 430.

Application.—*Sperduto v. New York City Interborough R. Co.* (1919), 186 App. Div. 145, 173 N. Y. Supp. 834.

§ 2718. Restitution from assets subsequently discovered.

Where a decree has been made for the application of the proceeds of real property as prescribed in this title, and assets, which should have been applied thereto, are afterward discovered; or, for any other reason, money or other personal property of the decedent, which should have been applied thereto, afterward comes to the hands of the executor, administrator, legatee or next of kin, the heir, devisee, or other person aggrieved may maintain an action to procure reimbursement therefrom.

Source.—Former § 2801, as amended by L. 1894, ch. 735; L. 1904, ch. 750; section new as originally inserted in Code of Civ. Proc.

TITLE V.

Accounting and judicial settlement; effect and contents of decrees on judicial settlement; costs, their amount, allowance and payment; fees of appraisers, referees, jurors and witnesses; commissions and allowances; appeals, how and to what court taken; undertakings and stay of execution; probate of heirship; definitions and application of other sections.

- ARTICLE 1. Accounting by recording settlement or filing account; intermediate, compulsory and voluntary judicial settlement. Decree for payment and distribution and delivery of property.
2. Costs in special proceedings, when and how payable; security for costs. Compensation of special guardian, fees of appraisers, referees, jurors and witnesses. Commissions and compensation of executors, administrators, guardians and testamentary trustees.
 3. Appeal, when, how and to what court taken, and power of appellate court. Undertaking to perfect appeal and stay execution.
 4. Probate of heirship. Definitions, and application of other sections to this chapter.

ARTICLE 1.

ACCOUNTING BY RECORDING SETTLEMENT OR FILING ACCOUNT; INTERMEDIATE, COMPULSORY AND VOLUNTARY JUDICIAL SETTLEMENT; DECREE FOR PAYMENT AND DISTRIBUTION AND DELIVERY OF PROPERTY.

- | | |
|---|---|
| <p>§ 2719. Recording instruments settling estates in part or in whole.</p> <p>2720. Judicial settlement where recovery has been had in negligence action.</p> <p>2721. Filing intermediate account voluntarily or by order.</p> <p>2722. Proceedings where account is filed pursuant to order.</p> <p>2723. Voluntary intermediate judicial settlement of the accounts of an executor, administrator, guardian or testamentary trustee.</p> <p>2724. Compulsory intermediate judicial settlement of the accounts of a guardian or testamentary trustee.</p> <p>2725. Accounting by executor, et cetera, of deceased executors, et cetera.</p> <p>2726. When surrogate's court may require judicial settlement of account.</p> <p>2727. Compulsory judicial settlement; who may petition.</p> <p>2728. Compulsory judicial settlement;</p> | <p>citation; order to account and proceedings thereon.</p> <p>§ 2729. Voluntary judicial settlement.</p> <p>2730. Voluntary judicial settlement; citation.</p> <p>2731. Proceedings on return of citation.</p> <p>2732. Affidavit to account.</p> <p>2733. Accounting for profit and loss.</p> <p>2734. Property of an estate or trust to be delivered upon order of the court.</p> <p>2735. Decree for payment and distribution.</p> <p>2736. Idem; when specific property may be delivered.</p> <p>2737. Idem; when money may be retained.</p> <p>2738. Adjustment of advancements.</p> <p>2739. Idem; share of infant.</p> <p>2740. Legacy, et cetera, to unknown person to be paid into state treasury.</p> <p>2741. When legacy, et cetera, to be paid to county treasurer.</p> <p>2742. Effect of judicial settlement of account; decree.</p> |
|---|---|

§ 2719. Recording instruments settling accounts in part or in whole.

There may be recorded in the surrogate's office any instrument settling an account in whole or in part, executed by one or more executors, administrators, testamentary trustees, or guardians, and one or more legatees, devisees, distributees, creditors or wards who have attained full age. Every such instrument to be recorded shall be acknowledged, or proved, and duly certified; and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution.

Source.—Former § 2502, as added by L. 1906, ch. 350.

fund in his hands, and the security or other instrument by which such investment or disposition is evidenced, or the property in the purchase of which such investment or disposition has been made, shall not be a part of the assets which his successor may be legally required to receive, the decree shall direct that such security or other instrument, or such property, if practicably capable of delivery under such direction, be forthwith deposited with a safe deposit company, authorized by law to do business as such, in such manner as to prevent the withdrawal of the same except upon the order of the surrogate.

Source.—New.

Revisers' note.—This new section enables the surrogate to retain control of the securities, and permit their sale only upon application of the proceeds upon the decree. Heretofore the representative could take the securities and never satisfy the decree.

ARTICLE 3.

APPLYING RENTS AND THE PROCEEDS OF MORTGAGE, LEASE OR SALE OF REAL ESTATE TO THE PAYMENT OF DEBTS, FUNERAL AND ADMINISTRATION EXPENSES, AND CHARGES UPON REAL ESTATE; SALE FOR DISTRIBUTION AND CONVEYANCE IN CONFIRMATION OF TITLE.

- | | |
|---|--|
| <p>§ 2701. When rents of real estate may be applied in the same manner as proceeds of mortgage, lease or sale.</p> <p>2702. What property subject to disposition for the payment of debts, funeral and administration expenses.</p> <p>2703. For what purposes real property is subject to disposition.</p> <p>2704. Sale to be refused if bond be given.</p> <p>2705. When and how real property may be mortgaged, leased or sold.</p> <p>2706. Trial and determination of claims and expenses; statute of limitations.</p> <p>2707. Order to mortgage, lease or sell.</p> <p>2708. Duty of executor or administrator to execute order after filing bond.</p> <p>2709. Order to be executed and report made.</p> | <p>§ 2710. Execution of order not affected by death, et cetera.</p> <p>2711. Execution of the order; decree of judicial settlement; conveyance to heirs.</p> <p>2712. Allowance on bid to creditor purchasing.</p> <p>2713. Provision for payment of undetermined claims and debts not yet due.</p> <p>2714. When conveyance not to affect purchaser or mortgagee from heir, et cetera.</p> <p>2715. Effect of conveyance of decedent's interest under contract.</p> <p>2716. Presumption where records have been removed.</p> <p>2717. Right of life tenant to be considered in sale.</p> <p>2718. Restitution from assets subsequently discovered.</p> |
|---|--|

§ 2701. When rents of real property may be received by the executor or administrator.

An executor or administrator may present a petition to the surrogate's court praying for leave to enter into possession of real property left by his decedent and to manage and control the same and receive the rents thereof. If from such *position it shall appear that a mortgage, lease or sale of such real property will be necessary unless the purposes specified in section 2703 of this title be otherwise fulfilled, a citation shall issue to all known persons within the state of New York who have the legal title to such real estate by descent or devise to show cause why the prayer of the petition should not be granted. Upon the return of the citation the surro-

* So in original.

trary be shown; the fact that the claim has been in dispute affords no ground for denying the application. *Matter of Calahan*, 66 Hun 118, 20 N. Y. Supp. 824.

After an executor's account has once been judicially settled, the mere fact that since the entry of the decree assets have come into his possession for which the decree made no provision does not, of itself, afford sufficient grounds for compelling another accounting. *Wetmore v. Wetmore*, 3 Dem. 414.

Action of the surrogate under subdivision 4 is a special proceeding and therefore subject to the statute of limitations. *Matter of Hale's Estate*, 6 App. Div. 411, 39 N. Y. Supp. 577.

Executor may be required to render an intermediate account on the petition of the widow of the testator who is entitled to a pecuniary provision in lieu of dower under the will. *Matter of Tisdale*, 110 App. Div. 857, 97 N. Y. Supp. 494.

A person not a creditor or entitled to a legacy or other pecuniary provision or distributive share under a will cannot compel the executor to account. *Matter of Steiner*, 135 App. Div. 162, 118 N. Y. Supp. 833.

Payment of legacy.—Upon a petition that an executor file an inventory and pay a legacy, and service of a citation on the executor, the surrogate has power to examine and settle the accounts, and to decree distribution to the legatees; and he can order the executor to account toward the ascertainment of money or property applicable to the petitioner's claim. *Matter of Macaulay*, 27 Hun 577, aff'd 94 N. Y. 574.

Protection of trust estate.—The duty of an executor or an administrator to keep the trust estate safely may be enforced by

means of an intermediate accounting. *Matter of Jones*, 30 Misc. 354, 63 N. Y. Supp. 726, aff'd 51 App. Div. 420, 64 N. Y. Supp. 667.

An accounting may be ordered by the surrogate on his own motion. *Matter of Kelly v. Langevin* (1912), 153 App. Div. 322, 137 N. Y. Supp. 1099.

Accounting by testamentary trustee.—The costs and expenses of an annual accounting by a testamentary trustee should be borne by the income unless they have been incurred in the administration, preservation or increase of the principal. *Matter of Long Island Loan & Trust Co.* (1913), 79 Misc. 176, 140 N. Y. Supp. 752.

Jurisdiction.—No authority has been conferred in proceedings hereunder to hear and determine any collateral or incidental disputes involving the rights of claimants to any interest in the estate. *Van Linderen v. Lawrence*, 50 Hun 272, 3 N. Y. Supp. 25. Supreme court not deprived of its jurisdiction over trustees and trust funds. *Cass v. Cass*, 61 Hun 460, 16 N. Y. Supp. 229.

Trustee and executor.—Executor cannot become a trustee until a final accounting and discharge by surrogate's decree. *Matter of Hood*, 98 N. Y. 363.

Accounting by testamentary guardian. *Matter of Hawley*, 104 N. Y. 250. The surrogate has jurisdiction to pass the accounts of a testamentary trustee. *Haight v. Brisbin*, 36 Hun 579; *Matter of Sill*, 41 Misc. 270, 84 N. Y. Supp. 213.

Right to consider validity of legacy on accounting.—Upon the hearing of a proceeding brought by an executor for the payment of debts and funeral expenses, the validity of a legacy given by the will cannot be considered. *Matter of Cole* (1914), 85 Misc. 630, 148 N. Y. Supp. 1099.

§ 2722. Proceedings where account is filed pursuant to order.

On the return of the order, where one is made as prescribed in the foregoing section of this article, if the respondent fails either to file his account, appear, or to show good cause to the contrary, or to present in a proper case, a petition as prescribed in section 2729, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose. If it appears that the account can be then judicially settled a supplemental citation may be issued directed to the persons who must be cited on a petition for a judicial settlement of his account. The pendency of a proceeding against the respondent to compel him to account does not preclude him from presenting a petition as prescribed in section 2729. If such petition is presented at or before the return day of the order, the citation issued thereon need not be directed to petitioner in the special proceeding pending against him and the two proceedings must be consolidated. When such account is filed in connection with a proceeding then pending any party may contest the account as to any matter affecting his interest, and the decree or other determination

made shall go to the extent only of determining the question or questions necessary to be decided in order to grant or deny the relief asked for in the special proceeding in which the account was ordered to be filed. Where the accounting is made a judicial settlement by the issuing of a supplemental citation or the filing of a petition as above provided, the same proceeding shall be had as on a judicial settlement.

Source.—Former § 2727, as amended by L. 1893, ch. 686; L. 1901, ch. 408; L. 1911, ch. 432; the amendment of 1893 consolidated former §§ 2726-2728. § 2726 was new as originally inserted in Code of Civ. Proc. §§ 2727, 2728 originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 53, 60.

Revisers' note.—This section is now made to apply where the account is filed voluntarily or by order when no decree is to be made; also when an account is filed to disclose the condition of the estate in order to decide a question arising in another proceeding (§§ 1381, 1826).

§ 2723. Voluntary intermediate judicial settlement of the account of an executor, administrator, guardian or testamentary trustee.

An executor, administrator, guardian or testamentary trustee may, at any time after one year has expired since letters were issued to him, or he was appointed and qualified, and not oftener than annually thereafter, file in the surrogate's court having jurisdiction an intermediate account and a petition for its judicial settlement.

If the surrogate entertain such application, a citation shall issue to all persons who would be required to be cited upon a voluntary final judicial settlement of such account, and the same proceeding shall be had and with like effect, so far as the settlement of such account is concerned, as though such proceeding were a final judicial settlement.

Source.—Former § 2802, as amended by L. 1885, ch. 518; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 66; L. 1866, ch. 115.

Revisers' note.—It has been a great hardship that there was no provision for an intermediate judicial settlement. The guardian ought not to be compelled to wait from 10 to 20 years before he can get credit for disbursements or have his commission or income allowed. See new § 2753.

§ 2724. Compulsory intermediate judicial settlement of the account of a guardian or testamentary trustee.

The surrogate of his own motion, or upon the petition of any person interested in the fund held by a guardian or testamentary trustee, may by order direct such guardian or testamentary trustee to make and settle an intermediate account of his proceedings. The proceedings upon the return of the order shall be the same as though the respondent had filed his petition for a voluntary intermediate judicial settlement as provided in section 2723 of this title, and the decree entered shall have the same force and effect as if made in such proceeding.

Source.—New.

Testamentary trustee; effect of death of beneficiary.—The death of a life beneficiary does not, in and of itself sever the trustee's relation to the trust fund, but he continues as trustee until the amount of the fund and the person to whom it is payable have been judicially determined; such determination can be had only after an accounting. *Deering v. Pierce* (1912), 149 App. Div. 10, 133 N. Y. Supp. 582.

§ 2725. Accounting by executor, etc., of deceased executors, etc.

Where an executor, administrator, guardian or testamentary trustee dies, the surrogate's court has the same jurisdiction, upon the petition of any person who would be required to be cited upon a voluntary judicial settlement of his account to compel the executor or administrator of the decedent to account, which it would have against the decedent if his letters had been revoked, or he had been removed, by a surrogate's decree. An executor or administrator of a deceased executor, administrator, guardian, or testamentary trustee may voluntarily account for the acts and doings of the decedent, and for the trust property which had come into his possession or into the possession of the decedent. On the death of any executor, administrator, guardian or testamentary trustee while an accounting by or against him, as such, is pending before a surrogate's court, such court may continue said proceeding where his executor, administrator or successor has voluntarily made himself a party thereto or has been brought in by a citation to show cause why he should not be made a party, and proceed with such accounting and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died or in a case where the executor or administrator of said last mentioned decedent had voluntarily petitioned for an accounting as provided for in this section. On a petition filed either by or against an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, the successor of such decedent, his executor or administrator, and all persons who would be necessary parties to a proceeding commenced by such decedent for a judicial settlement of his accounts shall be brought in. If upon such accounting, the surrogate finds that there can be a distribution, in whole or in part, to the parties entitled thereto, he may make a decree accordingly, and he may also therein direct payment and delivery, by the accounting party, upon such terms and security as may be proper, of the balance, if any, of said estate or fund. For the purpose of such payment and distribution the accounting party shall have all the powers and duties of the deceased representative, trustee or guardian.

Source.—Former § 2606, as amended by L. 1901, ch. 524; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—The parts omitted have been added to other sections or put in new sections. It does not seem that they belong in this section.

If a new representative has been appointed, why should all legatees or next of kin be cited? This makes a double citation of all parties, once on the accounting of the representative of the deceased representative, and again upon the accounting of the successor. To meet this difficulty the revisers suggest in the new matter [beginning "If upon such accounting"] that the surrogate be given, in a proper case, power to order distribution without the intervention of a successor.

Application.—Section does not apply to special guardian for the sale of the real estate of infants. *Long v. Long*, 142 N. Y. 545.

Amendment of 1884.—Under this section, as amended in 1884, the personal representative of a deceased executor cannot be required to deliver over trust property of the first decedent's estate except to the court or to a newly-appointed representative. *Matter of Fithian*, 44 Hun 457, 5 Dem. 305. As to effect of amendment of

1884, see also *Matter of Butler*, 1 Connolly 58, 9 N. Y. Supp. 641.

Who may petition for accounting.—Legatee of the original testator to apply for accounting by an executor of a deceased executor. *Matter of Irvin*, 68 App. Div. 158, 74 N. Y. Supp. 443. Proceeding by a legatee under this section to compel the personal representative of a deceased executor to account, see *Crawford v. Crawford*, 5 Dem. 37. A surviving trustee may compel an accounting by the executors of

his deceased cotrustee. *Matter of Kreischer*, 30 App. Div. 313, 51 N. Y. Supp. 802. Next of kin may compel the executrix of an administratrix to account. *Matter of Boylan*, 25 Misc. 281, 55 N. Y. Supp. 426. Action by next of kin to compel administrator to account. *Ward v. Ward*, 57 Misc. 428, 109 N. Y. Supp. 711, aff'd 130 App. Div. 27, 114 N. Y. Supp. 326.

Effect of surrogate's decree.—Surrogate's decree is not conclusive evidence as to assets in the hands of an administratrix of a deceased trustee. *Matter of Seaman*, 63 App. Div. 49, 71 N. Y. Supp. 376. As to the change wrought by the provision of this section in reference to the method of establishing a devastavit in an action upon the bond of a deceased administrator, see *Potter v. Ogden*, 136 N. Y. 384. Form of decree requiring an administrator to pay a certain sum out of the estate of which his intestate was administrator, see *Potter v. Ogden*, 65 Hun 27, 19 N. Y. Supp. 594, aff'd 136 N. Y. 384.

Administrator *de bonis non* may sue the surety on his predecessor's bond; leave to sue need not be obtained. *Dunne v. American Surety Co.*, 43 App. Div. 91, 59 N. Y. Supp. 429.

Executor of deceased executor can be required to deliver property in his hands to the surrogate's court or a representative of the first estate, but he cannot be required to distribute its unadministered funds. *Matter of Moehring*, 154 N. Y. 423; *Squire v. Bugbee*, 65 App. Div. 429, 72 N. Y. Supp. 1023. An executrix of a deceased executor who has not rendered an account of the estate is not bound to pay over to a substituted trustee the amount of a trust fund directed to be set aside by the will of her testator's testator. *Mount v. Mount*, 68 App. Div. 144, 74 N. Y. Supp. 148.

This section does not confer upon the court the right to order the delivery of property of a decedent's estate to the successor of a deceased representative, nor does it invest the representative of a deceased representative with the right to administer upon the decedent's estate. It is intended to give the surrogate's court power to order distribution without the intervention of a successor. *Matter of Fox* (1918), 104 Misc. 43, 171 N. Y. Supp. 986.

Funds recovered should not be paid to a creditor or legatee instituting the accounting, but to the successor of the deceased executor, or into court or to some person authorized by law to receive the fund. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, aff'd 195 N. Y. 3.

Right to review.—Revivor of a proceeding for an accounting by an executor who dies while it is pending; amendments of 1901 and 1902 to this section considered. *Matter of Tredwell*, 77 App. Div. 155, 79 N. Y. Supp. 83, s. c., 85 App. Div. 570, 83 N. Y. Supp. 242. Surrogate cannot make an order, without notice to any of the

parties in interest, declaring a proceeding to compel an administrator to account to have abated because of his death. *Matter of Armstrong*, 72 App. Div. 286, 76 N. Y. Supp. 37.

Parties.—As to parties to judicial settlement, see *Matter of Walton*, 38 Misc. 723, 78 N. Y. Supp. 296.

Termination of proceeding.—Application under this section to compel an accounting is not terminated by a verified denial that property has come into the possession or is under the control of the representative of a deceased corepresentative. *Wood v. Crooke*, 5 Redf. 381. But where a verified answer is filed denying receipt of property, which answer was not controverted, held, that this terminated the proceeding. *Peck v. Sherwood*, 5 Redf. 416.

Consolidation of proceedings.—What proceedings under this section cannot be consolidated. *Matter of Shipman*, 82 Hun 108, 31 N. Y. Supp. 571.

Statute of limitations as to compulsory accounting. *Matter of Lewis*, 36 Misc. 741, 74 N. Y. Supp. 469. Proceeding by an administrator to compel representative of his deceased predecessor to account is controlled by the ten years' statute of limitations. *Matter of Rogers*, 153 N. Y. 316. As to statute of limitations, see also *Matter of Van Dyke*, 5 Dem. 331; *Matter of Boylan*, 25 Misc. 281, 55 N. Y. Supp. 426; *Matter of Irwin*, 68 App. Div. 158, 74 N. Y. Supp. 443.

Beneficiary's right to an accounting from the representatives of a deceased executor accrues the moment they are appointed. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, aff'd 195 N. Y. 3.

Guardian and ward.—Application for accounting may be made immediately upon appointment of representative of a deceased guardian, executor, etc. *Matter of Wiley*, 119 N. Y. 642, aff'd 55 Hun 248, 7 N. Y. Supp. 828. As to order directing executor of deceased guardian to pay over the fund on the ward's attaining majority, see *Matter of Hicks*, 54 App. Div. 582, 66 N. Y. Supp. 1028, rev'd 170 N. Y. 195.

Sureties on a guardian's bond concluded by a decree against his executrix. *Martin v. Hann*, 32 App. Div. 602, 53 N. Y. Supp. 186.

Where, on an accounting by the administrator of a deceased general guardian, a decree is rendered adjudging that the deceased guardian was chargeable with a certain sum, it is not necessary that all remedies against the administrator shall be exhausted before recourse against guardian's sureties. *Van Zandt v. Grant*, 67 App. Div. 70, 73 N. Y. Supp. 600, aff'd 175 N. Y. 150. Identification of trust fund in hands of deceased guardian; order compelling accounting under this section not granted. *Matter of Hicks*, 170 N. Y. 195.

Liability for misconduct.—Proceedings under this section to determine the liability of the estate of an executor for

misconduct in his trust to be instituted within one year. *Matter of Schlesinger*, 24 Misc. 456, 53 N. Y. Supp. 710, rev'd on other grounds, 36 App. Div. 77, 55 N. Y. Supp. 514. Consent or connivance of administratrix held not a defense to an accounting demanded by her of the estate of a deceased corepresentative, who was a cashier and deposited moneys of the estate in his own failing bank. *Matter of Scudder*, 21 Misc. 179, 47 N. Y. Supp. 101.

Power of surrogate to compel accounting.—Power of surrogate to compel accounting by an executor, etc., of an executor, etc., see *Matter of Fithian*, 44 Hun 457; *Matter of Hull*, 97 App. Div. 258, 89 N. Y. Supp. 939; *Matter of Wood*, 34 Misc. 209, 69 N. Y. Supp. 491; *Matter of Watson*, 64 Hun 369, 19 N. Y. Supp. 637; *Matter of Latz*, 33 Hun 618; *Wallace v. Payne*, 14 App. Div. 597, 43 N. Y. Supp. 1119. Extent of accounting which surrogate's court may exact under this section. *Le Count v. Le Count*, 1 Dem. 29.

Surrogate's court has jurisdiction of an action to compel the executor of a deceased testamentary trustee to account. *Post v. Ingraham*, 122 App. Div. 738, 107 N. Y. Supp. 737.

Power of surrogate the same as if deceased executor's letters had been revoked

in his lifetime. *Matter of Clark*, 119 N. Y. 427; *Herbert v. Stevenson*, 3 Dem. 236; *Matter of Fithian*, 15 St. Rep. 734; *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795. Power of surrogate to direct the executor of deceased guardian to account. *Matter of Camp*, 91 Hun 204, 36 N. Y. Supp. 1123. Power of surrogate to turn an accounting instituted by the executors of a deceased executor into a judicial settlement, see *Matter of Furniss*, 86 App. Div. 96, 83 N. Y. Supp. 530.

Surrogate may compel executrix of deceased administrator to pay moneys into court although deceased administrator had accounted. *Matter of Collyer*, 113 App. Div. 468, 99 N. Y. Supp. 213.

Representative of a deceased executor, etc., may be compelled to render successive accounts to each of the persons mentioned therein as having a right to demand an account. *Spencer v. Popham*, 5 Redf. 425.

Surrogate may require the executor of a deceased executor to account for the acts and doings of the decedent and for the trust property which has come into the possession of the decedent. *Matter of Walton*, 112 App. Div. 176, 98 N. Y. Supp. 42.

Section cited.—*Matter of D'Adamo* (1916), 94 Misc. 1, 157 N. Y. Supp. 374.

§ 2726. When surrogate's court may require judicial settlement of account.

In either of the following cases, the surrogate's court may, from time to time, compel a judicial settlement of the account of an executor, administrator, guardian or trustee:

1. In the case of an executor or administrator.

a. Where fifteen days have elapsed after the time in which to present claims has expired, or one year has expired since letters were issued to him.

b. Where letters issued to him have been revoked, or, for any other reason, his powers have ceased.

c. Where the administrator is a temporary administrator.

d. Where he has sold, or otherwise disposed of, any of the decedent's real property, or the rents, profits or proceeds thereof, pursuant to a power contained in the decedent's will, or an order of the surrogate's court, and fifteen days have elapsed after the time in which to present claims has expired, or one year has elapsed since letters were issued to him.

2. In the case of a guardian.

a. Where the ward has attained the age of twenty-one years, or has died.

b. Where the guardian is a guardian in socage, or the guardian of the infant's person only.

c. Where letters issued to him have been revoked, or his powers have ceased.

3. In the case of a trustee.

a. Where the trustee has been removed, or for any other reason his powers have ceased.

b. Where the trusts, or one or more distinct and separate trusts, created by the terms of the will, have been executed, or are ready to be executed;

so that the persons beneficially interested are, by the terms of the will, or by operation of law, entitled to receive any money or other personal property from the trustee.

Source.—Former §§ 2605, 2726, 2803, 2807, 2808, 2837, 2847, 2848 and 2856. § 2605 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 40, ch. 8, tit. 3, § 17; L. 1865, ch. 733, § 1. § 2726, as amended by L. 1893, ch. 686; the amendment of 1893 consolidated former §§ 2724 and 2725. § 2724 originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 52, 68; and tit. 4, §§ 35, 57; L. 1837, ch. 460, § 36, first clause; L. 1865, ch. 733, § 1. § 2725 originally revised from R. S., pt. 2, ch. 6, tit. 4, § 24, last clause. §§ 2803, 2807, 2808; new as originally inserted in Code of Civ. Proc., but see L. 1850, ch. 272, as amended by L. 1866, ch. 115; L. 1867, ch. 782, as amended by L. 1871, ch. 482; L. 1870, ch. 359, §§ 3, 4. § 2837 originally revised from L. 1837, ch. 460, § 56. § 2847, as amended by L. 1890, ch. 62; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 11. § 2848, as amended by L. 1881, ch. 535; section new as originally inserted in Code of Civ. Proc. § 2856, as amended by L. 1891, ch. 197; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—Subd. 3 eliminated and added to subd. d. Concerning temporary administrator inserted as c. Last sentence of subd. 4 struck out as now inconsistent. Notice that settlement may be had at expiration of notice to creditors.

This section now includes guardians and trustees and permits the repeal of [former] §§ 2847 and 2448, 2807.

Guardian in socage, see new § 2510, subd. 8.

Scope and application of section.—The surrogate's court cannot compel a judicial settlement of the administrator's accounts until the expiration of one year from the issue of letters. *Matter of Miner*, 39 Misc. 605, 80 N. Y. Supp. 643. An executor is not compelled to account until one year after issue of letters although another executor had then served seven years and until death. *Matter of Crowley*, 33 Misc. 624, 68 N. Y. Supp. 939; *Cuthbert v. Jacobson*, 2 Dem. 134; *Matter of Blair*, 49 App. Div. 417, 63 N. Y. Supp. 678. The jurisdiction not affected by an answer denying the alleged relationship of the petitioners to the decedent. *Matter of Kipp*, 17 Misc. 491, 41 N. Y. Supp. 259, aff'd 5 App. Div. 625, 39 N. Y. Supp. 1126. The surrogate's court has jurisdiction to finally settle the account of an executor though the money in his possession is solely derived from the sale of testator's lands, sold under a power contained in a will. *Baldwin v. Smith*, 3 App. Div. 350, 38 N. Y. Supp. 299. As to power to compel a judicial settlement of an executor's accounts, see also *Matter of Eagan*, 89 App. Div. 565, 85 N. Y. Supp. 663.

In case a year has elapsed since letters were issued to an executor, a surrogate's court has power on its own motion, with or without a petition, to require from the executor a judicial settlement of his account. *Matter of Stevenson*, 77 Hun 203, 28 N. Y. Supp. 362. As to a single proceeding to compel an account of personalty and the proceeds of real estate sold for payment of debts, see *Matter of Bradley*, 25 Misc. 261, 54 N. Y. Supp. 555, aff'd 42 App. Div. 301, 59 N. Y. Supp. 105.

The surrogate may refuse the petition where it appears that the estate has been settled out of court, and that all the beneficiaries have received their share and re-

leased the executor. *Matter of Wagner*, 119 N. Y. 28.

Accounting of temporary administrator to administrator with will annexed, see *Matter of Goetz*, 120 App. Div. 10, 104 N. Y. Supp. 832.

Who may apply.—A judicial settlement of the account of an executor can be had in either of only two ways: (1) Upon petition of a creditor or person interested, under section 2726, or (2) upon a petition by the accounting party, under section 2729. *Schlegel v. Winckel*, 2 Dem. 232.

Legatees after a life estate are persons interested in the estate and are qualified to invoke the jurisdiction of the court to compel a judicial settlement of the accounts of executrix. *Matter of Jones*, 30 Misc. 354, 63 N. Y. Supp. 726; aff'd 51 App. Div. 420, 64 N. Y. Supp. 667. As to when the legatee of an original testator may apply for an account by an executor of a deceased executor of the latter's proceedings as such executor. *Matter of Irvin*, 68 App. Div. 158, 74 N. Y. Supp. 443.

An unknown brother of an intestate not cited or appearing at the judicial settlement of the estate may institute proceedings for a new accounting upon notice to parties interested and proof of his relationship. *Matter of Killan*, 172 N. Y. 547.

Statute of limitations.—The limitation of six years applies to a proceeding by a legatee or next of kin to compel an executor or administrator to account and for payment or distribution. *Matter of Miller*, 15 Misc. 556, 37 N. Y. Supp. 1129. It also applies to the right of a creditor to compel an executor or administrator to account after six years have elapsed since the right to compel such accounting accrued. *Matter of Schlesinger*, 36 App. Div. 77, 55 N. Y. Supp. 514; *Matter of Kirkpatrick*, 9 Misc. 228, 30 N. Y. Supp. 283.

The statute of limitations governing the creditor's right to require the administrators to render an account of the proceeds of a sale does not begin to run until the administrators receive such proceeds. *Matter of Sargent*, 42 App. Div. 301, 59 N. Y. Supp. 105.

An executor occupies a trust relation toward the persons entitled to take pursuant to the will, and the statute of limitations does not begin to run against the right of such persons to compel the executor to render an account until the executor has, by some act sufficient for the purpose, repudiated his liability as trustee. *Matter of Meyer*, 98 App. Div. 7, 90 N. Y. Supp. 185.

The right to compel an accounting accrues one year after the granting of letters and the statute ordinarily runs against it in six years from such grant, so far as a legatee is concerned. But this rule is subject to the exception that where the executor had within six years made payments to the legatee the running of the statute is intercepted. *Matter of Toms* (1914), 84 Misc. 312, 147 N. Y. Supp. 550.

Testamentary trustee; petition.—Petition asking for the settlement of the account of trustees under a will, see *Matter of Rogers*, 2 Connolly 639, 16 N. Y. Supp. 197.

Idem; to appear by guardian.—Petition for an infant praying for the settlement of a trustee's account not dismissible because of petitioner's failure to appear by

general or special guardian. *Matter of Wood*, 5 Dem. 345.

Idem; when lapse of time does not excuse from accounting.—If a testamentary trustee fails to distinctly repudiate the relationship and so inform the beneficiary, lapse of time will not excuse him from the necessity of accounting. *Matter of Martin*, 27 Misc. 416, 59 N. Y. Supp. 374.

Temporary guardian; proceeding for an accounting.—Temporary guardian to protect the rights of the infant in the proceeding, see *Matter of White*, 52 App. Div. 225, 65 N. Y. Supp. 168.

Petition by guardian to obtain judicial settlement of his accounts and a decree revoking his letters of guardianship, see *Matter of Wright*, 2 Connolly 108, 20 N. Y. Supp. 86. See also *Matter of Watson*, 2 Dem. 642; *Skidmore v. Davis*, 10 Paige 316; *Estate of Voelpel*, 3 Law Bull. 79.

Testamentary guardian.—Application for the accounting of a testamentary guardian, see *Matter of Hawley*, 104 N. Y. 250. Petition signed by guardian without adding any official designation, see *Matter of Hurlbut*, 43 Hun 311. A surety not entitled to any notice of the accounting, see *Smith v. Lusk*, 2 Dem. 595. Attorney or counsel of a guardian not compelled to account, see *Matter of O'Neil*, 1 Tuck. 36. Statement of account, see *Freeman v. Mohrman*, 1 Dem. 461.

Special proceeding by a ward against a deceased guardian's executor for an accounting barred by the lapse of time. *Matter of Lewis*, 74 N. Y. Supp. 469.

§ 2727. Compulsory judicial settlement; who may petition.

A petition praying for the judicial settlement of the accounts of a person described in the last section, and that such person may be cited to show cause why he should not render and settle such account may be presented in a case prescribed in the last section as follows:

1. Against an executor or administrator,
 - a. By a creditor or a person interested in the estate or fund,
 - b. By or on behalf of a child born after the making of the will, when interested in the estate.
2. Against a guardian,
 - a. By the ward after he has become twenty-one years of age,
 - b. By the executor or administrator of a ward who has died,
 - c. By the ward or a duly appointed guardian where a person has been acting as guardian in socage.
3. Against a testamentary trustee,
 - a. By any person beneficially interested in the execution of any of the trusts, or by any person on behalf of an infant so interested, unless his account has been judicially settled within one year preceding the application.

In any case,

- a. By a surety on the official bond of the person required to account, or the legal representative of such a surety,

b. By the successor, or by the remaining executor, administrator, guardian or trustee, where a representative, guardian or testamentary trustee has been removed or his letters revoked.

c. By the attorney-general of the state where any of the property or fund may belong to the state of New York, by reason of the death of any testator, intestate, or person interested without leaving known heirs-at-law or next of kin, as the case may be, or such heirs-at-law or next of kin are unknown.

Source.—Former §§ 2727, 2803, 2808, 2847 and 2856. § 2727, as amended by L. 1893, ch. 686; L. 1901, ch. 408; L. 1911, ch. 432; the amendment of 1893 consolidated former §§ 2726-2728. § 2726 new as originally inserted in Code of Civ. Proc. §§ 2727, 2728 originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 53, 60. §§ 2803, 2808 new as originally inserted in Code of Civ. Proc., but see L. 1850, ch. 272, as amended by L. 1866, ch. 115; L. 1867, ch. 782, as amended by L. 1871, ch. 482; L. 1870, ch. 359, §§ 3, 4, § 2847, as amended by L. 1890, ch. 62; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 11. § 2856, as amended by L. 1891, ch. 197; section new as originally inserted in Code of Civ. Proc.

Power of surrogate.—The surrogate may compel an account to enable the legatee to ascertain what is in the hands of a trustee, although the party applying be not entitled to a decree for the payment of any amount. *Harris v. Ely*, 25 N. Y. 138. As to the jurisdiction of the supreme court and of the surrogate's court over an executor's accounting, see *Steinway v. Von Bernuth*, 59 App. Div. 261, 69 N. Y. Supp. 1146.

The exercise by a surrogate of his discretion in denying the application of judgment creditors of a decedent for an order compelling the executor of the decedent to render an account will not be disturbed, where it appears that an appeal from the judgment is pending in the court of appeals and that the reversal of the judgment will deprive the judgment creditors of their standing. *Matter of Merritt*, 35 App. Div. 337, 54 N. Y. Supp. 955. The surrogate's discretion is not exhausted by the issuance of a citation, but he may thereafter dismiss the proceeding. *Matter of Stevenson*, 77 Hun 203, 28 N. Y. Supp. 362.

Who may apply.—Proceedings to compel an executor to account may be instituted by the testator's children. *Matter of Meyer*, 98 App. Div. 7, 90 N. Y. Supp. 185. A great grandchild may petition for an accounting. *Matter of Watts*, 68 App. Div. 357, 74 N. Y. Supp. 75. An unknown brother of an intestate not cited or appearing at a judicial settlement of an estate may institute proceedings for a new accounting. *Matter of Killan*, 172 N. Y. 547, rev'g 66 App. Div. 312, 72 N. Y. Supp. 714.

If executors unreasonably neglect to account, a claimant whose claim has been rejected may compel an accounting under this section. *Clarke v. Scovill*, 111 App. Div. 35, 97 N. Y. Supp. 1117.

An allegation, in a verified petition to compel an administrator to account, that petitioner was a niece of decedent and one

of his next of kin, though denied by a verified answer, sufficiently shows that she is a person interested in the estate so as to give the surrogate jurisdiction. *Matter of Kipp*, 17 Misc. 491, 41 N. Y. Supp. 259; aff'd 5 App. Div. 625, 39 N. Y. Supp. 1126.

A receiver in supplementary proceedings may require an accounting by executor. *Matter of Beyea*, 10 Misc. 198, 31 N. Y. Supp. 200. The holder of a claim for funeral expenses is not a creditor nor a person interested in the estate within the meaning of those terms as used in section 2727. *Matter of Flint*, 15 Misc. 598, 38 N. Y. Supp. 188. As to when a creditor is entitled to compel an accounting, see *Matter of Blum*, 83 App. Div. 161, 82 N. Y. Supp. 491; *Matter of Whitehead*, 38 App. Div. 319, 56 N. Y. Supp. 989; *Matter of Clauss*, 16 App. Div. 34, 44 N. Y. Supp. 805; *Matter of Callahan*, 66 Hun 118, 20 N. Y. Supp. 824; *Matter of Reinach*, 41 Misc. 78, 83 N. Y. Supp. 651; *Matter of Farmer*, 35 Misc. 150, 71 N. Y. Supp. 462; *Matter of Von Der Lieth*, 25 Misc. 255, 55 N. Y. Supp. 428.

A legatee under a will may compel an executor of it to account but there can be no distribution of the fund until all the parties in interest have been cited and given an opportunity to be heard. *Matter of Rainforth*, 37 Misc. 660, 76 N. Y. Supp. 314. If a residuary legatee has such an interest as to give him a right to compel the executrix to account in the first instance his interest will also qualify him to ask for a supplemental account when brought into court upon the citation of such executrix to attend her accounting. *Matter of Hunt*, 84 App. Div. 159, 82 N. Y. Supp. 538.

An assignee of a legatee of a chattel is not entitled under section 2727 to maintain a proceeding to compel the executrix, who is the legatee of all the rest of the personal estate of the deceased, to render an account where it appears that there are no outstanding debts due from the es-

tate. *Matter of Egan*, 89 App. Div. 565, 85 N. Y. Supp. 663.

The creditor of a distributee is not a person who is entitled to compel an administrator to account. In *re Witt's Estate* (1913), 141 N. Y. Supp. 179.

As to who may apply for an accounting, see also *Matter of Wood*, 119 N. Y. 661; *Clark v. Scovill*, 111 App. Div. 35, 97 N. Y. Supp. 1117; appeal dismissed, 185 N. Y. 541; *Hood v. Hood*, 85 N. Y. 561; *Harrison v. Clark*, 67 N. Y. 572; *Wood v. Brown*, 34 N. Y. 337; *Matter of De Pierris*, 79 Hun 279, 29 N. Y. Supp. 360; *Matter of Prout*, 52 Hun 109. 4 N. Y. Supp. 841; *Matter of Read*, 41 Hun 95; *Buchan v. Rintoul*, 10 Hun 183; *aff'd* 70 N. Y. 1; *Matter of Shafer*, 35 Misc. 371, 71 N. Y. Supp. 1033; *Matter of Hickey*, 34 Misc. 360, 69 N. Y. Supp. 844; *Matter of Van Wert*, 3 Misc. 563, 24 N. Y. Supp. 719; *Campbell v. Purdy*, 5 Redf. 434; *Matter of Jones*, 1 Redf. 263; *Matter of Duffy*, 4 Dem. 366; *Close v. Shute*, 4 Dem. 546; *Edwards v. Edwards*, 1 Dem. 132; *Boerum v. Betts*, 1 Dem. 471.

Contingent remaindermen may institute proceedings for accounting. *Matter of Bearse* (1915), 167 App. Div. 415, 153 N. Y. Supp. 514.

One interested in the corpus of the trust fund is not "a person interested in the

estate" of the deceased trustee and his application upon the death of the *cestui que trust* to compel the administratrix of the deceased trustee to account for the corpus of the trust fund will be denied. *Matter of Meehan* (1918), 104 Misc. 219, 171 N. Y. Supp. 766.

Attorney not person interested in estate.—Where administratrices have employed an attorney to represent them in procuring letters of administration, in adjusting the transfer tax and in attending to other matters of administration, and have refused to pay him for his services, he is not a "person interested in the estate or fund," and is not entitled to an accounting; but on his petition the surrogate may determine the value of his services. *Matter of Rabell* (1916), 175 App. Div. 345, 162 N. Y. Supp. 218.

Attorneys who have furnished legal services in probating a will in which their client, who is the sole legatee, is appointed administratrix, and as such has obtained the entire estate which will eventually belong to her individually, are persons "interested in the estate or fund" in the hands of the administratrix, within the meaning of subdivision a, as the term "interested" is defined in subdivision 11 of § 2768. *Matter of Wood* (1915), 170 App. Div. 533, 156 N. Y. Supp. 810.

§ 2728. Compulsory judicial settlement; citation; order to account and proceedings thereon.

On the presentation of a petition, as prescribed in the last section, a citation must be issued accordingly, and on the return of the citation if the person cited fails either to appear, or to file his account, or to show good cause to the contrary, or to present in a proper case, a petition as prescribed in the next section, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose. He is bound by such an order, without service thereof. If it appears that there is a surplus, distributable to creditors or persons interested, the surrogate may, at any time, issue a supplemental citation, directed to the persons who must be cited, on the petition for a judicial settlement of his account. The pendency of a proceeding against an executor, administrator, guardian or trustee to compel him to account does not preclude him from presenting a petition as prescribed in the next section. If such petition be presented at or before the return of a citation in and as prescribed in either of the foregoing sections of this title, the citation issued thereon need not be directed to petitioner in the special proceeding pending, and the two proceedings must be consolidated.

Source.—Former §§ 2727 and 2728. § 2727, as amended by L. 1893, ch. 686; L. 1901, ch. 408; L. 1911, ch. 432; the amendment of 1893 consolidated former §§ 2726-2728. § 2726 new as originally inserted in Code of Civ. Proc. §§ 2727, 2728, originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 53, 60. § 2728, as amended by L. 1893, ch. 686; L. 1894, ch. 421; L. 1895, ch. 426; L. 1911, chs. 329, 494; L. 1912, ch. 230; the amendment of 1893 consolidated former §§ 2729-2732; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 60, 63, 69, 70; L. 1867, ch. 782, § 14.

Revisers' note.—The first part of this section [former § 2727] has been put into new § 2727 and the remainder changed so as to include an accounting by a guardian or trustee.

Application.—*Matter of Heinze* (1917), 179 App. Div. 453, 165 N. Y. Supp. 1017.

A citation or order to show cause by a surrogate is not a "mandate" within the meaning of § 376. *Matter of Watson* (1914), 163 App. Div. 41, 148 N. Y. Supp. 25.

Parties to proceeding.—Where an executor or administrator is required to render and settle his account under §§ 2727 and 2728, the proceeding is confined to the original parties until it is made to appear that there is a surplus distributable to creditors or persons interested and until the surrogate has issued a supplemental citation. *Matter of Sogaard*, 39 Misc. 519, 80 N. Y. Supp. 379. As to the parties to be cited, see also *Welte v. Bosche*, 6 Dem. 364; *Duncan v. Guest*, 5 Redf. 440; *Matter of Gilligan*, 1 Connolly 137, 3 N. Y. Supp. 17; *Matter of Quinn*, 1 Connolly 381, 5 N. Y. Supp. 261.

Pendency of other proceedings, as to, see also *Borrowe v. Corbin*, 31 App. Div. 172, 52 N. Y. Supp. 741; *aff'd* 165 N. Y. 634; *Matthews v. Studley*, 17 App. Div. 303, 45 N. Y. Supp. 201; *aff'd* 161 N. Y. 633; *Shorter v. Mackey*, 13 App. Div. 20, 43 N. Y. Supp. 112; *Crouse v. Wilson*, 73 Hun 353, 26 N. Y. Supp. 923; *Meeks v. Meeks*, 34 Misc. 465, 69 N. Y. Supp. 737.

Service of order.—On a proceeding to compel an accounting, service of the order on the executor is not necessary. *Matter of Callahan*, 66 Hun 118, 20 N. Y. Supp. 824.

Abatement of proceeding.—A proceeding for the judicial settlement of an executor's and trustee's account abates by his death occurring before the matter is submitted to the court. *Boerum v. Betts*, 1 Dem. 471.

Consolidation.—Where parties have stipulated that one administrator shall account in a proceeding brought for that purpose by the other, the surrogate will carry out the stipulation, consolidate the proceedings, and direct distribution to be made by both administrators. *Matter of Smith*, 40 Misc. 331, 81 N. Y. Supp. 1035. As to the consolidation of compulsory and voluntary accounting, see *Matter of Mulry*, 31 Misc. 78, 64 N. Y. Supp. 576.

Settlement out of court.—While executors cannot, by a settlement between themselves, release each other from their duty to the estate or to a legatee not a party to the settlement, they can make an account-

ing and settlement out of court, as executors and legatees, valid as between themselves, and as to legatees acquiescing therein. *Matter of Pruyn*, 76 Hun 128, 27 N. Y. Supp. 572; *aff'd* 141 N. Y. 544.

Statute of limitations.—Where a surrogate, upon his own motion, makes an order that a citation issue requiring executors to file an intermediate account, the matter becomes a special proceeding to which the statute of limitations is applicable. *Matter of Hale*, 6 App. Div. 411, 39 N. Y. Supp. 577.

A motion to compel the executrix of a trustee to account to a successor trustee to the end that the latter be paid a judgment which he recovered as trustee in an action, brought against the executrix for an accounting of the trust, is a proceeding to recover a demand that was due, and as such is not governed by the ten years' statute of limitations, and is barred by the lapse of six years in analogy to an action at law. *Matter of Cruikshank*, 40 Misc. 325, 81 N. Y. Supp. 1029.

The acts of an executor or administrator in enforcing an obligation or liability to the estate are not sufficient to prevent the running of the statute in his favor. *Matter of Miller*, 15 Misc. 556, 37 N. Y. Supp. 1129. As to the statute of limitations being a bar to accounting, see also *Matter of Jordan*, 50 App. Div. 244, 63 N. Y. Supp. 911; *Matter of Taylor*, 30 App. Div. 213, 51 N. Y. Supp. 609; *Matter of Barnes*, 25 Misc. 279, 55 N. Y. Supp. 430; *Matter of Underhill*, 1 Connolly 541, 9 N. Y. Supp. 455; *Matter of Perry*, 2 Connolly 536, 15 N. Y. Supp. 535; *Matter of Clayton*, 1 Connolly 444, 5 N. Y. Supp. 266; *Matter of Hunham*, 1 Connolly 323, 6 N. Y. Supp. 563.

Sureties on bond.—A surety upon an administrator's bond is not entitled to a notice of a compulsory accounting. *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93. As to liabilities of sureties on an administrator's bond to pay a fine imposed on the administrator for contempt in not appearing when cited to do so, see *Loop v. Northrup*, 59 Hun 75, 13 N. Y. Supp. 144.

Sureties on the official bond of an administratrix are entitled to notice of proceedings for the settlement of the accounts of such administratrix. *Steinert v. Van Aken* (1914), 165 App. Div. 206, 150 N. Y. Supp. 525.

§ 2729. Voluntary judicial settlement.

In either of the following cases an administrator, executor, guardian or testamentary trustee may present to the surrogate's court his account and

a petition praying that his account may be judicially settled and that all necessary and proper parties may be cited to show cause why such settlement should not be had:

1. By an executor or administrator,
 - a. Where the time for presentation of claims as fixed by a notice duly published has expired; or one year has expired since letters were issued to him or his predecessor in office.
 - b. Where letters issued to the petitioner have been revoked.
 - c. The surrogate may, in his discretion, at any time within six months after letters were first issued upon an estate, entertain an application by an executor or administrator for the judicial settlement of his account, where it appears from the petition or account that a mortgage, lease or sale of the decedents's real property will be necessary for any of the purposes specified in section twenty-seven hundred and three of this act, and in a proceeding so commenced the citation must be directed generally to all unknown creditors of the deceased as well as to those known.
2. By a guardian,
 - a. Where a petition for a compulsory judicial settlement of his accounts may be presented by any other person.
 - b. Where he has properly used and expended all of the estate of the infant, and the circumstances are such that, in the discretion of the surrogate, it is proper that such guardian should be discharged.
3. By a testamentary trustee,
 - a. Where one or more distinct and separate trusts created by the will, have been, or are ready to be, fully executed.

Amended by L. 1917, ch. 684, in effect Sept. 1, 1917.

Source.—Former §§ 2728, 2810, 2849. § 2728, as amended by L. 1893, ch. 686; L. 1894, ch. 421; L. 1895, ch. 426; L. 1911, chs. 329, 494; L. 1912, ch. 230; the amendment of 1893 consolidated former §§ 2729-2732; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 60, 63, 69, 70; L. 1867, ch. 782, § 14. § 2810 new as originally inserted in Code of Civ. Proc., but see L. 1850, ch. 272, as amended by L. 1866, ch. 116; L. 1867, ch. 782, as amended by L. 1871, ch. 482; L. 1870, ch. 359, §§ 3, 4. § 2849, as amended by L. 1893, ch. 304; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 12.

General rules and principles.—Jurisdiction is not conferred on a surrogate by a waiver of the issue of a citation executed before any proceeding had been taken. *Matter of Graham*, 39 Misc. 226, 79 N. Y. Supp. 573. Executors or administrators are not entitled to a judicial settlement and distribution until one year after letters are issued. *Matter of Lawson*, 36 Misc. 96, 72 N. Y. Supp. 645; *Matter of Crowley*, 33 Misc. 624, 68 N. Y. Supp. 939.

Although an executor has duly advertised for creditors he cannot procure a judicial settlement of his accounts until one year has elapsed from the issue to him of letters testamentary. *Matter of Lansing*, 37 Misc. 177, 74 N. Y. Supp. 945. Where a decedent dies intestate a decree for a distribution of his estate cannot be granted until one year after the issue of letters, although all the beneficiaries as well as all the heirs-at-law and next of kin consent to the decree or waive service of citation to the accounting. *Matter of Bronner*, 30 Misc. 31, 62 N. Y. Supp. 1003.

Where two executors join in the account this is an admission of joint action and joint liability. *Matter of Osterhoudt*, 15 Misc. 566, 38 N. Y. Supp. 179. The rendering of an account by an executor or administrator and the settlement of the account after it has been rendered are separate and distinct proceedings. *Remington v. Walker*, 21 Hun 322.

If the executor apprehends that there may be a necessity for two trials of the same issues contested in regard to his account he may apply voluntarily to account and have the latter proceeding consolidated with the compulsory one. *Matter of Rainforth*, 37 Misc. 660, 76 N. Y. Supp. 314.

Power of surrogate.—As to powers of a surrogate upon an accounting, see *Lang v. Stringer*, 144 N. Y. 275; *Garlock v. Vandevort*, 128 N. Y. 374; *Matter of Underhill*, 117 N. Y. 471; *Matter of Niles*, 113 N. Y. 547; *Hyland v. Baxter*, 98 N. Y. 610; *Peck v. Sherwood*, 56 N. Y. 615; *Matter of Van Glahan*, 53 App. Div. 164, 65 N. Y. Supp. 865; *Matter of Perkins*, 75

Hun 129, 26 N. Y. Supp. 958; aff'd 145 N. Y. 599; Matter of French, 52 Hun 303, 5 N. Y. Supp. 249; Matter of Schaefer, 34 Misc. 34, 69 N. Y. Supp. 489; aff'd 65 App. Div. 378, 73 N. Y. Supp. 57; aff'd 171 N. Y. 686; Matter of Cooper, 6 Misc. 501, 27 N. Y. Supp. 425; Matter of Metcalfe, 6 Misc. 524, 27 N. Y. Supp. 879; Matter of Jones, 3 Misc. 586, 24 N. Y. Supp. 706; Matter of Valentine, 1 Misc. 491, 23 N. Y. Supp. 289; Clark v. Butler, 4 Dem. 378; Kelsey v. Van Camp, 3 Dem. 530; Bd. of Missions v. Scovell, 3 Dem. 516; Matter of Starr, 2 Dem. 141; DuBois v. Brown, 1 Dem. 317.

Restrictions upon surrogate.—As to restrictions upon a surrogate and what he

may not do on an accounting, see *Glacius v. Fogel*, 88 N. Y. 434; *Bevan v. Cooper*, 72 N. Y. 317; *Stilwell v. Carpenter*, 59 N. Y. 414; *Van Valkenburgh v. Lasher*, 53 Hun 594, 6 N. Y. Supp. 775; *Von Sinderen v. Lawrence*, 50 Hun 272, 3 N. Y. Supp. 25; *Wodruff v. Young*, 31 Hun 420; *Matter of Livingstone*, 27 Hun 607; *Richardson v. Root*, 19 Hun 473; *Matter of Perry*, 5 Misc. 149, 25 N. Y. Supp. 716; *Bulkely v. Staats*, 4 Redf. 524; *Leviness v. Cassebeer*, 3 Redf. 491; *Decker v. Morton*, 1 Redf. 477; *Kintz v. Friday*, 4 Dem. 540; *Rudd v. Rudd*, 4 Dem. 335; *Smith v. Baylis*, 4 Dem. 30; *Peters v. Carr*, 2 Dem. 22; *Terry v. Bale*, 1 Dem. 452; *Matter of Sittare*, 2 Connolly 544, 15 N. Y. Supp. 709.

§ 2730. Voluntary judicial settlement; citation.

Upon a voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee there must be cited:

1. All creditors or persons claiming to be creditors of the decedent, except such as by vouchers filed with the account appear to have been paid.

2. The sureties on his official bond, if any.

3. All co-executors, administrators, guardians or trustees who do not join in the petition.

4. The successor, if a successor has been appointed, in a case where the petitioner's letters have been revoked, or he has been removed, and if no successor has been appointed, all the persons interested who are required to be cited by this section.

5. The attorney-general in all cases where the decedent, ward or beneficiary died intestate as to any part of the estate or fund leaving no known heir-at-law or next of kin.

6. The widow or husband, if any, and all the heirs-at-law where the decedent, ward or beneficiary died intestate as to any real property, and all his next of kin where he died intestate as to any personal property.

7. All devisees, all trustees of any trust created by the will, and all legatees, except such as by voucher and release acknowledged, or proved, and duly certified and filed, appear to have been fully paid.

8. In the case of a guardian, there shall also be cited all persons who might have presented a petition for a compulsory settlement.

9. In the case of a trustee there shall also be cited all persons who are entitled absolutely or contingently, by the terms of the will or by operation of law, to share in the fund, or in the proceeds of property held by the petitioner as a part of his trust.

Where any person required to be cited has died, his executor or administrator shall be cited, and if no legal representative has been appointed, the husband or widow and all the heirs-at-law or next of kin, or both, of such deceased person, who are interested.

Source.—Former §§ 2728, 2743, 2810, 2811, 2849 and 2850. § 2728, as amended by L. 1893, ch. 686; L. 1894, ch. 421; L. 1895, ch. 426; L. 1911, chs. 329, 494; L. 1912, ch. 230, the amendment of 1893 consolidated former §§ 2729-2732; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 60, 63, 69, 70; L. 1867, ch. 782, § 14. § 2743, as amended by L. 1895, ch. 595; L. 1898, ch. 565; L. 1906, ch. 515; originally revised from

R. S., pt. 2, ch. 6, tit. 3, § 71. §§ 2810, 2811 new as originally inserted in Code of Civ. Proc., but see L. 1850, ch. 272, as amended by L. 1866, ch. 115; L. 1867, ch. 782, as amended by L. 1871, ch. 482; L. 1870, ch. 359, §§ 3, 4. § 2849, as amended by L. 1893, ch. 304; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 12. § 2850, as amended by L. 1882, ch. 400; L. 1887, ch. 143; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 22.

Revisers' note.—Part of § 2728 rewritten. This section has always been obscure and illogical, and the revisers think they have made it plain as to the different persons to be cited in testacy and intestacy. Subd. 7 puts legatees who have been paid in the same class with creditors, who have been paid, and thereby saves much expense, as heretofore they had to be cited unless waivers were filed.

Parties to proceeding.—Next of kin and legatees must be cited to attend an accounting by an executor or administrator even though they may have assigned their interests to strangers or executed formal releases. *Matter of Wood*, 38 Misc. 64, 76 N. Y. Supp. 967. Where an executor or administrator seeks a judicial settlement of his account under section 2730 it is the better practice to serve the citation upon all the persons interested in the estate of the decedent, including creditors who have been paid in full and who have receipted for the payment. *Matter of DeForest*, 86 Hun 300, 33 N. Y. Supp. 216.

The amendment to this section, requiring the surety of an administrator to be cited on a voluntary accounting, is retroactive. *Cookman v. Stoddard*, 132 App. Div. 485, 116 N. Y. Supp. 901.

Provision that the sureties upon the official bond of an executor or administrator may be cited to attend a settlement of his accounts only applies to a voluntary accounting by the executor or administrator. *Matter of Storm*, 84 App. Div. 552, 82 N. Y. Supp. 731; *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93. An administrator's former sureties are necessary parties to a judicial settlement. *Matter of Sill*, 41 Misc. 270, 84 N. Y. Supp. 213.

As to parties to a voluntary accounting, see also *Riggs v. Cragg*, 89 N. Y. 479; *Fisher v. Banta*, 66 N. Y. 468; *Matter of Smith*, 68 Hun 530, 23 N. Y. Supp. 87; *Duncan v. Guest*, 5 Redf. 440; *Mead v. Willoughby*, 4 Dem. 364; *Gibbons v. Shepard*, 2 Dem. 247.

As to the duty of accounting executors to cause to be cited all creditors or persons claiming to be creditors of the decedent, see *Matter of Hiscox*, 135 App. Div. 848, 120 N. Y. Supp. 308.

Where, though in the petition for the judicial settlement of the accounts of an executor a bank is described as a depository of funds alleged to belong to the decedent, the statement in the account makes it clear that at the death of decedent the bank was only a debtor either of decedent or of the person named as a possible beneficiary of the deposit, the bank is not a necessary party to the proceeding, and where in accordance with the allegations and prayer of the petition the bank was served with a citation, its motion to dismiss the proceeding as to itself,

for lack of jurisdiction, will be granted. *Mater of Kenny* (1915), 92 Misc. 330, 156 N. Y. Supp. 827.

Surety to be cited.—The provisions of the code of civil procedure require a surety of an administratrix to be cited on a voluntary accounting by her, and if not cited said surety is not bound by the decree. *Blake v. National Surety Co.* (1918), 184 App. Div. 57, 171 N. Y. Supp. 614.

A surety for an administratrix is entitled to notice of an application to vacate a decree in a voluntary proceeding for an accounting. *Blake v. National Surety Co.* (1918), 184 App. Div. 57, 171 N. Y. Supp. 614.

Intervening parties.—The mere allegation that one is a creditor of the estate is conclusive for the purpose of entitling him to be heard. *Matter of Miles*, 33 Misc. 147, 68 N. Y. Supp. 368; rev'd 61 App. Div. 562, 71 N. Y. Supp. 71; rev'd 170 N. Y. 75. The provisions declaring that "a person interested in the estate, although not cited, is entitled to appear on the hearing and thus make himself a party to the proceeding," do not apply to descendants and representatives of deceased uncles and aunts of a decedent who left nephews and a niece, as they are not persons interested in the estate. *Matter of Thompson*, 41 Misc. 223, 83 N. Y. Supp. 983; aff'd 87 App. Div. 609, 83 N. Y. Supp. 1117.

Where an executrix is accounting in her husband's estate and he and she have been successively the legal representatives of another estate, a person interested in that estate is a proper party to her accounting and may file objections to her account. *Matter of Walton*, 38 Misc. 723, 78 N. Y. Supp. 296. Upon an accounting of the administrator of a woman in whose estate a man claims an interest as her husband, the heirs-at-law and next of kin have the right to attack the validity of the asserted marriage. *Matter of Taylor*, 31 Misc. 579, 65 N. Y. Supp. 571. As to what parties may intervene, see also *Gibbons v. Shepard*, 2 Dem. 247; *Merritt v. Jackson*, 2 Dem. 214; *Greene v. Day*, 1 Dem. 45.

A person not cited, whose interest in an estate is dependent upon the determination of the question as to the survivorship of three persons, one of whom was the testator, is a person interested in an executor's accounting and is entitled to appear under this section. *Matter of St.*

John, 104 App. Div. 460, 93 N. Y. Supp. 836.

It is the duty of the surrogate's court in a voluntary proceeding for an accounting, if called upon by any party in interest, to issue a supplemental citation bringing in a new surety. *Blake v. National Surety Co.* (1918), 184 App. Div. 57, 171 N. Y. Supp. 614.

Second surety not bound by decree.—A second surety of an administratrix, appointed pursuant to the provisions of the code of civil procedure upon the insolvency of the original surety, not having been cited in a voluntary proceeding for an accounting by the administratrix, and not having appeared therein, is not bound by the decree, regardless of whether or not the original surety would have been bound thereby. *Blake v. National Surety Co.* (1918), 184 App. Div. 57, 171 N. Y. Supp. 614.

Where creditor has assigned claim.—A creditor of a decedent who not having presented his claim assigns it before the account of the administratrix is filed, need not be cited to attend the official settlement of her account. *Matter of Freije* (1915), 90 Misc. 246, 152 N. Y. Supp. 726.

Commission on stock of decedent sold by

broker to pay indebtedness to himself.—Where the personal estate of a decedent consisted substantially of shares of stock which had been purchased, and at the time of his decease were being carried by his brokers, on a margin, and the brokers sold a large number of shares of the stock in order to pay off decedent's indebtedness to them, it was held that his personal representative was entitled to commissions upon the proceeds of only so much of the stock as actually came into his possession after the indebtedness to the brokers had been paid in full. *Matter of Mercantile Trust Co.* (1913), 210 N. Y. 83. Modifying 156 App. Div. 224, 141 N. Y. Supp. 460.

The effect of § 2510 considered, and held to show no intention to enlarge the class of persons who may be parties to a proceeding for the judicial settlement of the accounts of an executor. *Matter of Kenny* (1915), 92 Misc. 330, 156 N. Y. Supp. 827.

Citations.—Executors should obtain necessary citations at the time of filing their accounts. In *re Powers' Estate* (1917), 166 N. Y. Supp. 1008.

Section cited.—*Matter of Heinze* (1917), 179 App. Div. 453, 165 N. Y. Supp. 1017.

§ 2731. Proceedings on return of citation.

On the return of a citation, issued as prescribed in the last section, the surrogate must take the account, and hear the allegations and proofs of the parties, respecting the same and make such order or decree as justice requires. The executor, administrator, guardian or trustee may be examined under oath by any party to the proceeding as to any matter relating to his administration of the estate or fund. If any party interested shall demand in writing that a voucher be produced and filed for any payment alleged by the account to have been made, the accounting party shall produce and file such voucher or make satisfactory proof of such payment.

Source.—Former § 2728, as amended by L. 1893, ch. 686; L. 1894, ch. 421; L. 1895, ch. 426; L. 1911, chs. 329, 494; L. 1912, ch. 230; the amendment of 1893 consolidated former §§ 2729-2732; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 60, 63, 69, 70; L. 1867, ch. 782, § 14.

Revisers' note.—Section 2728 rewritten and parts distributed to other sections, leaving only proceeding on return of citation. See new §§ 2511, 2535.

Right to contest omitted as being a right which need not be continually mentioned. Petition after revocation of letters provided for in new § 2729.

The provision in section 2729 making it mandatory to file a voucher is eliminated, as under *Matter of Wicke*, 74 A. D. 221, it has been held that failure to file a voucher goes to the jurisdiction to make a decree. By § 2730 citation must issue to all creditors from whom vouchers are not filed. The verified account ought to be sufficient proof of payment; unless objection is made. As accounts do not often contain the items of bills paid, it is now provided in this section, that if a voucher is not filed, it must be produced on demand, or satisfactory proof made. It would seem that this is all that ought to be necessary.

Objections to account.—As to objections to the account of an executor, see *Matter of Kendrick*, 107 N. Y. 104; *Matter of Weston*, 91 N. Y. 502; *Peck v. Sherwood*, 56 N. Y. 615; *Matter of Baker*, 42 App. Div. 370, 59 N. Y. Supp. 121; *Matter of Sprague*, 40 App. Div. 615, 57 N. Y. Supp. 1128; aff'd 162 N. Y. 611; *Matter of Heuser*, 87 Hun 262, 33 N. Y. Supp. 831; *Matter of Turfler*, 78 Hun 258, 29 N. Y. Supp.

1151; *Matter of Mullon*, 74 Hun 358, 26 N. Y. Supp. 683; rev'd 145 N. Y. 98; *Bainbridge v. McCullough*, 1 Hun 488; *Matter of Bratt*, 10 Misc. 491, 32 N. Y. Supp. 168; *Adams v. Glidden*, 6 Dem. 197; *Journal v. Ferris*, 2 Dem. 320; *Thompson v. Mott*, 2 Dem. 154; *Matter of Gilman*, 2 Connolly 78, 7 N. Y. Supp. 694; *Matter of Strickland*, 1 Connolly 435, 5 N. Y. Supp. 851; *Matter of Williams*, 1 Connolly 99, 2 N. Y. Supp. 669.

Procedure.—As to the procedure on an accounting, see *Buchan v. Rintoul*, 70 N. Y. Supp. 239; *Hone v. Lockman*, 4 Redf. 61; *Y. 1*; *Matter of Hart*, 60 Hun 516, 15 N. Y. Supp. 273; *Matter of Sharp*, 5 Dem. 516; *Herbert v. Stevenson*, 3 Dem. 236; *Tilden v. Dows*, 2 Dem. 489; *Duffy v. Kelly*, 1 Dem. 202; *Matter of Underhill*, 1 Connolly 541, 9 N. Y. Supp. 455.

Statute of limitations.—Executors and trustees voluntarily accounting more than six years after letters were issued and managing the estate, and making payments to the present time, cannot invoke the statute of limitations against objections to

their account. *Matter of Lyth*, 32 Misc. 608, 67 N. Y. Supp. 579.

Evidence.—As to evidence on an accounting, see *Matter of Frazer*, 92 N. Y. 239; *Martin v. Gage*, 9 N. Y. 398; *Carroll v. Hughes*, 5 Redf. 337; *Underhill v. Newburger*, 4 Redf. 499; *Valentine v. Valentine*, 4 Redf. 265; *Matter of Pollock*, 3 Redf. 100; *Matter of Rich*, 3 Redf. 177; *Matter of White*, 6 Dem. 375; *Matter of Palmer*, 3 Dem. 129; *Estate of Eisner*, 1 Connolly 358, 5 N. Y. Supp. 30.

Burden of proof as to property not included in account.—Where the account of executors is sought to be surcharged with property not brought into the inventory or account, the burden of proof is on the objectants alleging the omission, and if they do not sustain such burden the inventory or account stands and the objections thereto must be overruled. *Matter of Watson* (1914), 86 Misc. 588, 148 N. Y. Supp. 902.

Examination of executor as means of obtaining information as to allowance of doubtful claims. *Matter of Brommer* (1918), 105 Misc. 336, 173 N. Y. Supp. 200.

§ 2732. Affidavit to account.

To each account filed in the surrogate's court, as prescribed in this article, must be appended the affidavit of the accounting party, to the effect that the account contains, according to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate or fund, and of all money and other property belonging to the estate or fund, which have come to his hands, or been received by any other person, by his order or authority, for his use, and that he does not know of any error or omission in the account, to the prejudice of any creditor of, or person interested in, the estate or fund.

Source.—Former §§ 2729 and 2811. § 2729, as amended by L. 1893, ch. 686; L. 1901, ch. 293; the amendment of 1893 consolidated former §§ 2733-2735, 2741. § 2733 was new as originally inserted in Code of Civ. Proc. § 2734 originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 54, 55. § 2735 originally revised from R. S., pt. 2, ch. 6, tit. 3, § 54. § 2741 originally revised from R. S., pt. 2, ch. 6, tit. 3, § 56. § 2811, new as originally inserted in Code of Civ. Proc., but see L. 1850, ch. 272 (as amended by L. 1866, ch. 115). L. 1867, ch. 782 (as amended by L. 1871, ch. 482), L. 1870, ch. 359, §§ 3, 4.

§ 2733. Accounting for profit and loss.

No profit shall be made by an executor, administrator, guardian or testamentary trustee by the increase, nor shall he sustain any loss by the decrease or loss, without his fault, of any part of the estate or fund; but he shall account for such increase, and be allowed for such decrease or loss on the settlement of his accounts.

Source.—Former §§ 2717 and 2729. § 2717, as amended by L. 1893, ch. 686; revised from R. S., pt. 2, ch. 6, tit. 3, §§ 25, 26. § 2729; for source, see note to § 2732, supra.

§ 2734. Property of an estate or trust to be delivered upon order of the court.

The surrogate's court has jurisdiction to compel the executor, administrator, guardian or trustee, or successor of any deceased executor, administrator, trustee or guardian at any time to deliver over any property of the estate or trust which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow such credit upon the decree as justice requires.

The said court has also jurisdiction when an executor, administrator, trustee or guardian has died, absconded, been removed, or become insane to direct the person so removed, or any person or corporation having possession or control of any property belonging to such estate or fund to deliver the same to the court or to a successor duly appointed; or as directed by a decree made pursuant to section 2725 of this chapter.

Source.—Former §§ 2605 and 2606. § 2605 originally revised from R. S., pt. 2, ch. 6, tit. 2, § 40; tit. 3, § 17; L. 1865, ch. 733, § 1. § 2606, as amended by L. 1901, ch. 524; section new as originally inserted in Code of Civ. Proc.

Section cited.—Matter of D'Adamo (1916), 94 Misc. 1, 157 N. Y. Supp. 374.

Adverse claims of title or of the right to possession made by third persons in good faith and on substantial grounds are not to be litigated in proceedings under this section. Matter of Heinze (1918), 224 N. Y. 1.

Application for order requiring savings banks to turn over to new administrator deposits to the credit of the estate will be denied. The relation between a bank and a depositor is that of debtor and creditor. Matter of Vickery (1919), 106 Misc. 459, 176 N. Y. Supp. 288.

§ 2735. Decree for payment and distribution.

Where an account is judicially settled, as prescribed in this article, and any part of the estate or fund remains and is ready to be distributed, the decree must direct the payment and distribution thereof to the person so entitled, according to their respective rights. It may also award to a surviving husband, wife, or child, the same relief as to set off of exempt property which may be awarded in his or her favor, on a petition presented as prescribed in section 2671 of this chapter.

Source.—Former §§ 2724 and 2743. § 2724, as amended by L. 1893, ch. 686; the amendment of 1893 consolidated former §§ 2720, 2721, as amended by L. 1881, ch. 535; these sections were new as originally inserted in Code of Civ. Proc. § 2743, as amended by L. 1895, ch. 595; L. 1898, ch. 565; L. 1906, ch. 515; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 71.

Application and scope.—A claim neither admitted nor rejected cannot be ordered paid. Matter of Von Der Lieth, 25 Misc. 255, 55 N. Y. Supp. 428.

Distribution in kind may be authorized, where bulk of estate consists of stock. Matter of Thompson, 41 Misc. 420, 84 N. Y. Supp. 1111, aff'd 87 App. Div. 609, 83 N. Y. Supp. 1117.

Construction and effect of section in connection with § 2681 (former § 1822). see Matter of Browne, 35 Misc. 362, 71 N. Y. Supp. 1034; Matter of Eichman, 33 Misc. 322, 68 N. Y. Supp. 636. For a consideration of this section in connection with § 2728, see Matter of Bronner, 30 Misc. 31, 62 N. Y. Supp. 1003; Matter of Lawson,

36 Misc. 96, 72 N. Y. Supp. 645. This section is made applicable to the accounting of a testamentary trustee by § 2811. Matter of Valentine, 1 Misc. 491, 23 N. Y. Supp. 289.

Provision with respect to distribution is mandatory. Matter of Horn, 7 App. Div. 89, 39 N. Y. Supp. 954.

Section does not apply to the case of an accounting by a temporary administrator. Matter of Philp, 29 Misc. 263, 61 N. Y. Supp. 241. Application, generally, see Matter of Lane, 2 Connolly 266, 20 N. Y. Supp. 78; Matter of Te Culver, 22 Misc. 217, 49 N. Y. Supp. 820.

The powers of a surrogate's court on accountings by trustees are the same as on

those by executors. *Matter of U. S. Trust Co.*, 80 App. Div. 77, 80 N. Y. Supp. 475, aff'd 175 N. Y. 304.

The validity and correctness of the executor's account and the various items thereof may be determined, but also all matters which are necessarily related thereto. *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795.

An estate is "ready to be distributed" when its resources have been gathered and marshaled, so that their extent and nature are known, and its expenses and obligations have been ascertained. *Matter of Snedeker*, 61 Misc. 216, 114 N. Y. Supp. 936.

Assignment of distributive shares.—This section sets at rest questions, which before its enactment was disputed, concerning the authority of the surrogate to direct payment to an assignee of a legatee, etc. *Tilden v. Dowe*, 2 Dem. 489. See *Peyser v. Wendt*, 2 Dem. 221. The right to decree distribution among the assigns of legatees cannot be questioned. *Matter of Mount*, 27 Misc. 413, 59 N. Y. Supp. 176. A sheriff who has levied an attachment upon the interest of an heir or legatee is not an assignee of a creditor or legatee. *Matter of Arkenburgh*, 13 Misc. 744, 35 N. Y. Supp. 251.

Claim of executor or administrator.—Upon a final accounting of an executor, the surrogate may hear and determine a claim of the executor against the estate. *Boughton v. Flint*, 74 N. Y. 476. Surrogate cannot set aside an assignment of a distributive share to the administrator. *Matter of Randall*, 152 N. Y. 508.

Supplemental citation.—In an action against a surety on administrator's bond, by distributees mentioned in the decree, it is no defense that a supplemental citation was not issued to each distributee. *McMahon v. Smith*, 24 App. Div. 25, 49 N. Y. Supp. 93.

Validity of claim or distributive share contested.—When the same distributive share is claimed by two persons, one by original title and another by an assignment apparently valid, resort must be had to a court of equity to settle the dispute. *Matter of Randall*, 152 N. Y. 508. Compare *Matter of Havens*, 8 Misc. 574, 29 N. Y. Supp. 1085. Decree cannot issue directing payment of a claim, where its validity is contested. *Callahan's Estate*, 152 N. Y. 320. The creditors of a distributee cannot contest the validity of the assignment of such distributee's share. *Duncan v. Guest*, 5 Redf. 440; *Matter of Redfield*, 71 Hun 344, 25 N. Y. Supp. 3; *Adams v. Glidden*, 6 Dem. 197; *Giles v. Talleyrand*, 1 Dem. 97.

A filed written consent, as specified in § 1822, is necessary to give a surrogate jurisdiction to hear a disputed claim upon a judicial settlement. *Matter of Kirby*, 36 Misc. 312, 73 N. Y. Supp. 509; *Matter of Browne*, 35 Misc. 366, 71 N. Y. Supp.

1037. Under § 1822 and former § 2743, as amended in 1895, a surrogate has power to try a disputed claim if the parties consent thereto. *Matter of Edmonds*, 47 App. Div. 229, 62 N. Y. Supp. 652. Under these sections, as amended, surrogate may decide disputed claims when the respective parties file written consents with him. *Matter of Clark v. Hyland*, 88 App. Div. 392, 84 N. Y. Supp. 640.

The court will not recognize claimants other than those having legal titles and will remit to other tribunals parties claiming adversely to such titles on grounds of equity, the court itself not having any power to nullify or set aside the deeds of the parties for fraud or on other equitable considerations. *Matter of Lattan*, 42 Misc. 467, 87 N. Y. Supp. 246.

A surrogate's court in order to carry out the powers with which it is vested has incidental authority to try a claim disputed by the administrator, even though its exercise may involve the trying of a controverted demand. *Matter of Strickland*, 1 Connolly 435, 5 N. Y. Supp. 851.

Construction of will to determine persons to whom distributive shares should be paid, see *Washbon v. Cope*, 144 N. Y. 287; *Matter of Verplanck*, 91 N. Y. 450; *Conant v. Wright*, 22 App. Div. 216, 48 N. Y. Supp. 422, aff'd 162 N. Y. 635; *Matter of Vandevort*, 62 Hun 612, 17 N. Y. Supp. 316; *Fraenzwick v. Miller*, 1 Dem. 136; *Tappen v. M. E. Church*, 3 Dem. 187. Where determination of validity of trust is necessary to decree distribution, surrogate may act. *Matter of George*, 1 Connolly 241, 3 N. Y. Supp. 426.

Effect of decree of distribution.—After the decree of a surrogate for the payment of money by an administrator is docketed in the office of the county clerk, the person in whose favor it was docketed may enforce payment by attachment against the administrator in the surrogate's court, and by execution at the same time. *Townsend v. Whitney*, 75 N. Y. 425. A decree directing an administrator, if unable to pay a distributive share to the distributee, to pay it "to the surrogate court" of the county, must be taken to mean payment into court in the manner prescribed by § 2537, and therefore payment to the surrogate himself cannot discharge the administrator. *Matter of Sackett*, 38 Misc. 463, 77 N. Y. Supp. 1030.

A decree upon an accounting is conclusive as a judgment upon each party to the special proceeding who was duly cited and upon every person deriving title from such party. *Armstrong v. Stone*, 64 Misc. 504, 118 N. Y. Supp. 998.

An adult who was duly cited upon an executor's accounting cannot, upon their subsequent accounting as trustees, question the propriety of sales of estate securities and investments of estate funds shown by the accounts filed by the executors, as the decree entered on their ac-

counting as executors is a bar. *Matter of Halsted*, 41 Misc. 606, 85 N. Y. Supp. 301.

A surrogate's decree made on the accounting of an executrix is a bar to an action to have declared void a trust provided for by it. *Brown v. Wheeler*, 53 App. Div. 6, 65 N. Y. Supp. 436. A decree directing distribution made after the final accounting of the administratrix is not conclusive in favor of the administratrix or her surety against a person not party thereto, who at the time it was entered was prosecuting an action against the administratrix upon a claim against the estate, and who subsequently recovered judgment therein. *Matter of Gall*, 42 App. Div. 255, 59 N. Y. Supp. 254.

A surrogate's decree adjudging that moneys of an estate were invested in real property is conclusive on an executor and his wife in an action against them by a legatee to recover the real property. *Kager v. Brenneman*, 47 App. Div. 63, 62 N. Y. Supp. 339. As to the right of a "person interested in the estate" to intervene when not cited, see *Matter of Thompson*, 41 Misc. 223, 83 N. Y. Supp. 983. *aff'd* 87 App. Div. 609, 83 N. Y. Supp. 1117.

Overpayment.—The law does not recognize an overpayment by an executor to a legatee, and does not permit him on settlement of his accounts to credit himself with such overpayment. *Matter of Hodgman*, 140 N. Y. 421. A surrogate, upon

the final accounting of an executor, in case it is found there has been an overpayment to a legatee, has no power to render an affirmative judgment for the excess in favor of the executor against the legatee. *Matter of Underhill*, 117 N. Y. 471.

Where excessive payments are made by one executor, with the acquiescence of the others, out of a fund in the possession of such other executors, or in the joint possession and control of all, they are all liable to make good such payments to the other distributees, not only on final distribution, but at all intermediate stages when payments become due or payable. *Adair v. Brimmer*, 74 N. Y. 539.

Distribution prior to final accounting.—Under the provisions of § 2690 it is not necessary that the payment of legacies and distributive shares of an estate wait upon the final settlement of an executor's or trustee's account. The law favors an early distribution, and where, from any cause, the final distribution is delayed and a partial distribution can be made without prejudice to the rights of the creditors or to the executor or trustee provision is made for such partial distribution pending the outcome of a proceeding for the final judicial settlement of the account. *Matter of Kent* (1916), 173 App. Div. 563, 159 N. Y. Supp. 627.

Section cited.—*Hughes v. Stoutenburgh* (1915), 168 App. Div. 512, 154 N. Y. Supp. 65.

§ 2736. Id.; when specific property may be delivered.

In either of the following cases, the decree may direct the delivery of an unsold chattel, or the assignment of an uncollected demand, or any other personal property, to a party or parties entitled to payment or distribution in lieu of the money value of the property:

1. Where all the parties interested manifest their consent thereto by a writing filed in the surrogate's office.

2. Where any legatee or distributee files a consent to accept as payment in whole or in part any specified personal property at a value to be ascertained by appraisalment.

3. Where it appears that sale thereof, for the purpose of payment or distribution, would cause a loss to any infant or incompetent legatee or distributee, and the value thereof has been fixed by appraisalment.

The value must be ascertained, if the consent does not fix it, by an appraisalment under oath, made by one or more persons appointed by the surrogate for the purpose.

Source.—Former § 2744; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 72, as amended by L. 1878, ch. 30.

Revisers' note.—This section now enables a legatee or distributee to accept good securities in place of cash, and thus saves many good investments from being sacrificed.

By § 2753 commissions are allowed on such property.

Delivery of trust fund.—When surrogate has no jurisdiction to decree that a trust fund shall be delivered to the remaindermen in specie, by virtue of a consent filed by them. *Matter of Holzworth*

(1915), 166 App. Div. 150, 151 N. Y. Supp. 1072.

Method of payment of trustees with whom interest in estate has been pledged. *Matter of Titus* (1915), 170 App. Div. 764, 156 N. Y. Supp. 509.

§ 2737. Id.; when money or property may be retained.

Where an admitted debt of the decedent is not yet due, and the creditor will not accept present payment, with a rebate of interest; or when a debt, not yet due has been disputed or rejected; or where an action is pending between the executor or administrator, and a person claiming to be a creditor of the decedent; or where on the judicial settlement of the account of a testamentary trustee a controversy respecting the right of a party to share in the fund, or other personal property held by the trustee, has not been determined; the decree must direct that a sum sufficient to satisfy the claim, or the proportion to which it is entitled, together with the probable amount of the interest and costs, or that any personal property the right to which is in controversy, be retained in the hands of the accounting party; or be deposited in a safe bank, or trust company, subject to the order of the surrogate's court; or be paid into the surrogate's court, for the purpose of being applied to the payment of the claim, or the satisfaction of any judgment when it is due, recovered, or settled; and that so much thereof, as is not needed for that purpose, be afterwards distributed according to law.

Source.—Former §§ 2745 and 2812. § 2745; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 74. § 2812; new as originally inserted in Code of Civ. Proc., but see L. 1850, ch. 272 (as amended by L. 1866, ch. 115), L. 1867, ch. 782 (as amended by L. 1871, ch. 482), L. 1870, ch. 359, §§ 3, 4.

Revisers' note.—New matter inserted to cover case in 205 N. Y. 219.

Inadequacy of provisions of former sections.—The various statutory provisions relating to the administration of estates do not adequately protect holders of notes not due at the time of decedent's death and which will not become due for several years, where the personal representatives have rejected a claim therefor and there is danger that the estate will be distributed without paying or securing the claim, and an action in equity to declare plaintiff a creditor of the estate may be maintained; the validity of the notes once being established, however, the code provisions are adequate. *Bankers Surety Co. v. Meyer* (1912), 205 N. Y. 219.

Application and effect.—Where a claimant has made diligent but unsuccessful efforts to begin an action on a claim against the estate of a decedent and the administratrix of the latter has, by reason of her non-residence, avoided service, the surrogate has power to direct in a final decree on the accounting that moneys be retained to cover the disputed claim, although there is no specific provision of law authorizing

such a course. *Matter of Raach*, 26 Misc. 459, 55 N. Y. Supp. 434. Application and effect of section considered, see *Hoyt v. Bonnett*, 50 N. Y. 538; *Matter of Henshaw*, 37 Misc. 536, 75 N. Y. Supp. 1047; *Matter of Truslow*, 37 Misc. 189, 74 N. Y. Supp. 944; *Duncan v. Guest*, 5 Redf. 440.

Testamentary trustees; determination of controversy.—As to subject of controversy under this section and as to when power not conferred upon surrogate to withhold from a distributee the share to which he is entitled, see *Matter of Horn*, 7 App. Div. 89, 39 N. Y. Supp. 954. Surrogate may decide any controversy arising on the settlement of the account of a trustee as to a distributive share. *Matter of U. S. Trust Co.*, 175 N. Y. 304, in which case it was held that the surrogate must determine as to the effect of a release under the real and personal property laws upon a trust. The validity of an assignment of beneficiary's interest may be determined. In re *Roger's Estate*, 16 N. Y. Supp. 197; *Young v. Purdy*, 4 Dem. 455.

§ 2738. Adjustment of advancements.

Where there is a surplus of personal property to be distributed, and the advancement as provided in section 99 of the Decedent Estate Law, con-

sisted of personal property, or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution, in the surrogate's court, must adjust all the advancements which have not been previously adjusted by the judgment of a court of competent jurisdiction. For that purpose, if any person to be affected by the decree, is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation.

Source.—Former § 2733, as added by L. 1893, ch. 686, as amended by L. 1909, ch. 65; originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 76-78.

§ 2739. Payment of share of infant.

When a legacy or distributive share is payable to an infant, the decree shall direct that it be paid to his guardian, upon his filing sufficient security, unless the legacy does not exceed fifty dollars, or a distributive share does not exceed one hundred and fifty dollars, in which cases the decree may order it to be paid to his father, or to his mother, or to some competent person with whom the infant resides, or who has some interest in his welfare, for the use and benefit of such infant. If there be no guardian, the decree shall provide that the legacy or distributive share not disposed of in the manner aforesaid, shall be paid into or deposited with the surrogate's court.

Source.—Former § 2746, as amended by L. 1886, ch. 358; L. 1900, ch. 554; L. 1909, ch. 65; L. 1911, ch. 328; L. 1913, ch. 10; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 80. The amendment of 1886 entirely superseded the original section.

Revisers' note.—Difference between legacy and distributive share is made because a legacy is a gift which the donor, no doubt, wants the infant, and not the parents, to have.

In the second line "guardian" now applies to all guardians. It has been held that this section has not included testamentary guardians. *Matter of Klingenstein*, 156 A. D. 749.

Application and scope.—This section merely covers a case where a legacy or distributive share is payable to an infant and has no bearing on the conduct of a trustee in applying income. *Matter of Tucker*, 28 Misc. 595, 59 N. Y. Supp. 1022. An action under section 1819 is wholly independent of the proceeding provided by this section. *Wall v. Bulger*, 46 Hun 346.

Payment to guardian.—The general guardian of an infant legatee is not "a person entitled to" the legacy within the meaning of former § 2722 (now § 2686). Said section makes no provision for the application of the legacy or a part thereof for the support or education of infants. *Matter of Paton*, 7 Misc. 377, 28 N. Y. Supp. 160. Unless directed by the proper surrogate's court an administrator has no right to pay a distributive share to the general guardian of an infant. *Lowmen v. Elmira, C. & N. R. Co.*, 85 Hun 188, 32 N. Y. Supp. 579, aff'd 154 N. Y. 765.

Bond to be executed.—Although the guardian of an infant gave security upon his appointment and qualification, he must execute and deposit a bond, in pursuance of this section, before he can obtain possession of his ward's estate. *Flagg v. Har-*

beck, 6 Dem. 289; *Matter of Mills*, 29 Misc. 272, 61 N. Y. Supp. 243.

A legacy bequeathed directly to an infant must, if it exceeds \$50 in value, be paid to his general guardian, and such guardian before he can claim the legacy must, except in a case where, in pursuance of this section, the surrogate has relieved him, furnish the bond required. *Matter of Lichtenstadter*, 5 Dem. 214. As to an order directing payment to a guardian of proceeds of real estate sold for the support of the ward without requiring additional security, see *Allen v. Kelly*, 171 N. Y. 1, rev'g 66 App. Div. 623, 73 N. Y. Supp. 1129. As to the liability of sureties of a general guardian for sums paid to such guardian by himself as executor, see *Matter of Brown*, 72 Hun 160, 25 N. Y. Supp. 694. New security cannot be required by analogy to this section, where a share is payable to the committee of a lunatic. *Wright v. Hayden*, 31 Misc. 116, 63 N. Y. Supp. 796.

Payments of income from trust funds by testamentary trustees to a general guardian of an infant during the pendency of proceedings for the judicial settlement of their accounts are proper without requir-

ing a bond if such income is neither a legacy nor a distributive share within the meaning of this section. *Matter of Williams*, 66 Misc. 417, 123 N. Y. Supp. 383.

The provisions of former § 2746 relative to bonds applied only to general guardians appointed by the surrogate. *Matter of Klingenstein* (1913), 156 App. Div. 749, 141 N. Y. Supp. 742.

A testamentary guardian cannot be required to give a bond under this section before receiving a distributive share belonging to his ward, except under the circumstances prescribed in former § 2853 (repealed by L. 1914, ch. 443). *Matter of Klingenstein* (1913), 156 App. Div. 749, 141 N. Y. Supp. 742.

The decree to be entered upon the judicial settlement of the accounts of a testamentary guardian appointed without bond before the new surrogates' act went into effect should provide that he give sufficient security upon the payment to him of the distributive share of the infants. *Matter of Klein* (1916), 96 Misc. 118, 160 N. Y. Supp. 212.

Action by guardian.—Where a surrogate makes a decree directing payment by an administrator to a general guardian, the latter may maintain an action therefor

on the administrator's bond. *Prentiss v. Weatherly*, 68 Hun 114, 22 N. Y. Supp. 680, aff'd 144 N. Y. 707. As to when a general guardian of an infant may maintain an action against the sureties upon the bond of a deceased general guardian for moneys adjudged to be due an infant upon an involuntary accounting by an administrator of the deceased guardian, see *Van Zandt v. Grant*, 175 N. Y. 150.

Testamentary trustees.—Testamentary trustees may be compelled to apply the accrued income to the support of an infant beneficiary, and his guardian cannot be reimbursed for past maintenance. *Matter of Scherrer*, 24 Misc. 351, 53 N. Y. Supp. 714. Testamentary trustees are not subject to ex parte orders procured by a general guardian of infants. *Matter of Tucker*, 28 Misc. 595, 59 N. Y. Supp. 1022.

Letters of guardianship of infant.—An application for the issuance of letters of guardianship of an infant entitled to a legacy or distributive share under \$2,000, without security, pursuant to § 2650, will be denied on the ground that said section is in hopeless conflict with § 2739 which the court will follow. *Matter of Hirshfeld* (1914), 88 Misc. 399, 151 N. Y. Supp. 846.

§ 2740. Legacy, etc., to unknown person to be paid into state treasury.

Where the person entitled to a legacy or distributive share is unknown, the decree must direct the executor, administrator, guardian or testamentary trustee to pay the amount thereof into the treasury of the state, for the benefit of the person or persons who may thereafter appear to be entitled thereto. The surrogate's court, or the supreme court, upon the petition of a person claiming to be so entitled, and upon at least fourteen days notice to the attorney-general, accompanied with a copy of the petition, may by a reference, or by directing the trial of an issue by a jury, or otherwise, ascertain the rights of the persons interested, and grant an order directing the payment of any money, which appears to be due to the claimant, but without interest, and deducting all expenses incurred by the state with respect thereto. The comptroller, upon the production of a certified copy of the order, must draw his warrant upon the treasury, for the amount therein directed to be paid; which must be paid by the state treasurer, to the person entitled thereto.

Source.—Former § 2747; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 81, in part, as amended by L. 1877, ch. 456.

This section applies only to unknown owners. *Matter of Reformed Episcopal Church* (1916), 98 Misc. 145, 163 N. Y. Supp. 1042.

Excessive allowances to claimants.—The surrogate's court has power under § 2481, subd. 6 to set aside a decree of that court, upon motion made by the attorney-general on behalf of the state as trustee for unknown next of kin, where claims have been allowed which are un-

founded and allowances which are excessive. *Matter of Malone* (1912), 150 App. Div. 31, 134 N. Y. Supp. 496.

A sum of money in the hands of the public administrator of the county of Bronx for distribution among persons who are unknown, should be paid into the treasury of the city of New York, not into the treasury of the state, and the decree entered upon the judicial settlement of the accounts of the public admin-

istrator must so provide. *Matter of Ham-* city of New York to pay deposits to state
ner (1919), 105 Misc. 721, 174 N. Y. Supp. treasurer will be granted. *Matter of Peo-*
 387. *ple v. Maitbie* (1918), 102 Misc. 575, 169
Mandamus to compel chamberlain of N. Y. Supp. 339.

§ 2741. When legacy, etc., to be paid into court.

Where it appears that the whereabouts of any legatee or distributee is unknown, the decree must direct the executor, administrator or testamentary trustee to pay into surrogate's court a legacy or distributive share, which is not paid to the person entitled thereto, at the expiration of six months from the time when the decree is made, or when the legacy or distributive share is payable by the terms of the decree; or where, at the expiration of six months after the making of the decree, it is shown to the court that payment of a legacy or distributive share can not be made to the person entitled thereto, an order may be made directing the payment of the same into court. The money, so paid into court can be paid out only by the special direction of the surrogate; or pursuant to the judgment of a court of competent jurisdiction. The state comptroller may institute any necessary proceeding before the surrogate's court to compel the deposit of such moneys in court, which have not been paid over or deposited after the expiration of six months.

Source.—Former § 2748; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 81, in part, as amended by L. 1877, ch. 456.

Revisers' note.—The old section required every decree to contain the provision for payment to the county treasurer in two years. We change it so that it shall contain such direction only when there is a known absentee. The time is shortened because often money held so long, never is paid in.

§ 2742. Effect of judicial settlement of account; summary statement.

A judicial settlement of the account of an executor, administrator, guardian or testamentary trustee, either by the decree of the surrogate's court, or upon an appeal therefrom, is conclusive evidence against all the parties of whom jurisdiction was obtained and all persons deriving title from any of them at any time, as to all matters embraced in the account and decree.

Each decree, whereby an account is judicially settled, must contain, in the body thereof, a summary of the account as settled; or must refer to such a summary, which must be recorded in the same book, and is deemed a part of the decree.

Source.—Former §§ 2551 and 2742. § 2551 originally revised from L. 1837, ch. 460, § 2, in part. Section 2742 originally revised from R. S., pt. 2, ch. 6, tit. 3, § 65.

Revisers' note.—It is better to make the effect general as to all matters, etc., than to specify certain matters. See general section new 2550.

Against whom decree conclusive.—Accounting only conclusive as to parties to the proceeding, although certain persons in interest did not appear. *Elsworth v. Hinton*, 47 Hun 625; *Collier v. Miller*, 62 Hun 99, 16 N. Y. Supp. 633, aff'd 137 N. Y. 332. Where all the parties concerned were present, they were held concluded thereby, even though there had been a mistake of law. *Gill v. Brouwer*, 37 N. Y.

549. Decree conclusive as to sureties on administrator's bond. *Altman v. Hofeller*, 152 N. Y. 498.

The settlement of an executor's account is conclusive as against an application by him for additional commissions. *Matter of Tilden*, 44 Hun 441.

Against whom decree not conclusive.—An accounting before the surrogate is absolutely void as to heirs and next of kin

not notified therein. *Hood v. Hood*, 19 Hun 300, rev'd on another point, 85 N. Y. 561.

A person who has filed a claim against a decedent's estate is not concluded by a decree, made without notice to him, finally settling the administratrix's account; such claimant may procure the decree to be reopened and require the administratrix to justify, as to him, the distribution of the estate. *Matter of Gall*, 40 App. Div. 114, 57 N. Y. Supp. 835. An unknown brother of an intestate, not cited or appearing at a judicial settlement of the estate, may institute proceedings for a new accounting upon notice to parties interested and proof of his relationship. *Matter of Killan*, 172 N. Y. 547.

Not conclusive as against a creditor whose claim was not paid. *Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 216; *Matter of White*, 6 Dem. 375.

Decree is no bar to an action by the *cestuis que trustent* for the enforcement of a trust by a purchase of real estate, by which they became trustees *ex maleficio*, and not under the will. *Fulton v. Whitney*, 5 Hun 16, aff'd 66 N. Y. 548.

Effect of decree as to executors.—As to protection of a surrogate's decree to executors in relation to investment out of the state, see *Matter of Denton v. Sanford*, 103 N. Y. 607. An executor not protected as against a minor where the citation was not served on such minor, but only on his parent. *Davis v. Crandall*, 101 N. Y. 311. Nor where a statement made on the accounting that a debt or legacy had been paid was false and known to him to be so. *Davis v. Crandall*, 101 N. Y. 311.

Executors are discharged from liability as executors with respect to the property turned over, but continue as executors with respect to assets not turned over. *Willeys v. Haines*, 96 App. Div. 5, 88 N. Y. Supp. 1018; *Rosen v. Ward*, 96 App. Div. 262, 89 N. Y. Supp. 148. Accounting discharges executor *pro tanto* and his duties and liability continue as to other assets which may be realized. *Mahoney v. Bernhard*, 45 App. Div. 499, 63 N. Y. Supp. 642, aff'd 169 N. Y. 589. See also *Johnson v. Richard*, 3 Hun 454.

The effect of a surrogate's decree on an accounting as to matters not litigated and questions not directly passed upon is not precisely the same as is the effect of a judgment of a court of general jurisdiction. *Matter of Hunt*, 41 Misc. 72, 83 N. Y. Supp. 652. As to a further accounting after an executor's accounts have been judicially settled, see *Matter of Soutter*, 105 N. Y. 514.

Conclusive as to what.—The judicial settlement of an executor's account is conclusive as to any allowances made to the

accounting party for money paid to creditors, legatees, or next of kin. *Altman v. Hofeller*, 152 N. Y. 498, rev'g 83 Hun 426, 31 N. Y. Supp. 881. Decree is conclusive upon all parties duly cited, and settles that the allowance made to the accounting party in payment of legatees and others is correct. *Matter of Hodgman*, 140 N. Y. 421.

A decree rendered on an accounting by one as an administrator with the will annexed is an adjudication, binding upon the parties, that there had been no overpayment to the administrator. *Skillin v. Cent. Trust Co.*, 80 App. Div. 206, 80 N. Y. Supp. 188.

Decree conclusive only in regard to those matters which were involved in the accounting or were covered by it. *Frethey v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839.

Fact found by surrogate on accounting as to overpayment to legatee who was a party thereto, held conclusive in any further litigation between the executor and legatee in respect thereto. *Matter of Underhill*, 117 N. Y. 471.

A recital in a surrogate's decree that a schedule constituting part of an executor's account showed that the principal sum of an annuity was paid to a coexecutor for investment as an annuity, and that the coexecutor held the sum, does not relieve the other executors from responsibility for the fund nor prevent an inquiry as to how the fund came into the hands of the executor in default. *Thompson v. Hicks*, 1 App. Div. 275, 37 N. Y. Supp. 340.

Under the provisions of this section a decree settling the accounts of an executor or administrator is only conclusive as to the matters or items stated therein. *Joseph v. Herzig*, 198 N. Y. 456, mod'g 135 App. Div. 141, 120 N. Y. Supp. 324.

An accounting to which the plaintiffs were parties is conclusive upon all payments covered by it and precludes the recovery of the same or any part thereof. Such accounting, however, is not binding upon any rents, issues, profits or income which have accrued since that time. *Staples v. Mead* (1912), 152 App. Div. 745, 137 N. Y. Supp. 847.

Decree pending upon devisees.—A judicial decree settling the accounts of an executor after the sale of property of the deceased at foreclosure to the executor, is binding upon the devisees who were made parties to the proceeding, even though the unauthorized account of the executor render him personally liable for losses sustained. *Widerhold v. Koehler* (1916), 174 App. Div. 139, 160 N. Y. Supp. 927.

Section cited.—*Matter of Kent* (1915), 92 Misc. 113, 155 N. Y. Supp. 383.

ARTICLE 2.

COSTS IN SPECIAL PROCEEDINGS, WHEN AND HOW PAYABLE; SECURITY FOR COSTS; COMPENSATION OF SPECIAL GUARDIAN, FEES OF APPRAISERS, JURORS, REFEREES AND WITNESSES, COMMISSIONS AND COMPENSATION OF EXECUTORS, ADMINISTRATORS, GUARDIANS AND TRUSTEES.

- | | |
|---|--|
| <p>§ 2743. Costs in special proceedings.
 2744. Costs; how made payable.
 2745. Costs on order.
 2746. When surrogate to fix amount of costs.
 2747. Additional allowance in settling accounts.
 2748. Compensation of special guardian</p> | <p>§ 2749. Allowance upon sale of real property.
 2750. Security for costs.
 2751. Costs of appeal.
 2752. Fees of appraiser, referee, juror and witness.
 2753. Commissions of executor, administrator, guardian or testamentary trustee.</p> |
|---|--|

§ 2743. Costs in special proceedings.

Costs shall be awarded in special proceedings in surrogate's court solely in accordance with the following sections, and shall include all disbursements of the party to whom they are awarded, which might be taxed in the supreme court. The sum allowed for costs must be fixed by the surrogate, and inserted in the decree or order, and must be awarded to the party.

Source.—Former §§ 2559 and 2560. Sections new as originally inserted in Code of Civ. Proc.; but see R. S., pt. 3, ch. 10, tit. 3, § 27; Code of Civ. Proc., § 307; L. 1837, ch. 460, § 70; L. 1870, ch. 359, § 9.

The only law that authorizes a surrogate to allow costs in his discretion is found in §§ 2743, 2744, 2746. *Matter of Bush* (1919), 106 Misc. 227, 174 N. Y. Supp. 653.

In general.—No disbursements allowed except those that are allowed in the supreme court and the surrogate is made the taxing officer instead of the clerk. *Matter of Bender*, 86 Hun 570, 33 N. Y. Supp. 907. As to costs in proceedings by the district

attorney under the transfer act (Tax Law art. 9), see *Estate of McCarthy*, 5 Misc. 276, 25 N. Y. Supp. 987. Provision as to costs and allowances should be inserted in the decree. *Matter of Budlong*, 33 Hun 235, aff'd 100 N. Y. 203; *Long v. Olmsted*, 3 Dem. 581.

Fees of attorney for alien property custodian.—Surrogate may not grant an order directing payment. *Matter of Hendel* (1919), 106 Misc. 417, 176 N. Y. Supp. 262.

§ 2744. Costs; how made payable.

Except where special provision is otherwise made by law, costs, awarded by a decree or order may be made payable by the party personally, or out of the estate, or fund, or out of the share or interest therein of any person, or from both, in such proportion as the surrogate may direct, and justice requires.

Source.—Former § 2557; originally revised from R. S., pt. 3, ch. 2, tit. 1, § 10; L. 1866, ch. 784; L. 1867, ch. 782, § 8.

Revisers' note.—Giving discretion to make costs payable out of a share in whole or in part gives the surrogate a chance to adjust the costs equitably where there are a number of appearances.

As the surrogate is given discretion as to amount, and the maximum is small, it would seem that the last sentence might be safely omitted.

Allowances of costs generally.—The principal estate cannot be charged with the expenses of administering or the costs of the settlement of the income estate. In re *Estate of Goetschius*, 3 Misc. 155, 23 N. Y. Supp. 975. Surrogate has no power to make an award of costs to attorneys personally. *McMahon v. Smith*, 20 Misc. 305, 45 N. Y. Supp. 663. As to compensation of special guardian, see *Matter of Robin-*

son, 180 N. Y. 448. Costs imposed upon an administrator personally. *Beckett v. Place*, 12 Misc. 323, 33 N. Y. Supp. 634. Costs imposed upon a contestant personally in a probate proceeding. *Matter of Whelan*, 6 Dem. 425, 2 N. Y. Supp. 635.

§ 2745. Costs on order.

The costs upon granting or refusing to grant an order, are in the discretion of the surrogate, and when allowed may be collected in the same manner as costs allowed upon granting or refusing to grant an order in the supreme court.

Source.—Former § 2556; section new as originally inserted in Code of Civ. Proc.

§ 2746. When surrogate to fix amount of costs.

The surrogate, upon rendering a decree, may, in his discretion, fix such a sum as he deems reasonable, to be allowed as costs, to the petitioner, and to any other party who has succeeded in a contest, or whose attorney, in the absence of a contest, has rendered services in the proceeding of substantial benefit to him, or to the estate or fund, not exceeding, where there has not been a contest, twenty-five dollars, or where there has been a contest, seventy dollars; and, in addition thereto, where a trial or hearing upon the merits necessarily occupies more than one day, ten dollars for each additional day, necessarily occupied in the trial or hearing and in preparing therefor, and where a motion for a new trial is made, if it is granted, twenty-five dollars; if it is denied, fifteen dollars.

When the decree is made upon a contested application for probate of a will, costs, payable out of the estate or otherwise, shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant or incompetent, appointed by the surrogate, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent; but where a person named as the executor in a will propounds the will for probate, such person so named as executor may, whether successful or not, in the discretion of the surrogate, be awarded costs and all necessary disbursements made by him and all expenses incurred in the attempt to sustain the will. The surrogate may order a copy of the stenographer's minutes to be furnished to the contestant's counsel, and charge the expense thereof to the estate, if he shall be satisfied that the contest is made in good faith.

Source.—Former § 2558, subd. 3, § 2561. § 2558, as amended by L. 1881, ch. 535; L. 1911, ch. 539; L. 1913, ch. 447; originally revised from R. S., pt. 2, ch. 6, tit. 1, § 39; tit. 4, § 12. § 2561; new as originally inserted in Code of Civ. Proc.; but see references cited in note to § 2743, supra.

Revisers' note.—This section as changed is intended to allow the surrogate to make an allowance to any party who appears, and in connection with § 2557 (new § 2744) to charge such costs upon the estate or a share in whole or in part as justice requires. Often the attorney who does not file objections succeeds and does the estate great good, and there should be some way to compensate him. Surrogates will not be likely to abuse this discretion.

Power to grant a new trial is found in § 2490, subd. 6.

In general.—Surrogate may require an attorney for an executor to appear and submit to an examination as to services rendered on an accounting, where such attorney has presented a bill of costs for such services. *Matter of Reeves*, 48 Hun 606, 1

N. Y. Supp. 17. Costs must be allowed to parties and not to their counsel. *Matter of Aaron*, 5 Dem. 362.

Surrogate has no power to allow an executor his expenses on an appeal from a decree finally settling his accounts, which

is affirmed, without costs. *Matter of McEchron*, 55 App. Div. 147, 67 N. Y. Supp. 18.

Construction of this section and former § 2562 (now § 2747). *Walton v. Howard*, 1 Dem. 103. As to power of surrogate to grant costs to counsel being limited by §§ 2746 and 2747, see *Matter of Bailey*, 47 Hun 477; *Matter of Mitchell*, 39 Misc. 120, 78 N. Y. Supp. 976.

Allowance of costs in discretion of the surrogate. *Matter of Yates*, 99 N. Y. 94; *Matter of Richmond*, 63 App. Div. 488, 71 N. Y. Supp. 795. As to costs on established disputed claim referred by consent to the surrogate, see *Matter of Ingraham*, 35 Misc. 577, 72 N. Y. Supp. 62.

Surrogate has no power to include disbursements in his taxation of costs. *Matter of Moran*, 60 Misc. 298, 113 N. Y. Supp. 276.

Costs decreed against general guardians may be collected from their sureties. *Phillips v. Liebman*, 10 App. Div. 128, 41 N. Y. Supp. 1020. When an executor employs counsel in litigations for the benefit of the estate an allowance made under 4 Revised Statutes (8th ed.), page 2564, § 58, is entirely separate from the matter of taxable costs in a surrogate's court provided by this section. *Douglas v. Yost*, 64 Hun 155, 18 N. Y. Supp. 830.

Costs on appeal.—When the appellate court has failed to award costs of an appeal, power of surrogate to award such costs. *Matter of Campbell*, 48 Hun 417, 1 N. Y. Supp. 231; *Matter of Hatten*, 6 Dem. 444, 2 N. Y. Supp. 493; *Matter of McEchron*, 55 App. Div. 147, 67 N. Y. Supp. 18.

Contested application for probate, etc.—As to allowances and disbursements on contest of a will, see *Matter of Hitchler*, 25 Misc. 369, 55 N. Y. Supp. 640; *Matter of Mondorf*, 110 N. Y. 450; *Collyer v. Collyer*, 110 N. Y. 481; *Matter of Bogart*, 46 App. Div. 240, 61 N. Y. Supp. 671; *Matter of Budlong*, 100 N. Y. 203; *McCue v. O'Hara*, 5 Redf. 336; *Matter of Engelbrecht*, 15 App. Div. 541, 44 N. Y. Supp. 551; *Matter of Byron*, 61 Hun 278, 16 N. Y. Supp. 760; *Matter of Henry*, 5 Dem. 272; *Forster v. Kane*, 1 Dem. 67; *Whelpley v. Loder*, 1 Dem. 368; *Bertine v. Hubbell*, 1 Dem. 335.

An executor may recover from an estate, the necessary and reasonable expenses incurred by him in good faith in endeavoring to obtain probate of an instrument, although he was unsuccessful. *Dodd v. Anderson*, 131 App. Div. 224, 115 N. Y. Supp. 688.

The committee of a lunatic who unsuccessfully contests the probate of a will is not "a special guardian appointed by the court" to whom costs may be awarded. *Matter of Davis*, 60 Misc. 297, 113 N. Y. Supp. 287.

Contested proceedings.—Term "contest" as used in this section relates to the trial of an issue of fact. *Matter of Hogarty*, 62 App. Div. 79, 70 N. Y. Supp. 839. An

award of \$50 costs against an unsuccessful respondent in a contested special proceeding for the discovery of concealed assets, etc., held a reasonable exercise of surrogate's discretion. *De Lamater v. McCaskie*, 5 Dem. 8.

As to allowances and disbursements on contest of will, see *Matter of Hitchler*, 25 Misc. 369, 55 N. Y. Supp. 640; *Matter of Bogart*, 46 App. Div. 240, 61 N. Y. Supp. 671; *Foster v. Kane*, 1 Dem. 67.

Trustees allowed costs, where guardian of an infant made application for an order requiring the trustees to apply the entire income of infant's share as it accrues, to the infant's support, and where such application was successfully contested by the trustees. *Matter of McCormick*, 40 App. Div. 73, 57 N. Y. Supp. 548, aff'd 163 N. Y. 551.

In a special proceeding for the disposition of a decedent's real property for the payment of his debts, a creditor other than the petitioner, whose claim has been contested and allowed, cannot be awarded costs under this section. *Long v. Olmsted*, 3 Dem. 581. Costs on established disputed claim referred by consent to the surrogate. *Matter of Ingraham*, 35 Misc. 577, 72 N. Y. Supp. 62; *Matter of Cooley*, 38 Misc. 219, 77 N. Y. Supp. 269.

In a proceeding for probate and also for construction of will, costs may be awarded to all parties. *Matter of Sayre* (1917), 179 App. Div. 269, 166 N. Y. Supp. 499.

Costs where there has been no contest, see *Matter of Rylance*, 25 Misc. 283, 55 N. Y. Supp. 433. As to what the allowance of twenty-five dollars is intended to cover, see *Matter of Miles*, 5 Redf. 110.

Executor or trustee must render and settle his account without any other expense to the estate than the sums authorized to be allowed him by former §§ 2561 and 2562 (now §§ 2746, 2747) and such taxable disbursements as are connected with the judicial proceedings. *Hall v. Campbell*, 1 Dem. 415.

General guardian.—Under this section the general guardian of an infant legatee may only be granted twenty-five dollars costs upon the settlement of the accounts of the testamentary trustee. *Matter of Tilden* (1918), 105 Misc. 342, 172 N. Y. Supp. 811.

A general guardian who appears for an infant legatee may not be allowed more than twenty-five dollars costs. In re *Tilden's Estate* (1918), 172 N. Y. Supp. 811.

Special guardian's costs.—Surrogate has no power to award a special guardian, who represented an infant party to an executor's accounting, compensation out of the corpus of the estate, in excess of the costs authorized by this section. *Matter of Robinson*, No. 2, 40 App. Div. 30, 57 N. Y. Supp. 523, aff'd 160 N. Y. 448, aff'd 160 N. Y. 692; *Matter of O'Keefe*, 80 App. Div. 513, 81 N. Y. Supp. 118. As to power of surrogate to allow costs to a special guardian. *Matter of Dodge*, 40 Hun 443; *Mat-*

ter of James, 78 Hun 121, 28 N. Y. Supp. 992, aff'd 146 N. Y. 78; Matter of Rupaner, 7 App. Div. 11, 39 N. Y. Supp. 763.

Hearing upon the merits.—The summing up of counsel upon executors' accounting is a "hearing upon the merits," for which the per diem allowance of costs, specified in this section may be made. *Du Bois v. Brown*, 1 Dem. 317.

Trial by referee.—This section, providing that \$10 for each additional day more

than two days, may be allowed as costs, applies to a trial had before a referee appointed by a surrogate, as well as to a trial had before the surrogate himself. *Matter of Clark*, 36 Hun 301.

Administrators substituted as contestants for their intestates in probate proceedings not personally liable for costs. They are merely parties in their representative capacity. *Matter of McLean* (1917), 180 App. Div. 269, 167 N. Y. Supp. 656.

§ 2747. Additional allowance in settling account.

In addition to the sums specified in the last section, the surrogate may, in his discretion, allow to an executor, administrator, guardian, or testamentary trustee, upon a judicial settlement of his account, or on an intermediate accounting required by the surrogate, such a sum, as the surrogate deems reasonable, for his counsel fees and other expenses, not exceeding ten dollars for each day necessarily occupied in preparing his account for settlement and in drawing, entering and executing the decree.

Source.—Former § 2562, as amended by L. 1881, ch. 535; originally revised from substitute for L. 1863, ch. 362, § 8, last clause, and L. 1866, ch. 115.

Revisers' note.—This section now cuts out reference to trial which is covered by § 2561 (new § 2746), and authorizes an additional allowance to the accounting party for preparing his account and for drawing, entering and executing decree. Often the work of executing the decree is greater than in preparing the account, and the amount to be allowed for that purpose can be readily adjusted.

Reference.—See cases cited under previous sections.

Per diem allowance.—The per diem allowance authorized by this section for preparing for trial, cannot be lawfully made except to a party accounting and can be properly made to such a party only in so far as the labor of preparation is demanded by the best interests of the estate concerned. *Matter of Weeks*, 5 Dem. 194. The additional allowance is confined to an accounting party upon the judicial settlement of his account, or on an intermediate accounting. *Matter of Rylance*, 25 Misc. 283, 55 N. Y. Supp. 433; *In re Estate of Goetschius*, 3 Misc. 155, 23 N. Y. Supp. 975; *Matter of Aaron*, 5 Dem. 362.

The per diem allowance which may be allowed under this section is not intended to compensate the accounting party for his personal services in preparing his account, but is to enable him to secure legal assistance and advice when needed for putting the account into proper form. *Matter of Peyser*, 5 Dem. 244.

Allowance to executors of \$10 per day, for time consumed in preparing accounts, is proper. *Matter of Martin*, 124 App. Div. 793, 109 N. Y. Supp. 217.

Additional allowance made under this section should be made to the accounting

party and not to his attorney. *Matter of Welling*, 51 App. Div. 355, 64 N. Y. Supp. 1025. Time devoted by executor's counsel to examining the law, and drawing and settling the decree, on an accounting, which is not contested, is not occupied in "preparing for the trial." *Matter of Miles*, 5 Redf. 110.

Surrogate has no power to grant additional allowances to legatees and remaindermen, or their attorneys, who are not successful upon the accounting in either surcharging or securing allowance of items of account. *Matter of Welling*, 51 App. Div. 355, 64 N. Y. Supp. 1025.

A temporary administrator cannot saddle upon his decedent's estate a fee paid by him to an indemnity company as the consideration for its going bail for him. *Jenkins v. Shaffer*, 6 Dem. 59.

Costs.—Where, in the settlement of the accounts of an executor, it appears that, although he may have made mistakes in judgment, his good faith has not been successfully attacked, and that no act of his was done with the deliberate intention of injuring the estate or depleting its funds, and that his acts did not have such results, he should not be deprived of costs. *In re Garrabrant* (1916), 162 N. Y. Supp. 544.

§ 2748. Compensation of special guardian.

A special guardian for an infant or incompetent shall receive a reasonable compensation for his services to be fixed by the surrogate, payable

from the estate or fund, or from the interest of the ward therein, or from both in such proportion as the surrogate may direct.

Source.—New.

Constitutionality of section questioned. *Matter of O'Day* (1914), 88 Misc. 408, 150 N. Y. Supp. 425.

Effect of section on allowances granted under old § 2561.—It is doubtful if this section is a valid justification for an application for an allowance by a special guardian representing infants where there is no contest. The amendment of 1914 did not take into consideration that surrogates' courts are not courts of equity in possession of the *res*. Decrees of surrogates' courts operate almost entirely in *personam* and not on the *res*. It is doubtful whether the legislature has the power to authorize surrogates to grant an allowance where the allowance is to be paid not out of the property of the infants represented by a special guardian but out of the estate in which they have no interest after the withdrawal of the contest. As the new act (L. 1914, ch. 443), contains no repealing clause and § 2561 of former chapter 18 is not inconsistent with § 2748 of the new law, the allowance will be granted according to the old section. *In re Stevenson's Estate* (1914), 150 N. Y. Supp. 423.

This section should be so construed as to limit allowances to special guardians payable out of the estate, either in whole or in part to cases in which the services of the guardian are shown to be of value not only to the immediate ward or wards, but also to the owners of the estate or fund out of whose pockets the allowance is to be taken. Since the discretion vested in the surrogate in regard to allowances to special guardians is extensive, its exercise should be correspondingly conservative, and the amounts to be awarded

should depend at least as much upon the value of the services rendered as upon the size of the estate. Whatever be the extent of the discretion thus vested in the first instance in the surrogate, it is a legal and not an arbitrary discretion and is subject to review. *Matter of Thaw* (1918), 182 App. Div. 368, 169 N. Y. Supp. 430; *Matter of Rutherford* (1918), 103 Misc. 659, 170 N. Y. Supp. 1039.

Proceeding pending before September 1, 1914.—Where a proceeding for the judicial settlement of the accounts of a trustee was pending before September 1, 1914, a special guardian appointed therein may be granted an allowance under this section. *Matter of Union Trust Co.* (1914), 88 Misc. 456, 151 N. Y. Supp. 1099.

Reasonable compensation.—A special guardian, upon the judicial settlement of the account of executors and trustees, may be granted a reasonable compensation for his services, to be fixed by the surrogate and payable from the general funds of the estate. *Matter of Fitter* (1916), 100 Misc. 214, 165 N. Y. Supp. 406.

Special guardians of infants having no present interest.—Where an accounting proceeding is uncontested, a special guardian whose infants have no present interest in the estate in the hands of the accountants, may not be granted an allowance for services out of the principal of the estate which belongs to others. *Matter of O'Day* (1914), 88 Misc. 408, 150 N. Y. Supp. 425.

Where, although an estate is large, nothing is coming presently to infants and nothing ever may come to them, their special guardian may properly be given an allowance of \$25. *Matter of Seabury* (1914), 87 Misc. 241, 150 N. Y. Supp. 420.

§ 2749. Allowance upon sale of real property.

Upon the disposition of real property of a decedent, as prescribed in this chapter, the executor or administrator disposing of the property, must be allowed by the surrogate out of the proceeds of the sale brought into court, his commissions and expenses; and such a further sum as the surrogate thinks reasonable, for the necessary services of his attorney and counsel therein.

Source.—Former § 2563; originally revised from L. 1870, ch. 359, § 9.

Revisers' note.—We omit reference to compensation, as commissions are provided for in general section. new § 2753.

In general.—A freeholder appointed to sell the real estate of a decedent may be allowed his expenses, etc., by the surrogate, upon rendering his account of the sale. *Matter of McGee*, 65 App. Div. 460,

73 N. Y. Supp. 64. But see *Matter of Laird v. Arnold*, 42 Hun 136. No costs can be allowed under this section to a petitioning creditor. *Long v. Olmstead*, 3 Dem. 581. As to costs and allowances in

proceedings to sell infant's real property, see *Matter of Matthews*, 27 Hun 254.

An allowance to a freeholder's counsel, on a sale of a decedent's real estate, which

exhausts the fund, is not reasonable. In *re Matthewson's Estate*, 1 Connolly 254, 9 N. Y. Supp. 290.

§ 2750. Security for costs.

In any proceeding where an issue is raised by answer or objection by or on behalf of a non-resident of the state of New York against the proponent of a will, or an executor, administrator or trustee, or where the probate of a will has been tried before a jury which has disagreed, such proponent, executor, administrator or trustee shall be entitled in the discretion of the surrogate to have the person or persons raising such issue give security for costs.

Source.—New.

Revisers' note.—On account of giving the right of trial by jury it has been thought wise to require security for costs in cases of non-residents, and in all cases of probate where the jury has once disagreed. While the latter provision may seem unjust, there should be some curb on "strike" contests, and the surrogate may be safely trusted not to require security if the contestant has a meritorious case.

In an action by the comptroller of foreign state in proceeding to determine validity of claim security for costs will be required where it appears that costs heretofore awarded against such comptroller have not been paid. *Matter of Kopp* (1918), 103 Misc. 506, 169 N. Y. Supp. 324.

§ 2751. Costs of appeal.

The appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the surrogate's court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court; or, if such direction is not given, as directed by the surrogate.

The costs of an appeal, when they are awarded in a surrogate's court, are the same as if they were awarded in the supreme court.

Source.—Former §§ 2580 and 2589. § 2580; new as originally inserted in Code of Civ. Proc., but see R. S., pt. 3, ch. 10, tit. 3, § 27; Code of Proc., § 307; L. 1837, ch. 460, § 70; L. 1870, ch. 359, § 9. § 2589, originally revised from R. S., pt. 3, ch. 9, tit. 3, § 96; and pt. 2, ch. 6, tit. 1, § 61.

Costs to successful party.—This section authorizes costs to a successful party only. *Matter of Wilson*, 103 N. Y. 374; *Matter of Budlong*, 100 N. Y. 203; *Cole v. Terpenning*, 27 Hun 111. Costs imposed upon the unsuccessful party. *Matter of Martin*, 98 N. Y. 193. Right of a party to enter a judgment for costs. *Wadley v. Davis*, 38 Hun 186. Costs to abide the event. *Matter of Austin*; 45 Hun 1. Costs payable out of estate. *Matter of Folts*, 71 Hun 492, 24 N. Y. Supp. 1052.

Award of costs by surrogate.—The surrogate is not empowered by this section to award costs of appeal. His direction can relate only to the mode of payment. *Schell v. Hewitt*, 1 Dem. 249. As to power of surrogate to award costs of appeal, see also *Matter of Hatten*, 6 Dem. 444, 2 N. Y. Supp. 493.

Separate appeals by legatees.—Where an appeal is taken by each of two corporate legatees from a judgment determining that a bequest to each under the same will was subject to a transfer tax, the respondent on the affirmance of the judgment is entitled to tax a separate bill of costs against each appellant if each appeal raised separate issues. *Matter of Saunders* (1914), 86 Misc. 582, 149 N. Y. Supp. 461.

Transfer tax appeals.—Where a final order assessing a transfer tax upon a trust fund which came into possession of the trustees after decedent's death is reversed by the appellate division, the only costs which can be allowed to the appellant are the costs of the appeal. *Matter of Wright* (1915), 89 Misc. 108, 151 N. Y. Supp. 378.

§ 2752. Fees of appraiser, referee, juror and witness.

An appraiser is entitled, in addition to his actual expenses, to a sum, to be fixed by the surrogate, not exceeding five dollars for each day actually and necessarily occupied by him in making the appraisal or inventory. The number of days' services and the expenses, if any, must be proved by the affidavit of the appraiser; and the sums payable therefor taxed by the surrogate, and paid by the executor or administrator.

A referee, juror, or witness is entitled to the same fees for his services and for traveling, as is allowed for like services in the supreme court.

Source.—Former §§ 2565 and 2566. § 2565, originally revised from L. 1844, ch. 300, § 2, in part. § 2566, originally revised from R. S., pt. 2, ch. 6, tit. 1, § 19; L. 1873, ch. 225.

§ 2753. Commissions of executor, administrator, guardian or testamentary trustee.

On the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and necessary expenses actually paid by him, and if he be an attorney and counselor-at-law of this state, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable; and in addition thereto the surrogate must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity, and if there be more than one, apportion among them according to the services rendered by them respectively:

For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum.

For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum.

For all sums above eleven thousand dollars, at the rate of one per centum.

The value of any real or personal property, to be determined in such manner as the surrogate may direct, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. But this shall not apply in case of a specific legacy or devise.

If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and renders an annual account to the beneficiary of all his receipts and disbursements on account thereof, he shall be allowed, and may retain, the same commission on the amount so accounted for as he would be allowed upon principal on a judicial settlement; if he does not render such annual account, he shall be allowed, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary.

If the gross value of the principal of the estate or fund accounted for amounts to one hundred thousand dollars or more, each executor, administrator, guardian or testamentary trustee is entitled to the full compensation on principal and income allowed herein to a sole executor, administrator, guardian or testamentary trustee, unless there are more than three,

in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively. Where the will provides a specific compensation to an executor, administrator, testamentary guardian or trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letters, or in the case of a testamentary trustee or guardian, from the date of his filing his oath, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity.

Amended by L. 1916, ch. 596; L. 1919, ch. 279, in effect Sept. 1, 1919. The amendment of 1919 inserted the words "to be determined in such manner as the surrogate may direct" in lines 17 and 18.

Source.—Former §§ 2730, 2761, 2802, 2810, 2850 and 2856. § 2730, as amended by L. 1881, ch. 535; L. 1893, ch. 686; L. 1895, ch. 595, and L. 1905, ch. 328; the amendment of 1893 consolidated former §§ 2736, 2737 and 2738. §§ 2736 and 2737 originally revised from R. S., pt. 2, ch. 6, tit. 3, §§ 58 and 59. § 2738 new as originally inserted in Code of Civ. Proc. § 2761, as substituted for former §§ 2772-2776 by L. 1904, ch. 750. § 2802, as amended by L. 1885, ch. 518; originally revised from R. S., pt. 2, ch. 6, tit. 3, § 66; L. 1866, ch. 115. § 2810; new as originally inserted in Code of Civ. Proc., but see L. 1850, ch. 272 (as amended by L. 1866, ch. 115), L. 1867, ch. 782 (as amended by L. 1871, ch. 482), L. 1870, ch. 359, §§ 3, 4. § 2850, as amended by L. 1882, ch. 400; L. 1887, ch. 143; originally revised from R. S., pt. 2, ch. 8, tit. 3, § 22. § 2856, as amended by L. 1891, ch. 197; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—Section changed so as to cover the provisions for commissions found in §§ [former] 2761, 2802, 2810, 2850, 2856.

Notice new matter in first part of section, providing for compensation where executor, etc., acts as attorney. This authorizes what the surrogate often allows to be done through a dummy attorney.

Last new matter covers rule now made by decisions, except that it prevents forfeiture of commissions on income if the beneficiary gets property on judicial settlement.

Application.—Section does not apply to the account of an executor of a deceased representative or trustee. *Matter of Ingraham*, 60 Misc. 44, 112 N. Y. Supp. 763.

An administrator, appointed before the discovery of a will, is entitled to commissions on being superseded by an executor thereafter appointed. *Matter of Hurst*, 111 App. Div. 460, 97 N. Y. Supp. 697.

References.—Executors and administrators entitled to allowances for costs of bond, Code Civ. Pro., § 3320.

In general.—Commissions are only allowed for services in receiving and paying out money. *Matter of Dill*, 60 Misc. 294, 113 N. Y. Supp. 384.

Discretion of surrogate to withhold commissions.—A surrogate may, in his discretion, upon the settlement of an executor's accounts, deny him the statutory commissions if he has been guilty of misconduct. *Matter of Rutledge*, 162 N. Y. 31. Where one named as executor received assets of testatrix before her death and he, upon the day of her death, deposited the money in his own bank account and

spent it before her will was proved, the surrogate charged him with the fund, less disbursements and legal interest, but did not refuse him commissions because of such deposit. *Matter of Brintnall*, 40 Misc. 67, 81 N. Y. Supp. 250. One who takes no part in the administration is not entitled to commissions. *Matter of Manice*, 31 Hun 119; *Eager v. Roberts*, 2 Redf. 247. The surrogate may deny an executor the statutory commissions, subject, however, to review by the appellate division. *Matter of Gall*, 107 App. Div. 310, 95 N. Y. Supp. 124.

A widow who had only a life interest but treated the whole estate as her own, as executrix, made no inventory or appraisal and did not have set off her portion under the statute, was held not to be entitled to commissions. *Matter of Matthewson*, 8 App. Div. 8, 40 N. Y. Supp. 140. As to the withholding of commissions by surrogate, see also *Myers v. Bolton*, 157 N. Y. 393; *Stevens v. Melcher*, 152 N. Y. 551; *Matter of Douglas*, 60 App. Div. 64, 69 N. Y. Supp. 687; *Wheelwright*

v. Rhoades, 28 Hun 57; *Gillespie v. Brooks*, 2 Redf. 349; *Matter of Welling*, 3 Dem. 511; *Hill v. Nelson*, 1 Dem. 357.

An executor is not entitled to commissions as a matter of right, but there is some discretion in the surrogate. And he may deny commissions where the executor has rendered no services beneficial to the estate or if the doings of the executor were prejudicial to the just and lawful administration of the estate. *Matter of Ellis* (1917), 176 App. Div. 425, 163 N. Y. Supp. 27.

Commissions, how determined.—Executors are not entitled to commissions on a specific legacy of shares of stock; and commissions should not be allowed upon the basis of the inventory of the estate, but only for actual services in receiving and disbursing the moneys of the estate. *Matter of Whipple*, 81 App. Div. 589, 81 N. Y. Supp. 393; *Matter of Bidgood*, 36 Misc. 516, 73 N. Y. Supp. 1061. Executors are entitled to nothing beyond statutory commissions. *Collier v. Munn*, 41 N. Y. Supp. 143; *Russell v. Hilton*, 37 Misc. 642, 76 N. Y. Supp. 233; *aff'd* 175 N. Y. 525; *Matter of Hayden*, 1 Connolly 454, 5 N. Y. Supp. 845.

Where the amount of an executor's commissions depends upon whether certain bequests of corporate stock and other personal property are specific legacies or not, the court before reaching a determination must ascertain the intent of the testatrix as gathered from the whole will. *Matter of Evans* (1918), 104 Misc. 641, 172 N. Y. Supp. 876.

Executors are entitled to commissions upon the gross proceeds of a sale of securities and not merely upon a surplus remaining after satisfaction of debts. *Matter of Bolles*, 67 Misc. 40, 124 N. Y. Supp. 640.

Where one of two executors qualifies, receives full commissions, and dies, and another executor then receives letters and acts, he is entitled to full commissions on moneys received and paid out by him and half commissions on moneys received and held. *Matter of Depew*, 6 Dem. 54. Where an executor or administrator has only received, and not paid out funds of the estate, he should be allowed therefor commissions at one-half the legal rate. *Lyden-decker v. Eiseman*, 3 Dem. 72.

Commissions should be equally divided among executors, where they all shared in the responsibility of the office and each took part in the work pertaining to the administration of the estate. *Matter of Arnton*, 106 App. Div. 326, 94 N. Y. Supp. 471.

Executors and trustees of real and personal estate, having as trustees separable duties, but no express or implied mandatory power to sell the realty are not entitled when accounting as executors to have the value of the realty in their hands unsold considered in determining their com-

missions. *Matter of McGlynn*, 41 Misc. 156, 83 N. Y. Supp. 975. Executors have no such vested rights to commissions as remain unaffected by a statutory change of rate or proportion, taking effect after their services are rendered, and before entry of the decree whereby their compensation is fixed. *Matter of Harris*, 4 Dem. 463.

Executors are not entitled to commissions upon specific securities or upon unsold real estate, bequeathed in trust, in advance of their conversion into money. *Matter of Wauninger*, 120 App. Div. 273, 105 N. Y. Supp. 4, *aff'd* 190 N. Y. 527.

An executor or trustee is only entitled to commissions upon acting as such in receiving and paying out moneys of the estate. *Matter of Boyle* (1912), 151 App. Div. 568, 136 N. Y. Supp. 96.

An executor who, without authority, continues the business of his testator, or without authority uses the property of the estate in a new business and continues the same, in contemplation of law renders no service to the estate and is not entitled to compensation therefor independent of his right to statutory commissions, in the absence of evidence of an agreement between the beneficiaries of the testator and the executor that he was to be paid for services rendered in said business. *Matter of Archer* (1912), 77 Misc. 288; 137 N. Y. Supp. 770.

An executor who upon his own motion continues the business of the testator is not to be compensated therefor, and he must account to the beneficiaries of the estate for all the profits which he makes. *Matter of Peck*, 79 App. Div. 296, 80 N. Y. Supp. 76, *aff'd* 177 N. Y. 538. As to how commissions are determined, see also *Matter of Willets*, 112 N. Y. 289; *Matter of Tilden*, 44 Hun 441; *Matter of Baker*, 35 Hun 272; *Baucus v. Stover*, 24 Hun 109, *rev'd* 89 N. Y. 1; *Matter of Robinson*, 37 Misc. 336, 75 N. Y. Supp. 490; *Matter of Ross*, 33 Misc. 163, 68 N. Y. Supp. 373; *Matter of McLoren*, 6 Misc. 483, 27 N. Y. Supp. 289; *Matter of Harris*, 4 Dem. 463; *Hawley v. Singer*, 3 Dem. 589.

Quaere, as to whether the executor is entitled to full compensation and whether the failure to file the renunciation until two and one-half years after letters testamentary were issued does not constitute such laches as will deprive the executor of the benefit thereof. *Matter of Arkenburgh*, 38 App. Div. 473, 56 N. Y. Supp. 523.

Commissions on real estate.—While the amendment of 1916 would doubtless authorize the allowance of commissions on real estate received by trustees subsequently to the date of the amendment, it does not authorize the allowance of commissions on real estate received by trustees prior to the date of the amendment unless such trustees are actually account-

ing for the real estate. *Matter of Hamersley* (1917), 99 Misc. 218, 163 N. Y. Supp. 667.

Testamentary trustees are not entitled to commissions upon the value of real estate held in trust during the life of testator's wife, notwithstanding a power of sale given to them, where such power was not exercised, and the testator's issue became entitled to possession immediately upon the death of the life tenant. In re *Suarez's Estate* (1916), 158 N. Y. Supp. 140.

Unsold real estate.—Executors are not entitled to commissions on unsold real estate over which they have power of sale to pay legacies. *Matter of Juilliard* (1918), 103 Misc. 178, 169 N. Y. Supp. 1079.

Temporary administrator is not entitled to commissions upon the fee value of real estate placed in his possession for the purpose of receiving rents and profits. *Matter of Runk* (1918), 181 App. Div. 461, 168 N. Y. Supp. 970; *aff'd*, 224 N. Y. 570.

The amendment of 1916 restored in substance the provision for commissions to testamentary trustees formerly contained in § 3320. *Matter of Bushe* (1918), 183 App. Div. 834, 171 N. Y. Supp. 406.

Commissions, when taken.—Commissions are not to be taken until actually allowed by the surrogate. *Matter of Worthington*, 141 N. Y. 9; *Beard v. Beard*, 140 N. Y. 260; *Wheelwright v. Rhoades*, 28 Hun 57. See also *Hancox v. Meeker*, 95 N. Y. 528; *Carrol v. Hughes*, 5 Redf. 337; *Wycoff v. Van Sielen*, 3 Dem. 75; *Matter of Butler*, 1 Connolly 58, 9 N. Y. Supp. 641.

Compensation by will.—As to compensation of executors and administrators by will, see *Matter of Mason*, 98 N. Y. 527; *Ireland v. Corse*, 67 N. Y. 343; *Matter of Arkenburgh*, 13 Misc. 744, 35 N. Y. Supp. 251; *Matter of Weeks*, 5 Dem. 195. See also *Matter of Kernochan*, 104 N. Y. 618; *Matter of Tilden*, 44 Hun 441; *Matter of Hopkins*, 32 Hun 618; *aff'd* 98 N. Y. 636; *Arthur v. Nelson*, 1 Dem. 337.

An executor to whom a specific compensation has been given by will may renounce that right within a reasonable time and elect to take the allowance given to executors by law. But such right of election may be waived. *Matter of Nester* (1915), 166 App. Div. 224, 151 N. Y. Supp. 194.

Estates exceeding \$100,000.—Where the estate exceeds \$100,000, and there are but three executors, each is entitled to full commissions, based on the whole estate, irrespective of which executor actually handled it. *Matter of Kenworthy*, 63 Hun 165, 17 N. Y. Supp. 655. Where a will authorizes a sale of all the real estate of testatrix, the real estate becomes personalty as of the time of her death for the purpose of determining whether the personal property over all her debts amounts to \$100,000, and therefore entitles the ex-

ecutors to full commissions each. *Matter of Clinton*, 16 Misc. 199, 38 N. Y. Supp. 945; *aff'd* 12 App. Div. 132, 42 N. Y. Supp. 674. As to the apportionment of full commissions among four executors, see *Matter of Meyer*, 95 App. Div. 443, 88 N. Y. Supp. 798.

Where the corpus of a testamentary trust in personalty exceeds \$100,000, the trustees, not exceeding three, are each entitled to executor's commissions on the annual income received and disbursed by them as fixed by \$2,730. *Matter of Hunt*, 41 Misc. 72, 83 N. Y. Supp. 652; *Matter of Holbrook*, 39 Misc. 139, 78 N. Y. Supp. 972.

Principal and income may not be added together in order to make an estate of over \$100,000 and thus entitle each trustee to full commissions. *Matter of Grossman* (1915), 92 Misc. 656, 156 N. Y. Supp. 268.

Where the gross value of the principal of an estate consists of unsold real estate which is not to be distributed or delivered, it cannot be taken into consideration so as to bring the value of the estate beyond \$100,000. *Matter of Grossman* (1915), 92 Misc. 656, 156 N. Y. Supp. 268.

Where upon the judicial settlement of the accounts of three executors it appears that though the amount of the principal and income of the estate is over \$100,000, the principal is less than that sum, only one commission on the amount of both principal and income may be allowed, the executors sharing equally therein. *Matter of Freeman* (1918), 105 Misc. 423, 174 N. Y. Supp. 416.

Commissions as executor and trustee.—Where the residuary estate is given to the executors in trust to sell and invest the proceeds to pay the income to testator's widow and children during their lives, and the principal at their respective deaths to their heirs and next of kin, their duties as executor and as trustees are separate and distinct, and they are entitled to double commissions. *Matter of Curtiss*, 15 Misc. 545, 37 N. Y. Supp. 586; *aff'd* 9 App. Div. 285, 41 N. Y. Supp. 496. Where the survivor of two original trustees named in a will dies leaving the trust unexecuted, his estate is entitled at most to but one-half of the fees. *Quaere*, as to the effect of the fact that the trust estate had never been reduced to money upon the right of the estate of the deceased trustee to any commissions. *Matter of Todd*, 64 App. Div. 435, 72 N. Y. Supp. 277. As to commissions of testamentary trustees when the same persons are trustees of several distinct trusts, see *Matter of Johnson*, 170 N. Y. 139, modifying 57 App. Div. 494, 67 N. Y. Supp. 1004. As to commissions where executors act also as trustees, see *Matter of Slocum*, 69 N. Y. 153; *McAlpine v. Potter*, 126 N. Y. 285; *Matter of Crawford*, 113 N. Y. 560; *Phoenix v. Livingston*,

101 N. Y. 451; *Matter of Hood*, 98 N. Y. 363; *Laytin v. Davidson*, 95 N. Y. 263; *Hall v. Hall*, 78 N. Y. 535; *Willey v. Robinson*, 85 Hun 362, 32 N. Y. Supp. 1018; *Matter of Beard*, 77 Hun 111, 28 N. Y. Supp. 305. See also *Hurlburt v. Durant*, 88 N. Y. 121; *Matter of Lawrence*, 37 Misc. 702, 76 N. Y. Supp. 653; *Matter of Gilbert*, 25 Misc. 584, 56 N. Y. Supp. 149; *Matter of Clinton*, 12 App. Div. 132, 42 N. Y. Supp. 674; *Matter of Roosevelt*, 5 Redf. 601.

A substituted trustee is entitled to one-half commissions for receiving property from his predecessor. In *re Naylor's Estate* (1917), 164 N. Y. Supp. 462.

Trustees should not have commissions on an unsecured debt, which under the will they have no power to treat as an investment. The personal property upon which commissions may be allowed must have been received. The right to receive a debt is not the receipt thereof. Commissions are allowed to compensate the representative or trustee for services rendered by him. *Matter of Keane* (1916), 97 Misc. 213, 162 N. Y. Supp. 856.

Since Sept., 1914, commissions to testamentary trustees accounting in surrogate's court are commissions allowed in accordance with this section and not under § 3320. *Matter of Grossman* (1915), 92 Misc. 656, 156 N. Y. Supp. 268.

Right of two trustees to full commissions.—The gross value of the principal of an estate is the determining factor as to whether or not two testamentary trustees shall each be entitled to full commissions on principal and income and the amount of the latter has nothing to do with the right to more than one full commission. *Matter of Grossman* (1915), 92 Misc. 656, 156 N. Y. Supp. 268.

Where the will provides that the residuary estate is bequeathed to the executor in trust for certain purposes so that necessarily all of the executorial duties were to be performed and the debts and legacies paid before the residue was ascertained so that in the administration of the trust fund no executorial duties were to be performed, the executors were entitled to commissions both as executors and trustees. In *re Blun's Estate* (1916), 176 App. Div. 189, 162 N. Y. Supp. 458.

Where a clause in a will provides for the investment of a certain fund for the use of a certain person with reversion to the residuary estate on her death the executor is not entitled to receive, on this fund, trustee's commissions in addition to his commissions as executor. In *re Vanneck's Estate* (1916), 175 App. Div. 363, 161 N. Y. Supp. 893.

Commissions as trustees as well as executors may be allowed where the duties in both capacities are separate and distinct. In *re Textor's Estate* (1916), 157 N. Y. Supp. 848.

Double commissions.—Executors authorized to act as trustees of the personal

property in order to be entitled to double commissions must be able to differentiate between their duties in respect to the real property, and in respect to the personal property of the estate, and must further show that they are required as executors, first to conserve the entire estate that they may set aside the personal property in one fund for the purposes of an expressed trust established by the will, and the administration of that trust must be separate and severable in both act and time from their administration of the estate as executors, and they must further show that they are directed in both of the above particulars distinctly, definitely and expressly, or by fair intendment by the will under which they assume to act. *Matter of Ziegler* (1915), 168 App. Div. 735, 154 N. Y. Supp. 652.

After the termination of a trust testamentary trustees are not entitled to commissions on rents received or collected, as where a trust terminated on the death of a life tenant. In *re Suarez's Estate* (1916), 158 N. Y. Supp. 140.

Amount of commissions allowed to testamentary trustees is governed by the law in force at the time of the settlement of their accounts. In *re Naylor's Estate* (1917), 164 N. Y. Supp. 462.

The transfer of property to succeeding trustees is not a paying out, so as to entitle a trustee to a one-half commission. In *re Naylor's Estate* (1917), 164 N. Y. Supp. 462.

Allowance for expenses.—The actual and necessary expenses for which an executor must be reimbursed are those which he has contracted in good faith and with reasonable judgment, whether with or without the advice of counsel. *Matter of Huntley*, 13 Misc. 375, 35 N. Y. Supp. 113. An administrator may be allowed a reasonable sum for expenses of necessary litigation. *Matter of Hoffman*, 62 Misc. 600, 115 N. Y. Supp. 984. The authority of the surrogate to reimburse executors or administrators for counsel fees paid for services rendered them in the course of their administration is derived from 2 R. S. 93, § 58, as amended by L. 1863, ch. 362, which is now incorporated in section 2753. *Matter of Flint*, 15 Misc. 598, 38 N. Y. Supp. 188; *aff'd* 157 N. Y. 689; *Matter of O'Brien*, 5 Misc. 136, 25 N. Y. Supp. 704. As to payment of counsel fees, expenses, and necessary disbursements of litigation, see *Arkenburgh v. Wiggins*, 13 App. Div. 96, 43 N. Y. Supp. 294; *aff'd* 162 N. Y. 596. As to payment of attorney's fees, see also *Matter of Pond*, 42 Misc. 165, 85 N. Y. Supp. 1080.

Allowances by a surrogate are not proper in the case of executors of a trustee, for services in the compromise of a devastavit by the trustee. *Matter of Welling*, 51 App. Div. 355, 64 N. Y. Supp. 1025. An obligation paid by the executor's outstanding promissory note is not allowable to

him on his accounting. *Matter of Blair*, 49 App. Div. 417, 63 N. Y. Supp. 678.

The surrogate has no power to allow an executor his expenses on an appeal from a decree finally settling his accounts, which is affirmed without costs. *Matter of McEchron*, 55 App. Div. 147, 67 N. Y. Supp. 18.

Expenses of temporary administrators.—The authority of temporary administrators is *ipso facto* terminated by the appointment of an executor or an administrator with the will annexed and without formal revocation of the letters of temporary administrators or an accounting, but temporary administrators may have authority to deduct the just and reasonable expenses necessarily and actually paid out by them. *People ex rel. Every v. Purdy* (1913), 155 App. Div. 607, 140 N. Y. Supp. 614.

Commissions of trustees.—Trust estate not reduced to money; commissions of a trustee in case of his death while the trust remains unexecuted. *Matter of Todd*, 64 App. Div. 435, 72 N. Y. Supp. 277. Trustees' commissions cannot be legally taken before the settlement of their accounts. *Beard v. Beard*, 140 N. Y. 260. Double commissions for executors and trustees; policy of the law, see *In re Bennett's Estate*, 42 N. Y. Supp. 674; *Matter of Union Trust Co.*, 70 App. Div. 5, 75 N. Y. Supp. 68; *Matter of Curtiss*, 9 App. Div. 285, 37 N. Y. Supp. 586, 41 N. Y. Supp. 1111, and cases cited *supra* under heading "commissions as executor and trustee." Section relates entirely to annual accounts of trustees. Commissions of executors and trustees discussed. *Matter of Holbrook*, 39 Misc. 139, 78 N. Y. Supp. 972. See, generally, as to commissions of trustees, *Hurlburt v. Durant*, 88 N. Y. 121; *Hall v. Hall*, 78 N. Y. 535.

Trustee's commissions denied for misconduct of trustee. *Cook v. Lowry*, 95 N. Y. 103. Resignation and fees of trustees. *Matter of Allen*, 96 N. Y. 327.

Commissions for receiving corpus of trust fund.—*Matter of McDowell* (1918), 102 Misc. 275, 169 N. Y. Supp. 853.

The general guardian of an infant, who was directed to cumulate the income of a trust fund for the benefit of the ward and none of the income was ever paid to him, is not entitled to commissions on income received each year, but only on the gross income received and ready for payment to the beneficiary at the final accounting. *Matter of Chenery* (1915), 89 Misc. 680, 152 N. Y. Supp. 312.

Temporary administrator.—The amount of commissions to be allowed to temporary administrators cannot be determined in advance of the judicial settlement of their accounts, and any provision in the order appointing them limiting or determining the amount of such commissions must be stricken out. *Matter of Eno*

(1915), 92 Misc. 656, 156 N. Y. Supp. 268.

Commissions of the public administrator of New York county are governed by L. 1898, ch. 230, § 3, and not by this section, and he is not entitled to commissions on securities received by him and not converted into cash, but delivered in kind to the ancillary executor. *In re Brewis' Estate* (1917), 165 N. Y. Supp. 1066.

Temporary administrator who is an attorney entitled to allowance for legal services rendered to the estate. *Matter of Runk* (1918), 181 App. Div. 461, 168 N. Y. Supp. 970; *affd.* 224 N. Y. 570.

This section as amended in 1914 is retroactive, and an executor may be awarded compensation for legal services performed for the estate prior to Sept. 1, 1914, insofar as a claim therefor is not barred by decrees entered either on intermediate or private accountings. *Matter of Daly* (1917), 99 Misc. 203, 165 N. Y. Supp. 792.

Amendment by laws 1914, ch. 443, providing compensation for services rendered by attorney who is also an executor, is not retroactive. *Matter of Daly* (1918), 223 N. Y. 671.

The representatives of executors who died before the amendment made in 1916, are not entitled as a matter of right to one-half commissions based on the valuation of real estate not sold at the time of their testator's death, where said representatives are not accounting, but only the surviving trustees and executors. *Matter of Barker* (1919), 186 App. Div. 317, 174 N. Y. Supp. 230.

The amount agreed upon between an administrator and his attorney for services in bringing an action to recover for the wrongful death of the intestate, investigating the facts and negotiating a settlement of the action, will be allowed the administrator upon the judicial settlement of his accounts, in the absence of evidence of fraud or that undue advantage was taken of the administrator. *Matter of D'Adamo* (1916), 94 Misc. 1, 157 N. Y. Supp. 374.

The fact that one of the executors, an attorney and counselor at law, represented the estate in his professional capacity, did not warrant the transfer tax appraiser in refusing to allow expenses of administration as upon an accounting the surrogate may allow such an executor a reasonable sum as compensation for professional services rendered by him. *Matter of Bell* (1916), 94 Misc. 552, 158 N. Y. Supp. 142.

Legal services.—Amendment allowing compensation to executor who renders legal services is not retroactive. *Matter of Daly* (1917), 180 App. Div. 307, 167 N. Y. Supp. 229.

Commissions of committee of incompetent.—The committee of the person and property of an incompetent has no right to commissions upon the corpus of the estate until they are awarded to him on

the judicial settlement of his account. *Matter of Stratton* (1912), 76 Misc. 584, 137 N. Y. Supp. 311.

When commissions payable to executor's estate.—Where after a surrogate had published a decision settling an account and directing the entry of a decree thereon, but before the signing of the decree one of the executors died and it appeared that he had during his life time performed all the duties of his administration and trust except the ministerial act of "paying out" to be done pursuant to the decree, his estate will be allowed a full one-half of one per cent commissions for the "paying out" directed by the decree. *Matter of Ziegler* (1914), 85 Misc. 673, 148 N. Y. Supp. 1055.

The representatives of a deceased executor are not entitled to commissions for paying out, where the executor died before any payment was actually made by him. *In re Naylor's Estate* (1917), 164 N. Y. Supp. 462.

Where one of the executors and trustees under a will died after a decision of the surrogate's court settling their accounts, but before it was signed, his estate is not entitled to commissions upon payments directed to be made and actually made subsequent to his death. *Matter of Ziegler* (1915), 168 App. Div. 735, 154 N. Y. Supp. 652.

The amendment of 1916 which includes an allowance of commissions to executors upon real property received by them, is not retroactive, and hence does not vest in the estate of a deceased executor a right to commissions, to which he was not then entitled for services in receiving real property, which remained undisposed of at the time of his death. *Matter of Bushe* (1918), 183 App. Div. 832, 171 N. Y. Supp. 404.

Right to divide commission.—While the law does not in terms apportion one-half to the receiving and the balance to the paying out of the moneys, yet the courts, from an early date, have given the language a liberal construction, and have accordingly held that executors, administrators, and trustees were entitled to one-half of their commissions for the receipt of the moneys and funds of the estate, and to the other half for paying out the

same. *Matter of Smith* (1914), 86 Misc. 136, 49 N. Y. Supp. 131.

Demonstrative legacies.—Where testatrix in a bequest to her sister and another, of all her furniture, ornaments, glass, etc., and "all other personal effects in said house" expresses the wish that the contents of the house shall not be sold but divided between the legatees share and share alike according to value, the legacies are demonstrative and not specific, and under this section the executors are entitled to commissions thereon. *Matter of Grosvenor* (1918), 105 Misc. 344, 173 N. Y. Supp. 203.

Commissions on income.—The income which the trustee is required by the will to receive and distribute amongst beneficiaries constitutes an altogether new fund, on which commissions will be separately allowed. *Matter of Smith* (1914), 86 Misc. 136, 149 N. Y. Supp. 131.

Idem; rate of commissions.—Where the accounting is of the income only, commissions are chargeable at the same rate as are allowed on the principal of the estate. *Matter of Smith* (1914), 86 Misc. 136, 149 N. Y. Supp. 131.

Idem; chargeable on income only.—As a general rule, the amount of commissions on the income is a charge, not upon the principal of the estate, but upon the interest of the beneficiary; that is, a trustee holding a fund under a trust to pay the net income annually to a beneficiary may, on paying over the income and settling his account with the beneficiary, deduct and retain full commissions each year from the income received. *Matter of Smith* (1914), 86 Misc. 136, 149 N. Y. Supp. 131.

The amendment of 1916 which interpolated the words "and the increment thereof, received," had for its object the allowance to trustees of commissions on real estate under the same circumstances that would entitle them to commissions on securities. *Matter of Keane* (1916), 97 Misc. 213, 162 N. Y. Supp. 856.

Under the amendment of 1916 the test of the size of the estate or fund is the amount found in each fund separately accounted for, the value of the estate to be taken as of the time of its receipt by the trustee. *Matter of Potter* (1919), 106 Misc. 113, 175 N. Y. Supp. 598.

ARTICLE 3.

APPEAL; WHEN, HOW AND TO WHAT COURT TAKEN, AND POWER OF APPELLATE COURT; UNDERTAKING TO PERFECT APPEAL AND STAY EXECUTION; PROBATE OF HEIRSHIP; DEFINITION AND APPLICATION OF OTHER SECTIONS TO THIS CHAPTER.

- | | |
|--|--|
| <p>§ 2754. Appeal; when and to what court it may be taken.</p> <p>2755. Who must be made parties.</p> <p>2756. Time to appeal; how taken.</p> <p>2757. Appeal may be on the law or the facts; case to be made; reversal.</p> <p>2758. Certain provisions of chapter twelve made applicable.</p> <p>2759. Security to perfect appeal.</p> | <p>§ 2760. Idem; where decree is for money or delivery of property, et cetera.</p> <p>2761. Security to stay proceedings in case of commitment.</p> <p>2762. Amount and requisites of undertaking; action thereon.</p> <p>2763. Power of appellate court; further testimony.</p> <p>2764. Appeal; proceedings thereupon.</p> |
|--|--|

§ 2754. Appeal; when and to what court it may be taken.

An appeal to the appellate division of the supreme court may be taken from a decree of a surrogate's court, or from an order affecting a substantial right, made by a surrogate, or by a surrogate's court in a special proceeding, by any party aggrieved thereby, except where the decree or order was rendered or made upon his default in appearing.

Source.—Former §§ 2568 and 2570. § 2568; new as originally inserted in Code of Civ. Proc. § 2570, as amended by L. 1895, ch. 946; originally revised from R. S., pt. 2, ch. 6, tit. 1, § 35, in part; pt. 3, ch. 9, tit. 3, § 104, and part of § 118.

Application.—Former §§ 2568, 2570 and 2572 held to govern cases on appeal from surrogate's court from one of its own decrees. *Matter of Daly*, 34 Misc. 148, 89 N. Y. Supp. 494; *Matter of Housman* (1918), 224 N. Y. 525.

Former §§ 2568 to 2589, from which this article was taken, were held not to apply to an appeal from the appellate division to the court of appeals. *Matter of Gihon*, 29 Misc. 273, 61 N. Y. Supp. 244; *Matter of Ross*, 87 N. Y. 514; *Hewlett v. Elmer*, 103 N. Y. 164. When conclusions of law found in support of decree settling an intestate's estate are reviewable in court of appeals. *Matter of Killan*, 172 N. Y. 547.

Party aggrieved.—A person nominated as executor in a will is a "party aggrieved" by a decree denying probate to such instrument. *Matter of Rayner*, 93 App. Div. 114, 87 N. Y. Supp. 23. Executor not entitled to appeal from a decree directing payment of a bequest, the residuary legatees being the only persons aggrieved. *Coe's Will*, 55 App. Div. 270, 66 N. Y. Supp. 784. As to who is a "party aggrieved," see also *Matter of Hodgman*, 11 App. Div. 344, 42 N. Y. Supp. 1004, aff'd 161 N. Y. 627. As to persons held not to have been parties aggrieved, see *Kellett v. Rathbun*, 4 Paige 102; *Foster v. Foster*, 7 Paige 48; *Reid v. Vanderheyden*, 5 Cow. 719.

As to taking an appeal from an order of the surrogate admitting a will to probate, see *Austin's Will*, 35 App. Div. 278, 55 N. Y. Supp. 52. A devisee or legatee may appeal from an order admitting

a will to probate notwithstanding he was one of the persons who presented the will and petitioned for its probate. *Vandemark v. Vandemark*, 26 Barb. 416.

The parties to a proceeding for the probate of a will and codicils may appeal from decision admitting the codicils to probate even though their interests are unaffected. *Matter of Parish Will*, 42 Barb. 274, aff'd 25 N. Y. 9. As to appeal by heir-at-law from decision of surrogate in proceedings for the sale of real estate for the payment of debts, see *Owens v. Bloomer*, 14 Hun 296.

An executor may appeal from a judgment of the surrogate refusing probate to a codicil. *Stapleton's Will*, 71 App. Div. 1, 75 N. Y. Supp. 657.

A creditor appointed administratrix of an estate is not a "party aggrieved" by a decree of the surrogate's court directing the residue of the estate to be paid to the next of kin instead of to an illegitimate son of the intestate. *Matter of Heldmann* (1912), 151 App. Div. 234, 135 N. Y. Supp. 143.

Substantial rights.—An order adjudging against the denial of an administrator, that there are assets of the estate in his hands, and requiring him to account therefor, is an order affecting a substantial right. *Matter of Gilbert*, 104 N. Y. 200, aff'd 39 Hun 61. An order of a surrogate's court fixing the fees of appraisers of the estate of a deceased testator is a final order affecting a substantial right. *Matter of Harriott*, 145 N. Y. 540.

Order of denial held not appealable where surrogate denied a motion to forthwith proceed with the distribution of the personal estate, no party opposing, but remedy is by mandamus. *Matter of Nottingham*, 88 Hun 443, 34 N. Y. Supp. 404. The comptroller may appeal from a transfer tax decision. *Morgan v. Warner*, 45 App. Div. 424, 60 N. Y. Supp. 963, *aff'd* 162 N. Y. 612. An assessment of a transfer tax by the surrogate is a judicial act and is appealable under this section. *Matter of Hull*, 109 App. Div. 248, 95 N. Y. Supp. 819.

An order denying a motion, made before the citation is served, to set aside a citation issued in proceedings for the revocation of letters, is not appealable. *Matter of Westurn*, 5 App. Div. 595, 39 N. Y. Supp. 429. An order denying a motion to dismiss proceedings to revoke a probate does not affect any substantial rights. *Matter of Soule*, 46 Hun 661, *aff'd* 109 N. Y. 662.

Where the determination of the surrogate is purely arbitrary and results in a violation of justice it may be reviewed by the appellate division. *Matter of Powell*, 136 App. Div. 830, 121 N. Y. Supp. 779.

An order of a surrogate's court denying a motion for the simultaneous trial of different issues joined in a special proceeding pending therein does not affect a substantial right. *Henry v. Henry*, 4 Dem. 253. The decision of a surrogate on the question of the competency of an applicant for letters is appealable. *McMahon v. Harrison*, 6 N. Y. 443.

As to what affects a substantial right, see also *Accounting of Burnett*, 15 St. Rep. 116; *Matter of Johnson*, 27 Hun 538; *Skidmore v. Davis*, 10 Paige 316; *Matter of Halsey*, 17 Week. Dig. 241; *Fiester v. Shepard*, 26 Hun 183, *aff'd* 92 N. Y. 251;

Munro's Estate, 15 Abb. 363; *Lewis v. Jones*, 50 Barb. 645; *Matter of Pearsall*, 21 St. Rep. 305, 4 N. Y. Supp. 365; *Matter of Phalen*, 51 Hun 208, 4 N. Y. Supp. 408; *People ex rel. v. Lott*, 42 Hun 408; *Delaplaine v. Lawrence*, 3 N. Y. 301; *Matter of Scott*, 49 App. Div. 130, 62 N. Y. Supp. 1059.

Appeal from an erroneous decision of a surrogate that land, to be sold under his decree for the payment of a decedent's debts, is subject to a life estate, as a consequence of which an inadequate price is received therefor, is a proper remedy. *Leet v. Leet*, 12 App. Div. 11, 42 N. Y. Supp. 174. An application addressed to the discretion of the surrogate is not reviewable, unless under very special circumstances. *Boughten v. Flint*, 74 N. Y. 476. As to reviewing the probate of a will, see *Hawke v. Hawke*, 82 Hun 439, 31 N. Y. Supp. 968. As to appeal from a decree settling the account of an executor, see *Matter of Van Houten*, 18 App. Div. 301, 46 N. Y. Supp. 190.

The appellate division may, under this section, review an order refusing to open a decree, although the order is discretionary. *Matter of Doig*, 125 App. Div. 746, 110 N. Y. Supp. 93.

Default.—This section relates only to a default in appearing. *People ex rel. Patrick v. Fitzgerald*, 73 App. Div. 339, 76 N. Y. Supp. 865. Administrator allowed to appeal where judgment was obtained against him by default. *Davies v. Skidmore*, 5 Hill 501.

Costs.—As to appeal from a decision awarding costs, see *Wilcox v. Smith*, 26 Barb. 316; *Lain v. Lain*, 10 Paige 191; *Seaman v. Whitehead*, 78 N. Y. 306; *Reid v. Vanderheyden*, 5 Cow. 719; *Devin v. Patchin*, 26 N. Y. 441.

§ 2755. Who must be made parties.

Each party who has appeared in the special proceeding in the surrogate's court, must be made a party to the appeal. A person not a party, may be brought in by an order of the appellate court, made after the appeal is taken, in such manner as the order may prescribe.

Source.—Former § 2573; section new as originally inserted in Code of Civ. Proc.

Necessary parties.—Heirs-at-law, next of kin, and legatees of a decedent, as well as the executor. *Gilman v. Brinkerhoff*, 57 Barb. 176. Heirs, where a creditor appeals from an order fixing his claim in proceedings to sell real property. *Patterson v. Hamilton*, 26 Hun 665. All persons to whom sums are awarded by the surrogate. *Wilcox v. Smith*, 26 Barb. 316. See *Gilchrist v. Rea*, 9 Paige 66; *Matter of Thompson*, 11 Paige 453; *Jauncey v. Rutherford*, 9 Paige 273. All persons interested in sustaining a decree. *Brown*

v. Evans, 34 Barb. 594; *Kellett v. Rathbun*, 4 Barb. 102; *Gardner v. Gardner*, 5 Barb. 170. Counsel for contestants to a will to whom surrogate has made allowance. *Peck v. Peck*, 23 Hun 312, *aff'd* 99 N. Y. 608.

A special guardian is a necessary party to an appeal from a decree of the surrogate. *Matter of Stewart*, 23 App. Div. 17, 48 N. Y. Supp. 999. On appeal from an order appointing a guardian, infant should be made a party with the guardian. *Underhill v. Dennis*, 9 Paige 202. See also

Kellinger v. Roe, 7 Paige 362; *Matter of Van Vranken*, 20 St. Rep. 387, 3 N. Y. Supp. 445.

New parties.—As to power to bring in new parties under this section and § 452, see *Matter of Dunn*, 1 Dem. 294. Any person affected by or interested in a decree may apply to be made a respondent though his own time to appeal has expired. *Cox v. Schermerhorn*, 12 Hun 411.

Defect of parties.—Effect of defect of parties, if no motion is made to stay or dismiss the appeal on that ground, and the omitted parties have neither taken an appeal themselves, nor applied to be made parties. *Brown v. Evans*, 34 Barb. 594. For former practice in regard to dismissing appeal for defect of parties, see *Gardner v. Gardner*, 5 Paige 170; *Suffern v. Lawrence*, 4 How. 129.

§ 2756. Time to appeal; how taken.

An appeal must be taken within thirty days after the service, upon the appellant, or upon the attorney, if any, who appeared for him in the surrogate's court, of a copy of the decree, or order from which the appeal is taken, and a written notice of the entry thereof, except that the party entering such decree or order shall not be entitled to further notice to limit his time to appeal.

An appeal must be taken by the service upon each party to the appeal, other than the appellant, and upon the surrogate, or the clerk of the surrogate's court, of a written notice, referring to the decree or order appealed from, and stating that the appellant appeals from the same, or from a specified part thereof. Where a party to the special proceeding in the court below appeared in person, the notice of appeal must be personally served upon him; where he appeared by an attorney, it must be served personally, either upon him or upon his attorney.

Source.—Former §§ 2572 and 2574. § 2572 originally revised from R. S., pt. 2, ch. 6, tit. 1, § 55; pt. 3, ch. 9, tit. 3, §§ 90, 105, 106, and 107. Section 2574 new as originally inserted in Code of Civ. Proc.

Revisers' note.—A party in default cannot appeal, new § 2754.

No appeal should be allowed to a person who was not a party; he should be made a party by opening the decree, or in the appellate court.

Transfer tax proceeding.—Comptroller not a party to proceeding and therefore has three months to appeal from order therein. *Matter of Dingman*, 66 App. Div. 228, 72 N. Y. Supp. 694; *Matter of Daly*, 34 Misc. 148, 69 N. Y. Supp. 494.

Limiting time to appeal.—Service of a copy of the decree with notice of its filing is not sufficient to limit the time for appeal. *Matter of Armstrong*, 32 St. Rep. 441. But see *In re Kavanaugh's Estate*, 10 N. Y. Supp. 899. Effect of allowing time to appeal to expire. *Marsh v. Avery*, 81 N. Y. 29.

Where an attorney appears for two separate parties in surrogate's court, and notice of entry of the decree is served upon him, addressed to him as attorney for one of the parties only, such notice will, notwithstanding that fact, limit the time within which either of the parties may appeal. *Matter of Heldmann* (1912), 153 App. Div. 583, 138 N. Y. Supp. 59.

Under the provision that an appeal must be taken within thirty days after the service of a copy of the decree, or order from which the appeal is taken, and a written notice of the entry thereof, except that

the party entering such decree or order shall not be entitled to further notice to limit his time to appeal, a party serving a copy of the decree with written notice of its entry must be taken to have entered the decree and his time to appeal runs from the time of such service by him. *Matter of Flatauer* (1917), 100 Misc. 231, 165 N. Y. Supp. 414.

Modification of order after time has expired.—The surrogate has power to modify an order fixing a transfer tax so as to relieve a charitable institution from the payment of such transfer tax upon an exempt legacy, although the time to appeal from the order has expired. *Matter of Townsend* (1912), 153 App. Div. 85, 138 N. Y. Supp. 191.

The service of a copy of a decree with notice of entry by a party who desires to appeal therefrom, but did not enter the decree is not sufficient to set running the thirty days within which his appeal must be taken. In order to set the thirty days' limitation running against him, a copy of the decree with notice of entry must be served upon the party intending to appeal therefrom by the other party who wishes

to limit the time, and if the appeal be taken within thirty days of such service, it is timely, although the appellant had previously served the decree and notice upon her opponent. *Matter of Loser* (1917), 179 App. Div. 450, 166 N. Y. Supp. 401.

§ 2757. Appeal may be on the law or the facts; case to be made; reversal.

The appeal may be taken upon questions of law, or upon the facts, or upon both. If it is taken from a decree rendered upon the trial by the surrogate, or by the surrogate and a jury, of an issue of fact, it must be heard upon a case, to be made and settled by the surrogate, as prescribed by law, for the making and settling of a case upon an appeal in an action. Such appeal brings up for review, by each court to which the appeal is carried, each decision, to which an exception is duly taken by the appellant, as prescribed in section 2542. But such a decree or order shall not be reversed, for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.

Source.—Former §§ 2545 and 2576; sections new as originally inserted in Code of Civ. Proc.

References.—Settlement of case on appeal, Code Civ. Pro., § 997; case and bill of exceptions; contents; resettlement, Gen. Rules of Prac., No. 33; case and exceptions, when served; amendments; settlement of case, Gen. Rules of Prac., No. 32.

In general.—The provisions of this section (former §§ 2545 and 2576) were designed with the intention of making the practice in the surrogate's court substantially the same as in the supreme court. *Matter of Sprathoff*, 50 Misc. 109, 98 N. Y. Supp. 921.

Decision.—In order to review a decision, it must be filed in writing, stating separately the findings of fact and of law, and this must be included in the papers presented upon appeal. *Waldo v. Waldo*, 32 Hun 251. As to duty of appellate court to decide the questions of fact which were before the surrogate, see *Matter of McGraw v. Cornell University*, 45 Hun 354, *aff'd* 111 N. Y. 66.

Filing of decision.—The decision which surrogate must file refers to trials conducted before the surrogate as a trial court. *Matter of Niles*, 47 Hun 348. Surrogate must file his decision, stating his findings of fact and conclusions of law, before his decree can be reviewed. *Waldo v. Waldo*, 32 Hun 251; *Matter of Marsh*, 45 Hun 107; *Matter of Widmayer*, 52 App. Div. 301, 65 N. Y. Supp. 83; *Matter of Deymon*, 47 App. Div. 315, 61 N. Y. Supp. 997; *Matter of Sherwood*, 75 App. Div. 342, 78 N. Y. Supp. 186. As to duty of surrogate to make and file in his office his decision, see also *Sessions v. Palmeto*, 75 Hun 268, 26 N. Y. Supp. 1076; *Baucus v. Stover*, 89 N. Y. 1. As to what constitutes "decision in writing," see *Matter of Johnston*, 6 Dem. 355.

Notice of appeal.—If the appellant desires to review the facts, the notice of appeal should contain a statement to that effect. *Matter of Gilman*, 92 App. Div. 462, 87 N. Y. Supp. 128. Where the notice of appeal states that the appeal is taken from the decree of the surrogate, and every part thereof, the facts are before the appellate court for review, though no exception to the decision has been filed. *Re Spratt's Will*, 4 App. Div. 1, 38 N. Y. Supp. 329.

When surrogate to order second trial.—*Matter of Huber* (1918), 103 Misc. 599, 170 N. Y. Supp. 901.

Motion for new trial.—As to necessity of motion for new trial in order to review the facts, see *Re Spratt's Will*, 4 App. Div. 1, 38 N. Y. Supp. 329; *Smith v. Velie*, 60 N. Y. 106; *Matter of Schreyer*, 12 Week. Dig. 223.

Case.—There can be no review of the facts where no case is made. *Matter of Clark*, 119 N. Y. 427; *Matter of Walrath*, 69 Hun 403, 23 N. Y. Supp. 648; *Wheelwright v. Rhodes*, 11 Abb. N. C. 382; *Hannahs v. Hannahs*, 5 Hun 644, *aff'd* 68 N. Y. 610; *Matter of Will of Stewart*, 135 N. Y. 413; *Matter of Potter*, 32 Hun 599. No case necessary where there is no issue of fact. *Matter of Jackson*, 32 Hun 200; *Matter of Byron*, 61 Hun 278, 16 N. Y. Supp. 760. As to application to serve a case at any time after an appeal is taken, see *Matter of Williams*, 6 Misc. 512, 27 N. Y. Supp. 433. As to what may be inserted in the case upon an appeal from an order refusing a decree upon a report of a referee, see *In re Post's Estate*, 18 N. Y. Supp. 812.

An appeal from a decree in a proceeding to prove a will must be heard upon a

case made and settled by the surrogate. *Matter of Goldsticker*, 54 Misc. 175, 105 N. Y. Supp. 931.

It seems that the appellate division may review an order removing executors made on pleadings and admissions of counsel not appearing in the printed case. *Matter of Waterman*, 112 App. Div. 313, 98 N. Y. Supp. 583; appeal dismissed, 186 N. Y. 534.

Requests to find.—As to when surrogate is required to pass upon requests to find, see *Matter of Dodge*, 40 Hun 443; *Dickel v. Yates*, 2 Dem. 229; *Matter of Hoyt*, 5 Dem. 284.

Exceptions.—No questions of law can be reviewed upon appeal unless exceptions have been taken as provided by this section. *Matter of Spratt*, 4 App. Div. 1, 38 N. Y. Supp. 329. A general exception to each and every portion of a surrogate's decree is insufficient to raise any specific question. *Angevine v. Jackson*, 103 N. Y. 470.

In the absence of findings or refusals to find any proper exceptions, no question can be reviewed. *Matter of Bradway*, 74 Hun 630; *In re Robert's Estate*, 26 N. Y. Supp. 838; *Matter of Kellog*, 104 N. Y. 648; *Matter of Sprague*, 125 N. Y. 732.

Error.—As to error necessary to reverse decree of surrogate, see *Matter of Will of Snelling*, 136 N. Y. 515; *Matter of Folts*, 71 Hun 492, 24 N. Y. Supp. 1052; *Matter of Gaines*, 84 Hun 520, 32 N. Y. Supp. 398, aff'd 154 N. Y. 747; *Matter of Degen*, 89 Hun 143, 34 N. Y. Supp. 1137; *Matter of Miner*, 146 N. Y. 121; *Matter of Morgan*, 104 N. Y. 74; *Snyder v. Sherman*, 88 N. Y. 656; *Matter of Ross*, 87 N. Y. 514; *Matter of Woodward*, 167 N. Y. 28; *Matter of Potter*, 161 N. Y. 84; *Matter of Seagrist*, 1 App. Div. 615, 37 N. Y. Supp. 496, aff'd 153 N. Y. 682; *Matter of Pierson*, 19 App. Div. 478, 46 N. Y. Supp. 557; *Matter of Benton*, 71 App. Div. 522, 75 N. Y. Supp. 859; *Matter of Hopkins*, 73 App. Div. 559, 77 N. Y. Supp. 178; *Matter of Steenwerth*, 97 App. Div. 116, 89 N. Y. Supp. 654; *Matter of Wilson*, 10 App. Div. 371, 41 N. Y. Supp. 1006; *Matter of Palmeteer*, 7 Hun 43, 28 N. Y. Supp. 1062; *Matter of Torkington*, 79 Hun 128, 29 N. Y. Supp. 433; *Matter of Chase*, 41 Hun 203; *Matter of Mellen*, 56 Hun 553, 9 N. Y. Supp. 929; *In re King* (1918), 172 N. Y. Supp. 868.

Rulings on evidence not prejudicial.—*Matter of Huber* (1918), 103 Misc. 599, 170 N. Y. Supp. 901.

§ 2758. Certain provisions of chapter twelve made applicable.

The provisions of the following sections of this act, to wit: sections 1295 to 1299 both inclusive, and 1301 to 1303 and 1305 to 1309 both inclusive, apply to an appeal taken as prescribed in this article, and for the purpose of such application the word "judgment" shall mean a decree.

Source.—Former § 2575; section new as originally inserted in Code of Civ. Proc.

§ 2759. Security to perfect appeal.

To render a notice of appeal effectual for any purpose, except in a case specified in the next section, or where it is specially prescribed by law, that security is not necessary to perfect the appeal, the appellant must give a written undertaking, with at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him upon the appeal, not exceeding two hundred and fifty dollars.

Source.—Former § 2577; originally revised from R. S., pt. 2, ch. 6, tit. 1. § 56; and pt. 3, ch. 9, tit. 3, § 108.

Necessity of undertaking.—Unless the appeal is taken by an executor, only the undertaking mentioned in this section need be given to stay proceedings. *Arkenburgh's Estate*, 17 Misc. 543, 41 N. Y. Supp. 287; aff'd 11 App. Div. 44, 43 N. Y. Supp. 1150. Undertaking essential on appeal from a decree revoking letters testamentary and removing a testamentary trustee from office, see *Estate of Cluff*, 11 Civ. Pro. Rep. 338, 7 St. Rep. 753. Undertaking for \$250 necessary to make

the appeal effectual for any purpose. *Fernbacher v. Fernbacher*, 4 Dem. 227; *In re Graham's Estate* (1918), 171 N. Y. Supp. 862.

The appeal will be dismissed where the appellant does not file an undertaking or make out a case to relieve him from the default. *Matter of Howell* (1915), 169 App. Div. 909, 153 N. Y. Supp. 1120.

As to sufficiency of undertaking under this section alone, where an executor appeals individually from a decree, see *Du*

Bois v. Brown, 1 Dem. 317. As to amendment of defective bond, see *Matter of Witmark*, 15 St. Rep. 745.

Surrogate may not grant leave, but ap-

plication should be made to appellate court. In *re Graham's Estate* (1918), 172 N. Y. Supp. 606.

§ 2760. Id.; where decree is for money or delivery of property, etc.

In every case except one in which the letters of an executor, administrator or guardian have been revoked, or a trustee has been removed a notice of appeal by an executor, administrator, testamentary trustee, guardian or other person appointed by the surrogate's court, from a decree directing him to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property; or by an executor or administrator from an order granting leave to issue an execution against him, as prescribed in section 1825 of this act, does not stay the execution of the decree appealed from unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages, which may be awarded against him upon the appeal, and will pay the sum so directed to be paid or collected, or, as the case requires will deposit or distribute the money, or deliver the property, so directed to be deposited, distributed, or delivered, or the part thereof as to which the decree or order is affirmed.

Source.—Former § 2578, as amended by L. 1882, ch. 399; originally revised from R. S., pt. 2, ch. 6, tit. 5, § 21, last clause; L. 1870, ch. 359, § 2.

Application and effect.—Provision as to stay of execution of a surrogate's decree by an undertaking on appeal does not apply to decrees removing testamentary trustees or executors. *Stout v. Betts*, 74 Hun 266, 26 N. Y. Supp. 809.

By giving the special security in cases provided for in this and next section, pro-

ceedings are thereupon stayed by the operation of section 2534. *Fernbacher v. Fernbacher*, 4 Dem. 227. Effect of failure to give the undertaking required by this section. *Matter of Holmes*, 79 App. Div. 267, 79 N. Y. Supp. 687; *aff'd* 176 N. Y. 604.

§ 2761. Security to stay proceedings in case of commitment.

An appeal from a decree or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify, when required according to law; does not stay the execution of the decree or order appealed from, unless the appellant gives an undertaking with at least two sureties, in a sum therein specified, to the effect that if the decree or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will, within twenty days after the affirmance or dismissal, surrender himself in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed.

Source.—Former § 2579; originally revised from R. S., pt. 3, ch. 9, tit. 3, §§ 111-115.

§ 2762. Amount and requisites of undertaking; action thereon.

The sum specified in an undertaking, executed as prescribed in either of the last two sections, must be fixed by the surrogate, or by a judge of

the appellate court, who may require proof, by affidavit, of the value of any property, or of such other facts as he deems proper.

An undertaking, given as prescribed in the last three sections, must be to the people of the state; must contain the name and residence of each of the sureties thereto; must be approved by the surrogate or a judge of the appellate court; and must be filed in the surrogate's office. The surrogate may, at any time in his discretion, make an order authorizing any person aggrieved to bring an action upon the undertaking, in his own name, or in the name of the people. Such action may be prosecuted in the same manner, and with the same effect as an action upon an administrator's bond; and the proceeds of the action must be paid or distributed as directed by the surrogate, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them, and the balance, if any, must be paid into the surrogate's court.

Source.—Former §§ 2579, 2580 and 2581. § 2579; originally revised from R. S., pt. 3, ch. 9, tit. 3, §§ 111-115. §§ 2580 and 2581; new as originally inserted in Code of Civ. Proc.

§ 2763. Power of appellate court; further testimony.

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee.

The appellate court may reverse, affirm, or modify, the decree or order appealed from, and each intermediate order, specified in the notice of appeal, which it is authorized by law to review, and as to any or all of the parties; and it may, if necessary or proper, grant a new trial or hearing. Upon an appeal from a determination of the surrogate, made upon an application pursuant to subdivision six of section 2490 the appellate court has the same power as the surrogate, and his determination must be reviewed as if an original application were made to that court. The decree or order appealed from may be enforced, or restitution may be awarded, as the case requires, as prescribed in title first of chapter twelfth of this act, with respect to an appeal from a judgment.

Source.—Former §§ 2481, 2586 and 2587. § 2481, as amended by L. 1909, ch. 65; originally revised from R. S., pt. 3, ch. 2, tit. 1, §§ 6, 11; L. 1837, ch. 460, § 9, in part, and § 61; L. 1870, ch. 74, § 2; L. 1871, ch. 424, § 2; L. 1874, ch. 9; L. 1884, ch. 309, § 1, as amended by L. 1900, ch. 510, § 1. §§ 2586 and 2587; new as originally inserted in Code of Civ. Proc.

In general.—A decision of the appellate court, upon the facts, upon an application to revoke probate, is not a bar to an action to try the title to real estate devised by the will. *Ranken v. Janes*, 10 App. Div. 400, 41 N. Y. Supp. 1129.

Consideration of evidence upon appeal.—Appellate court is not limited to the consideration of whether there was sufficient evidence to support the decision of the surrogate, but should decide for itself whether the surrogate correctly determined the facts. *Matter of Warner*, 53 App. Div. 565, 65 N. Y. Supp. 1022; *Matter of Hall*, 61 App. Div. 266, 70 N. Y. Supp. 406; *Matter of Laudy*, 78 Hun 479,

29 N. Y. Supp. 136; aff'd 147 N. Y. 699.

And if, upon a consideration of the whole testimony, the result reached by the court below was not entirely satisfactory and upon the evidence is not free from doubt, the case should be considered by a jury. *Matter of Richadson*, 51 App. Div. 637, 64 N. Y. Supp. 944; *Matter of Pike*, 83 Hun 327, 31 N. Y. Supp. 689. Case to be determined in the appellate court upon the competent evidence appearing, disregarding such as is incompetent. *Matter of Bedlow*, 67 Hun 408, 22 N. Y. Supp. 290.

Power of appellate division to enter judgment or decree in accordance with its

determination, or to take further proof in reference to the subject-matter and enter a final decree. *Matter of Westerfield*, 61 App. Div. 413, 70 N. Y. Supp. 641. As to power of appellate division to decide questions of fact, etc., see *Matter of Patterson*, 63 Hun 529, 18 N. Y. Supp. 499; *Kingsland v. Murray*, 133 N. Y. 170; *Matter of Laudy*, 148 N. Y. 403; *Matter of Gilman*, 92 App. Div. 462, 87 N. Y. Supp. 128; *Matter of Rice*, 81 App. Div. 223, 81 N. Y. Supp. 68; *aff'd* 176 N. Y. 570; *Matter of Stapleton*, 71 App. Div. 1, 75 N. Y. Supp. 657; *Matter of Tilden*, 56 App. Div. 277, 67 N. Y. Supp. 879; *Matter of Hedges*, 57 App. Div. 48, 67 N. Y. Supp. 1028; *Matter of Arkenburgh*, 58 App. Div. 583, 69 N. Y. Supp. 125; *Matter of Drake*, 45 App. Div. 206, 60 N. Y. Supp. 1020; *Matter of Purdy*, 46 App. Div. 33, 61 N. Y. Supp. 430; *Matter of Cameron*, 47 App. Div. 120, 62 N. Y. Supp. 187; *aff'd* 166 N. Y. 610; *Matter of Lawrence*, 48 App. Div. 83, 63 N. Y. Supp. 673; *Matter of Hurlbut*, 48 App. Div. 91, 62 N. Y. Supp. 698; *Matter of Manhardt*, 17 App. Div. 1, 44 N. Y. Supp. 836; *Matter of Stevenson*, 86 Hun 325, 33 N. Y. Supp. 493; *Matter of Hardenburg*, 85 Hun 580, 33 N. Y. Supp. 150; *Matter of Rogers*, 10 App. Div. 593, 42 N. Y. Supp. 133.

Finding of fact by appellate division conclusive on court of appeals.—The appellate division may affirm, reverse, modify or give final judgment on an appeal from a surrogate's court and has the same power to decide questions of fact which the surrogate had. Hence where the appellate division made a new finding of fact reversing the surrogate's court, which finding is not erroneous as a matter of law, it is conclusive on this court. *Matter of Housman* (1918), 224 N. Y. 525.

Further testimony.—Power of appellate division to supply any finding of fact omitted from the referee's report or decision and the surrogate's decree, essential to the case, see *Matter of Snedeker*, 95 App. Div. 149, 88 N. Y. Supp. 847. Where

referee is appointed and in substance a new case is made, the necessity is imposed upon the appellate court of making an original determination. *Matter of Farmers' Loan & Trust Co.*, 47 App. Div. 448, 62 N. Y. Supp. 359. Power to receive further testimony should be cautiously used. *Matter of Hannah*, 45 Hun 561. As to power to supply further testimony, see also *Matter of Beck*, 6 App. Div. 211, 39 N. Y. Supp. 810; *aff'd* 154 N. Y. Supp. 750; *Matter of Gaines*, 84 Hun 520, 32 N. Y. Supp. 398; *aff'd* 154 N. Y. 747.

Review in court of appeals.—Order of reversal of affirmance of a surrogate's decree by the appellate division upon the law and the facts is reviewable in the court of appeals when no question of fact is involved. *Matter of Totten*, 179 N. Y. 112; *Matter of Ross*, 87 N. Y. 514; *Davis v. Clark*, 87 N. Y. 623; *Matter of Hopkins*, 41 Misc. 83, 83 N. Y. Supp. 890. When conclusions of law found in support of decree settling an intestate's estate reviewable in court of appeals, see *Matter of Killan*, 172 N. Y. 547, 567.

Order of appellate court.—Appellate court to grant new trial or hearing where the facts are not sufficiently before that court to enable it to modify decree. *Matter of Ryalls*, 74 Hun 205, 26 N. Y. Supp. 815; *Matter of Teed*, 59 Hun 63, 12 N. Y. Supp. 642. Surrogate's court cannot open a decree of the appellate division finally disposing of an appeal. *Matter of Westerfield*, 61 App. Div. 413, 70 N. Y. Supp. 641. As to power to reverse, affirm, or modify decree, see *Matter of Kellog*, 104 N. Y. 648; *Wadley v. Davis*, 38 Hun 186.

When case will be sent back for new trial although the appellate division has power to decide questions of fact upon the evidence. *Matter of Horton* (1916), 175 App. Div. 447, 161 N. Y. Supp. 1071.

When surrogate has no power to strike out stipulation from case decided by appellate division. *Matter of Del Genovese* (1918), 183 App. Div. 200, 170 N. Y. Supp. 216.

§ 2764. Appeal; proceedings thereupon.

In the appellate division of the supreme court the order made upon an appeal from a decree or an order of a surrogate's court must be entered with the clerk of the appellate division, and a certified copy thereof annexed to the papers transmitted from the court below upon which the appeal was heard, must be transmitted to the court from which the appeal was taken, and the court below shall enter the judgment or order necessary to carry the determination of the appellate division into effect.

Source.—Former § 2585, as amended by L. 1895, ch. 946; section new as originally inserted in Code of Civ. Proc.

References.—As to appeals generally from an inferior court to the supreme court, see Code Civ. Proc., §§ 1340, 1345.

In general.—Surrogate cannot act pending an appeal from a decree admitting to probate, or revoking the probate of a will.

Matter of Murphy, 79 App. Div. 541, 81 N. Y. Supp. 102; Matter of Hopkins, 41 Misc. 83, 83 N. Y. Supp. 890.

Proceedings in the supreme court, upon the reversal of a surrogate's decree and the trial of the issues at a trial term, must be regarded as taken upon the appeal from the surrogate's decree. Matter of Laudy, 35 App. Div. 542, 55 N. Y. Supp. 98. Trial of issues, settled by an order of the general term reversing a decree refusing probate of a will; the circuit court

can only certify the verdict to the surrogate; it cannot grant costs. Matter of Campbell, 48 Hun 417, 1 N. Y. Supp. 231.

Power of surrogate's court over judgment of the supreme court. Matter of De Haas, 24 Misc. 258, 53 N. Y. Supp. 565. As to filing of judgment-roll, see Matter of Patterson, 63 Hun 529, 18 N. Y. Supp. 499; Wadley v. Davis, 38 Hun 186. As to mode of proceeding, see Cole v. Terpenning, 27 Hun 111.

ARTICLE 4.

PROBATE OF HEIRSHIP; DEFINITIONS, AND APPLICATION OF OTHER SECTIONS TO THIS CHAPTER.

§ 2765. Heir, et cetera, may apply to establish heirship.

2766. What facts to be ascertained; decree thereupon.

2767. Decree to be recorded; effect thereof.

2768. Definition of expressions used in this chapter.

§ 2769. Application of chapter; confirmation of previous acts.

2770. Certain provisions made applicable to proceedings in surrogate's courts.

2771. Effect of this chapter on laws applicable to certain counties.

Effect on jurisdiction of court.—L. 1914,

§ 2765. Heir, etc., may apply to establish heirship.

Where a person, seized in fee of real property within the state, dies intestate, or without having devised his real property, his heirs, or any of them, or any person deriving title from or through such heirs, or any of them, may present to the surrogate's court which has acquired jurisdiction of the estate, or, if no surrogate's court has acquired such jurisdiction, then to the surrogate's court of the county where the real property, or any part thereof is situated, a petition, describing the real property, setting forth the facts upon which the jurisdiction of the court depends, and the interest or share of the petitioner, and of each other heir of the decedent, in the real property, and praying for a decree establishing the right of inheritance thereto, and that all the heirs of the decedent may be cited to show cause why the prayer of the petition should not be granted. Upon the presentation of such a petition a citation must be issued accordingly, except in a case where the petitioner was a party to a judicial settlement, the decree upon which determined the rights of the parties to such real estate.

Source.—Former § 2654, as amended by L. 1892, ch. 115; originally revised from L. 1873, ch. 552, §§ 1, 2, in part.

Revisers' note.—Right is given by the revision to determine heirship on judicial settlement (new § 2735), hence the last three lines.

§ 2766. What facts to be ascertained; decree thereupon.

Upon the return of the citation, the surrogate's court must hear the allegations and proofs of the parties and determine all the issues raised. The petitioner must establish the fact of the decedent's death; the place of his

residence at the time of his death; his intestacy, either generally, or as to the real property in question; the heirs entitled to inherit the property in question; the name, age, residence and relationship to the decedent, of each; and the interest or share of each in the property. The surrogate, when these facts are established, must make a decree, describing the property, and declaring that the right of inheritance thereto has been established to his satisfaction, in accordance with the facts, which must be recited in the decree.

Source.—Former § 2656; originally revised from L. 1873, ch. 552, §§ 1 and 2, in part, as amended by L. 1874, ch. 127.

Revisers' note.—Provision is now made for trial of such questions by jury so that the proceeding need not be dismissed in event of contest.

§ 2767. Decree to be recorded; effect thereof.

A certified copy of a decree, made as prescribed in the last section may be recorded in the office of the clerk, or of the register, as the case requires, of each county in which the real property is situated, as prescribed by law for recording a deed, and, from the time when such copy is so recorded, the decree, or the record thereof, is conclusive evidence of the facts so declared to be established thereby against all parties to such proceeding.

Source.—Former § 2657; originally revised from L. 1873, ch. 552, §§ 1 and 2, in part, as amended by L. 1874, ch. 127.

Revisers' note.—As provision is made for trial by jury, the decree should be conclusive. There is no need for recording the proofs.

§ 2768. Definition of expressions used in this chapter.

In construing the provisions of this chapter, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. The word "intestate," signifies a person who died without leaving a valid will; but where it is used with respect to particular property it signifies a person who died without effectually disposing of that property by will whether he left a will or not.

2. The word "assets," signifies personal property applicable to the payment of the debts of a decedent.

3. The word "debts" includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money could be recovered in an action; and the word "creditor" includes every person having such a claim or demand, any person having a claim for expenses of administration, or any person having a claim for funeral expenses.

4. The word "will," signifies a last will and testament, and includes all the codicils to a will.

5. The expression, "letters of administration," includes letters of temporary administration.

6. The expression, "testamentary trustee," includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator,

where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.

7. The word, "surrogate," where it is used in the text, or in a bond or undertaking, given pursuant to any provision of this chapter, includes every officer or court vested by law with the functions of surrogate.

8. The expression, "judicial settlement," where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be "judicially settled."

9. The expression, "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement.

10. The expression, "upon the return of a citation," where it is used in a provision requiring an act to be done in the surrogate's court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation, issued to bring in a party who ought to be but has not been cited; and implies that before doing the act specified, due proof must be made, that all persons required to be cited have been duly cited.

11. The expression, "persons interested," where it is used in connection with an estate or fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise except as a creditor. Where a provision of this chapter prescribed that a person interested may object to an appointment or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending.

12. The term, "next of kin," includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife.

13. The expression, "real property," includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets. The word, "inheritance," signifies real property as defined in this subdivision, descended as prescribed by law. The expression, "personal property," signifies every kind of property which survives a decedent, other than real property as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator.

14. The word "guardian" refers to a guardian of an infant's person or property, or both, appointed by the surrogate's court or the supreme court, and includes a guardian appointed by will or deed.

15. Whenever in this chapter a paper or instrument is required to be "acknowledged, or proved, and duly certified," the same shall be acknowl-

edged or proven in the same manner as a deed is required to be acknowledged or proved and certified to be recorded in that county, except that when executed within the state of New York, no certificate of the county clerk shall be required.

16. The word "respondent" when used in this chapter signifies every party to a special proceeding, except the petitioner.

17. The words "surrogate's court" and "surrogate" where they refer to jurisdiction mean the particular court or surrogate having jurisdiction of the estate or fund.

18. Whenever in this chapter a citation, order, notice or paper is directed to be deposited in the "post-office" or in a "specified post-office," such deposit may be made or directed to be made in any post-office, branch post-office, sub-station or letter box maintained and exclusively controlled by the United States government.

Amended by L. 1916, ch. 447, in effect May 9, 1916.

Source.—Former § 2514, as amended by L. 1900, ch. 120. Mostly new; but subd. 4 was originally revised from R. S., pt. 2, ch. 6, tit. 1, § 71, and subd. 13 from R. S., pt. 2, ch. 2, § 27.

Action to compel production of will.—Where a decedent, by a will which had been admitted to probate, gave all of his property to an institution, and the institution made an agreement with the heirs at law and next of kin of the decedent that, in consideration of the payment of a certain sum of money, they released all their right, title and claim to the property of the decedent, it was held that, notwithstanding such agreement, one of such heirs at law was entitled to bring an action under § 2607 as a person interested in the estate of the decedent, to compel the production of an alleged subsequent will. *Matter of Hardy* (1915). 216 N. Y. 132.

A person having a lien upon a legacy may be regarded as an equitable assignee of the legatee in whole or in part, and as

being "persons interested" within the meaning of subdivision 11. *Matter of Wood* (1915), 170 App. Div. 533, 156 N. Y. Supp. 810.

Judicial settlement.—Where a final decree of a surrogate's court was entered in accounting proceedings in 1900, directing the distribution of all moneys on hand to the persons entitled thereto, save a certain sum which the executors were directed to retain to meet the expenses of defending any suit which might be brought to recover a legacy claimed by the plaintiff, there was a "judicial settlement," within the meaning of this section. *Pattee v. Harper* (1918). 183 App. Div. 88, 170 N. Y. Supp. 562.

Section cited.—In *re Long's Estate* (1916), 161 N. Y. Supp. 449.

§ 2769. Application of chapter; confirmation of previous acts.

Each provision of this chapter, relating to the jurisdiction of the surrogate's court, to take the proof of a will, and to grant letters testamentary or letters of administration or regulating the mode of proceeding in any manner connected with the estate of the decedent applies, unless otherwise expressly declared therein, whether the will was made, or the decedent died, before or after this chapter takes effect. All acts hitherto of surrogates and officers acting as such in completing by certifying in their own names any uncertified wills and by signing and certifying in their own names any uncertified records of wills and of other proofs and examinations taken in the proceedings of probate thereof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements.

Source.—Former § 2482, as amended by L. 1893, ch. 686; originally revised from R. S., pt. 2, ch. 6, tit. 1, § 68-b.

§ 2770. Certain provisions made applicable to proceedings in surrogates' courts.

Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of this chapter, all other portions of this act, and the general rules of practice apply to surrogates' courts and to the proceedings therein, so far as they can be applied to the substance and subject matter of a proceeding without regard to its form.

Source.—Former § 2538; section new as originally inserted in Code of Civ. Proc.

Revisers' note.—On account of enlarged jurisdiction, jury, trial, etc., we omit specification of certain parts, and include all the Code, as limited by the language used.

Cross-application of other provisions of code.—This section contains the authority for a cross-application of the sections of the code stating rules of procedure in the other courts of record to contested probate proceedings conducted with juries in this court. But a cursory reading of this section discloses that the cross-application of such other sections is very provisional, and it should be so in view of the essential differences between proceedings in the ordinary courts and in the courts of the surrogates. *Matter of Zimmerman* (1918), 104 Misc. 516, 172 N. Y. Supp. 80.

Application to grant commission to take testimony of witnesses without state under § 889. *Matter of Shannon* (1917), 180 App. Div. 214, 167 N. Y. Supp. 472.

The appellant sought to obtain an order for a physical examination of the executor. That part of the application was denied for want of power. Assuming, without deciding, that the general provisions of the code with respect to examinations before trial are applicable to the surrogate's court, they would not authorize a physical examination, for the authority for such examination is confined to an action for personal injuries. *Matter of Leland* (1916), 175 App. Div. 56, 161 N. Y. Supp. 315.

Jury trials.—Sections 998, 1185, 1233 are applicable to trials with juries in surrogates' courts. *Matter of Dorsey* (1916), 94 Misc. 566, 157 N. Y. Supp. 662.

§ 2771. Effect of this chapter.

Nothing in this chapter shall repeal, amend or modify any existing law specially applying to any county, which is inconsistent with any section of this chapter, nor in any manner affect any litigation, action or special proceeding pending at the time when this act takes effect, except as hereinafter stated, and such pending action or special proceeding shall proceed under the practice established, the same as though not affected by this act; provided, however, that the provisions of this chapter relating to the trial by jury of controverted questions of fact shall apply to all such pending actions or special proceedings.

Amended by L. 1915. ch. 274, in effect April 13, 1915.

Source.—New.

Application.—*Matter of Kent* (1915), 169 App. Div. 388, 155 N. Y. Supp. 894.

Effect on jurisdiction of court.—L. 1914, chapter 443, has not converted the surrogate's court into a common law court, where all the issues of fact may be submitted to a jury. The surrogate's court continues a court of peculiar and limited jurisdiction but under the new statute a trial by jury may be had only in the particular instances specified therein. *Matter of Silverman* (1914), 87 Misc. 571, 151 N. Y. Supp. 382.

Pending litigation.—This section making the new surrogate's code inapplicable to a litigation pending before the same went into effect, affects not only litigation pend-

ing in those counties having special laws, but all litigation in the surrogates' courts throughout the State. *Matter of Iovinella* (1915), 166 App. Div. 460, 151 N. Y. Supp. 1007.

This section is general in its application and all proceedings instituted by the filing of a petition prior to September 1, 1914, are governed and controlled solely by the practice as it existed prior to said date. *Matter of Scovill* (1914), 88 Misc. 364, 150 N. Y. Supp. 1070.

Procedure on petition for probate where a citation was issued prior to September 1, 1914, see *Matter of Iovinella* (1914), 88 Misc. 224, 150 N. Y. Supp. 689.

In a probate proceeding pending prior

to September 1, 1914, the surrogate has no power to grant an application for a trial by jury of controverted issues of fact. *Matter of Spooner* (1914), 87 Misc. 170, 150 N. Y. Supp. 136.

An action under § 2653a to revoke the probate of a will may be considered as pending at the time of the repeal of said section, within the meaning of this section, although some of the defendants were not served with a summons and complaint until after the repeal went into effect. *Raught v. Weed* (1915), 170 App. Div. 188, 155 N. Y. Supp. 1053.

Where proceeding commenced prior to Sept. 1, 1914.—Where a decree of the surrogate's court denying a petition for the

probate of an alleged will is reversed and a new trial by a jury ordered, and the proceeding was commenced prior to Sept. 1, 1914, the new trial should be directed to be held in the supreme court. *Matter of Cutter* (1916), 175 App. Div. 647, 162 N. Y. Supp. 545.

The taxation of costs is controlled by the statute in existence at the time of taxation, and a later statute prevails over the one in existence at the time when the action or proceeding was commenced. Hence, the costs in a proceeding pending in the surrogate's court on September 1, 1914, must be taxed under the statute then in force. *Matter of Cunningham* (1914), 87 Misc. 172, 150 N. Y. Supp. 431.

CODE TABLE.

Original section	Embodied in revised sections	Original section	Embodied in revised sections
2472	2510	2529	To Judiciary Law.
2472a Repealed except as found in..	2510	2530	Repealed.
2473	2513	2531	Repealed.
2474 Repealed Rewritten into....	2512	2532	2531
2475	2514	2533	2519
2476	2515	2534	2520
2477	2516	2535	2532
2478	2517	2536	Already repealed.
2479 Repealed.		2537	2699
2480 Repealed.		2538	2770
2481	2490, 2502, 2763	2539	2543
2482	2769	2540	2541
2483	2472	2541	2497
2484	2478	2542	2498
2485	2479	2543	2498
2486	2480	2544	2546
2487	2481	2545	2541, 2542, 2757
2488	2482	2546	2536
2489	2483	2547	2538
2490	2507	2548	Already repealed.
2491	2508	2549	Already repealed.
2492	2484	2550	Repeal. Rewritten into.....
2493	2485	2551	2742
2494	2509	2552	2549
2495	2474	2553	2499, 2551
2496	2476	2554	2553
2497	2477	2555	2554
2498	2486	2556	Repeal. Rewritten into... 2548, 2745
2499	2487	2557	2744
2500	2488	2558	Repeal
2501 Repeal, except as found in....	2499	2559	2743
2502 Repeal, except as found in		2560	Repeal
2486, 2499, 2552, 2719		2561	2743, 2751
2503	2489, 2499	2562	2746
2504	2504, 2506	2563	2747
2505 Repeal. Rewritten into.....	2504	2564	Repeal.
2506	2505	2565	2752
2507	2473	2566	2752
2508	2491	2567	2499, 2501
2509	2491, 2502	2568	Repeal
2509a	2492	2569	Repeal.
2510	2502	2570	2574
2511	2475	2571	Repeal.
2512	2493, 2495	2572	2756
2513	2496, 2500	2573	2755
2513a	2494	2574	2756
2514	2768	2575	2758
2515	2522	2576	2757
2516 Repeal. Rewritten into.....	2518	2577	2759
2517	2518	2578	2760
2518 Repeal. Rewritten into.....	2490	2579	2557, 2761, 2762
2511, 2524, 2529, 2550		2580	2762
2519 Repeal. Rewritten into.....	2523	2581	2759, 2762
2520	2525, 2529	2582	Repeal
2521 Repeal. Rewritten into.....	2525	2583	2557, 2560
2522 Repeal. Rewritten into.....	2526	2584	2557
2523 Repeal. Rewritten into.....	2526	2585	2764
2524 Repeal. Rewritten into.....	2528	2586	2763
2529, 2530		2587	2763
2525 Repeal. Rewritten into... 2529, 2531		2588	Repeal
2526 Repeal. Rewritten into... 2525, 2529		2589	2539
2527	2530	2590	2751
2528 Repeal. Rewritten into... 2511, 2533		2591	2558
			2560

TABLE SHOWING DISPOSITION OF SECTIONS.

601

Original section	Embodied in revised sections	Original section	Embodied in revised sections
2592	2561	2657	2767
2593	2562	2658 Repeal.	
2594	2568	2659 Repeal	
2595	2576	2660	2588, 2603
2596	2582	2661 Repeal. Rewritten into	2564, 2565
2597	2577	2662	2490, 2521, 2589
2598	2578	2663	2511, 2524, 2590
2599 Repeal. Covered by	2574, 2578	2664	2559, 2591, 2592
2600	2579	2665 Repeal. Rewritten into	2592
2601	2580	2666 Repealed.	
2602	2698	2667 Repeal. Rewritten into	2489
2603	2555	2668 Repealed.	
2604	2556	2669	2594
2605	2563, 2726, 2734	2670	2596
2606	2549, 2584, 2725, 2734	2671 Repealed. Rewritten into	2596
2607	2583	2672	2597
2608	2584	2673	2598
2609	2585	2674	2599
2610	2587	2675	2600
2611 In Dec. Est. Law.		2676	2601
2612 Repeal. Rewritten into	2564	2677 Consolidated with	2601
	2565, 2655	2678 Repeal.	
2613	2626, 2693, 2695	2679 Repeal.	
2614 Repeal. Rewritten into	2609	2680 Repeal.	
2615	2610	2681	2602
2616	2523, 2524, 2610	2682 Repealed. Rewritten into	2598
2617	2511, 2618		2599
2618	2611	2683 Repeal.	
2619	2543, 2544, 2612	2684	2624
2620 Repeal. Rewritten into	2497	2685	2569
	2498, 2547, 2612, 2620	2686	2570
2621	2613	2687	2571
2621a	2607	2688 Consolidated with	2571
2622	2614	2689	2572
2623	2614, 2620	2690	2573
2624 Consolidated with	2615	2691	2574
2625 Repeal.		2692	2563
2626 Already repealed.		2693	2606
2627 Already repealed.		2694 In Dec. Est. Law.	
2628 In Dec. Est. Law.		2695	2629
2629	2621	2696	2630
2630	2622	2697	2631
2631	2623	2698	2511, 2632
2632 Consolidated with	2623	2699	2633
2633 In Dec. Est. Law.		2700	2634
2634 Repeal	2753	2701	2635
2635 Repeal.		2702	2636
2636 Repeal. Rewritten into	2625	2703 In Dec. Est. Law.	
2637 Repeal.		2704 In Dec. Est. Law.	
2638	2567	2705	2608
2639	2628	2706 Repeal.	
2640 Repeal. Covered by	2625	2707	2675
2641 Repeal. Covered by	2566	2708 Repeal.	
2642	2627, 2694	2709 Repeal	2676
2643	2603	2710	2676
2644	2521, 2604	2711	2665, 2666
2645	2605	2712	2672
2646 Repealed.		2713	2670
2647 Already repealed.		2714	2666, 2667, 2673
2648 Already repealed.		2715	2668
2649 Already repealed.		2716	2669
2650 Already repealed.		2717	2684, 2733
2651 Already repealed.		2718	2677, 2678
2652 Already repealed.		2718a Repeal	2681
2653 Already repealed.		2719	2682, 2683
2653a Repeal.		2720	2674
2654	2765	2721	2688
2655 Repeal	2511, 2523	2722 Repeal	2687
2656	2766	2723	2691

TABLE SHOWING DISPOSITION OF SECTIONS.

Original section	Embodied in revised sections	Original section	Embodied in revised sections
2724	2510, 2671, 2735	2793	Already repealed.
2725	2721	2794	Already repealed.
2726	2510, 2736	2795	Already repealed.
2727	2535, 2721, 2722, 2727, 2728	2796	Already repealed.
2728	2729, 2730, 2731	2797	Already repealed.
2729	2686, 2721, 2732, 2733	2798	Repeal
2730	2753	2799	Repeal
2731	2679	2800	
2732	In Dec. Est. Law.	2801	
2733	2738	2801a	
2734	In Dec. Est. Law.	2802	Repeal
2735	Already repealed.	2803	Repeal
2736	Already repealed.	2804	
2737	Already repealed.	2805	
2738	Already repealed.	2806	Repeal
2739	Already repealed.	2807	Repeal
2740	Already repealed.	2808	Repeal
2741	Already repealed.	2809	Repeal
2742	2742	2810	Repeal
2743	2730, 2735, 2742	2811	Repeal
2744	2736	2812	Repeal
2745	2737	2813	Repeal
2746	2664, 2669, 2739	2814	Repeal. Rewritten into
2747	2740	2815	Repeal
2748	2741	2816	Repeal
2749	Repeal	2817	Repeal. Covered by
2750	Repeal.	2818	
2751	Repeal.	2819	
2752	Repeal.	2820	
2753	Repeal.	2821	
2754	Repeal.	2822	Repeal
2755	Repeal	2823	Repeal
2756	2706	2824	Repeal
2757	2707	2825	Repeal
2758	2708	2826	Repeal
2759	Repeal.	2827	Repeal
2760	2710	2828	Repeal
2761	2753	2829	Repeal
2762	Already repealed.	2830	
2763	Repeal.	2831	
2764	2712	2832	Repeal. Rewritten into
2765	2704	2833	Repeal. Rewritten into
2766	Already repealed.	2834	Consolidated with
2767	Already repealed.	2835	Repeal. Rewritten
2768	Already repealed.	2836	Repeal. Rewritten into
2769	Already repealed.	2837	Repeal
2770	Already repealed.	2838	
2771	Repeal.	2839	
2772	Already repealed.	2840	
2773	Already repealed.	2841	Repeal.
2774	Repeal.	2842	
2775	Already repealed.	2843	
2776	Already repealed.	2844	
2777	2714	2845	
2778	Already repealed.	2846	
2779	Already repealed.	2847	Repeal
2780	Already repealed.	2848	Repeal
2781	Already repealed.	2849	Repeal
2782	2715	2850	Repeal
2783	2715	2851	
2784	Already repealed.	2852	
2785	2716	2853	Repeal
2786	Already repealed.	2854	Repeal.
2787	Already repealed.	2855	Repeal
2788	Already repealed.	2856	Repeal
2789	Already repealed.	2857	Repeal. Embodied in
2790	Already repealed.	2858	Repeal. Embodied in
2791	Already repealed.	2859	Repeal. Embodied in
2792	Already repealed.	2860	

§ 2861. Justice's jurisdiction must be specially conferred by law.

Crime under conservation law.—A justice of the peace, under the conservation law, has jurisdiction to try one accused of committing a crime covered by said law, committed anywhere within the county where the magistrate resides. *People v. Keenan* (1913), 80 Misc. 539, 141 N. Y. Supp. 781.

§ 2862. General civil jurisdiction.

A justice of the peace in the city of Mount Vernon has not the jurisdiction possessed by a justice of the peace of a town. *Schwartz v. Palm* (1914), 163 App. Div. 7, 147 N. Y. Supp. 1081.

§ 2863. No jurisdiction in certain cases.

1. Where the people of the state of New York are a party except for one or more fines or penalties not exceeding two hundred dollars, or for premiums due the insurance fund under the workmen's compensation law not exceeding two hundred dollars.

Section amended by L. 1882, ch. 399; L. 1895, ch. 527, and L. 1909, ch. 65. Subd. 1 amended by L. 1917, ch. 772, in effect June 6, 1917. The amendment of 1917 added the last two lines beginning with the words "or for."

Source.—Code of Proc., § 54.

§ 2868. Justices to hold court; general powers.

A justice of the peace must hold, within his town or city, a court for the trial of any action or special proceeding, of which he has jurisdiction, brought before him, excepting that a justice who is a resident of an incorporated village located in two or more adjoining towns, may hold court for the trial of actions in any part of such incorporated village; but such a court shall not be held in a room in any part of which trafficking in liquors is authorized or in any adjoining room. He must hear, try and determine the same according to law and equity, and for that purpose, where special provision is not otherwise made by law, the court is vested with all the necessary powers possessed by the supreme court.

Amended by L. 1919, ch. 280, in effect Sept. 1, 1919. The amendment of 1919 inserted the words "excepting that . . . incorporated village" in lines 3-5.

A justice has no jurisdiction within a city's limits under the charter of the city of Canandaigua (L. 1913, ch. 371, § 238), although he maintain his office within the city. *Dodds v. O'Brien* (1917), 166 N. Y. Supp. 1065.

§ 2869. In what town, etc., action must be brought.

Jurisdiction of residents of adjoining town.—Where a city court had all the powers, civil and criminal, pertaining to justices of the peace, it had jurisdiction of an action between residents of a town adjoining the city where the summons was served on the defendant while he was within the city. *Sweetman v. Empie* (1916), 161 N. Y. Supp. 822.

Where an attorney receives hundreds of

claims at a time, the debtor and creditor both being residents of a city, and causes them to be assigned to a resident of an adjoining town for the sole purpose of bringing suits in that town, he is evading the statute and depriving the defendants of a privilege which the law has secured them. *Matter of —*, an Attorney (1915), 170 App. Div. 922, 154 N. Y. Supp. 703.

§ 2870. Criminal contempts.

The justice may punish in a proper manner a disturbance of the court where such disturbance tends to interrupt his official proceedings. *People v. Soule* (1913), 142 N. Y. Supp. 876.

§ 2877. Contents of summons.

Amendment to correct error.—Where a summons issued by a justice of the peace was antedated through clerical error, the plaintiff may apply for an amendment correcting the date; but having failed to do

so, the justice should dismiss the action on motion of the defendant. *Richmond Sales Co. v. Morris* (1913), 157 App. Div. 374, 142 N. Y. Supp. 244.

§ 2878. Service of summons.

Effect of service less than six days before return day.—Where a summons in an action in a justice's court, returnable ten days after date, was served five days after its date, the service was not a nullity; from the constable's return showing proof of personal service upon the defendant it must be presumed that the justice de-

cided that the service was due and proper; in doing so he acted judicially and while he made an error which would have resulted in a reversal of the judgment on appeal, he acquired jurisdiction of the person of the defendant. *Denovsky v. Bach* (1916), 93 Misc. 472, 158 N. Y. Supp. 442.

§ 2879. Idem; upon a corporation.

Managing agent.—The manager of one of two stores conducted by a foreign corporation is a managing agent. *Sautter v. Atlantic & Pacific Tea Co.* (1915), 92 Misc. 378, 156 N. Y. Supp. 992.

The word corporation includes a foreign corporation, and service of the summons in an action against it in the justice's

court of the city of Utica upon a manager of one of defendant's stores therein is sufficient to give the court jurisdiction without the necessity of complying with the provisions of § 432. *Sautter v. Atlantic & Pacific Tea Co.* (1915), 92 Misc. 378, 156 N. Y. Supp. 992.

§ 2887. Guardian ad litem for infant plaintiff.

Undertaking.—The provisions of § 474 regarding undertakings to be given by a guardian ad litem do not apply to guardians appointed to bring an action in a

justice's court even though the case is taken by appeal to the county court. *Short v. Corning & Painted Post St. Ry.* (1915), 154 N. Y. Supp. 236.

§ 2891. Plaintiff to prove his case, except where a verified complaint is

Default; presumption of service.—A judgment entered on the defendant's default should stand, although the complaint shows that the defendant was not a resident of the county, for presumably he was served within the town in which the justice resided. *Pitts v. Francis* (1914), 163 App. Div. 787, 149 N. Y. Supp. 271.

Lack of authority on the part of the person who appeared for the plaintiff on the defendant's default is immaterial and does not invalidate the judgment. *Pitts v. Francis* (1914), 163 App. Div. 787, 149 N. Y. Supp. 271.

Entering judgment on default.—A justice of the peace with whom a summons and verified complaint with proof of service thereof have been filed, should, on the default of the defendant in appearing, enter judgment for the plaintiff without further proof. *Pitts v. Francis* (1914), 163 App. Div. 787, 149 N. Y. Supp. 271.

Election.—When a plaintiff served a verified complaint with the summons and upon the return day appears and asks judgment, he thereby makes his election. *Finkelstein v. Barrett* (1917), 178 App. Div. 233, 164 N. Y. Supp. 1021.

§ 2936. Complaint.

An action upon a carrier's implied contract to transport goods delivered to it for shipment and deliver them at their destination in the usual course and without injury or delay through its fault or negligence is not "an action arising from contract for the recovery of money only." *Finkelstein v. Barrett* (1916), 96 Misc. 546, 161 N. Y. Supp. 952.

Failure to state amount actually due.—Where the verified complaint did not meet the requirements, in that said complaint

did not specify the amount actually due to plaintiff from defendant and did not pray judgment for the amount so due, the justice's court is without jurisdiction to enter judgment by default in pleading, and a motion to cancel and set aside a transcript of a judgment so entered and filed in the office of the county clerk and to vacate the judgment docketed thereon in the county clerk's office and to set aside an execution thereon and directing the sheriff to return to defendant all

moneys or other property in his hands levied or received pursuant to said execution will be granted. *Moneyweight Scale Co. v. Price* (1915), 92 Misc. 730, 157 N. Y. Supp. 463.

If it is doubtful whether an action is brought in tort or on contract, every in-

tendment is in favor of construing the complaint as setting forth a cause of action on contract on the theory that the tort has been waived. *Finkelstein v. Barrett* (1917), 178 App. Div. 233, 164 N. Y. Supp. 1021.

§ 2937. What causes of action may be joined.

Actions against infant and father.—An action against an infant on a contract whereby he was to receive instruction from the defendant cannot be united with an action against his parents on a col-

lateral contract guaranteeing payments by the infant. *International Text Book Co. v. Fox* (1912), 149 App. Div. 369, 134 N. Y. Supp. 383.

§ 2938. Answer.

Misjoinder as defense.—While the Code does not prescribe the remedy available to a defendant in a justice's court for a misjoinder of action, the objection to the defect should be raised in the answer by plea in abatement. *International Text Book Co. v. Fox* (1912), 149 App. Div. 369, 134 N. Y. Supp. 383.

Denial on information and belief.—Although a denial of "any knowledge or information sufficient to form a belief" is good under § 500, it does not meet the requirements of this section relating to

proceedings in the justice's court. *Thorn-ton v. Bell* (1914), 164 App. Div. 580, 150 N. Y. Supp. 39.

Verification.—In an action brought in justice's court upon a verified complaint to recover damages for shooting and killing plaintiff's dog while it was chasing defendant's turkeys, the answer is not required to be verified since such action is neither on contract for money only, nor on an account. *Collinson v. Wier* (1915), 91 Misc. 501, 154 N. Y. Supp. 951.

§ 2939. Demurrer.

Misjoinder.—Where in an action in a justice's court the allegations against misjoinder cannot be attacked by demurrer although it appears upon the face of the complaint. *International Text Book Co. v. Fox* (1912), 149 App. Div. 369; 134 N. Y. Supp. 383.

Question of jurisdiction.—A defendant cannot by demurrer raise the question of the jurisdiction of the city court of Ithaca, it being a justice's court. Nor does the

objection that the complaint does not state facts sufficient to constitute a cause of action raise the question of jurisdiction. *Wells v. Scofield* (1913), 157 App. Div. 8, 141 N. Y. Supp. 657.

Objection as to the power to bring an action into city court cannot be taken by demurrer, but may be raised by a motion to dismiss. *Board of Health of New Rochelle v. Farrell* (1917), 178 App. Div. 714, 165 N. Y. Supp. 911.

§ 2940. General rules of pleading.

Conclusions of law; denial of indebtedness insufficient.—Where, in an action to recover on a contract for telephone service, the making of the contract is admitted by the answer, allegations thereof that from and after a certain date the services was defective and of no value, and that the defendant could not use the same, are simply conclusions of law and raise no issue. A mere denial of indebtedness to the amount sued for is insufficient. *New York Telephone Co. v. Simon* (1912), 77 Misc. 192, 137 N. Y. Supp. 542.

No particular form required.—The rules applying to pleadings in justice's court apply to the city court of Elmira, and a pleading is not required to be in any particular form but must be so expressed as

to enable a person of common understanding to know what is intended. *Kopczynski* (1913), 158 App. Div. 247, 143 N. Y. Supp. 130.

Where from the reading of the complaint a person of "common understanding" would conclude that defendant had purchased goods and had leased premises of the plaintiff and that he had paid upon both items a certain sum, leaving the balance unpaid, and said complaint demands judgment therefor, the complaint is good though under strict rules an allegation of nonpayment contained in the second cause of action would not apply to the first cause of action. *Johnson v. Case* (1916), 97 Misc. 247, 162 N. Y. Supp. 841.

§ 2942. Court may require items to be exhibited.

Bill of particulars, when required.—In an action in justice's court, brought for the wrongful killing of plaintiff's geese by defendant's dog, defendant not entitled to a bill of particulars of plaintiff's evidence, relative to a scenter. *Hepp v. Tyler* (1914), 88 Misc. 121, 151 N. Y. Supp. 591.

A justice of the peace may, upon the request of either party, require the adverse

party to exhibit his account on demand. *Hepp v. Tyler* (1914), 88 Misc. 121, 151 N. Y. Supp. 591.

Idem; actions of tort.—*Quære* whether the provision requiring that items of the plaintiff's claim in justice's court be exhibited relates to actions of tort. *Hepp v. Tyler* (1914), 88 Misc. 121, 151 N. Y. Supp. 591.

§ 2951. Answer of title.

In summary proceedings.—The question in summary proceedings is whether the relation of landlord and tenant exists, and the question of title to property cannot arise. *People ex rel. v. Kelsey* (1913), 82 Misc. 491, 144 N. Y. Supp. 135.

Answer must show that title is ques-

tioned.—Before a justice is called upon to enter judgment of discontinuance because of a plea of title, the answer must allege facts showing that the title to real property will come in question. *Sacred Heart Roman Catholic Church v. Bedder* (1913), 80 Misc. 541, 142 N. Y. Supp. 870.

§ 2952. Undertaking thereupon.

Practice.—Where in an action brought in justice's court for trespass on lands, the defendant with his answer, pleading title to land by user, delivers to the justice an undertaking under this section, the defend-

ant has all of twenty days in which to give the written admission of service and the defendant is entitled to twenty days in which to answer. *Hallock v. Dillon* (1912), 75 Misc. 292; 132 N. Y. Supp. 796.

§ 2959. Adjournment by justice.

Holding case open to allow plaintiff's attorney to appear.—Where upon joinder of issue before a justice of the peace, the case is adjourned by consent of parties and again at request of defendant and both parties appear on the adjourned day, the

justice is without power over the objection of the defendant to hold the case open six hours to enable plaintiff's attorney to appear. *Blowers v. Malone* (1912), 75 Misc. 396; 135 N. Y. Supp. 535.

§ 2960. Adjournment on application of plaintiff.

Jurisdiction.—Where upon joinder of issue before a justice of the peace, the case is adjourned by consent of parties and again at request of defendant and both parties appear on the adjourned day, the

justice is without power over the objection of the defendant to hold the case open six hours to enable plaintiff's attorney to appear. *Blowers v. Malone* (1912), 75 Misc. 396, 135 N. Y. Supp. 535.

§ 2961. Adjournment on application of defendant.

After issue joined.—An adjournment after issue joined in a justice's court on the application of the defendant under § 2961, is not limited to eight days, nor need the defendant, as a condition precedent, make

the affidavit provided for in subd. 1, nor give the undertaking required by subd. 2 of said section unless the plaintiff so required. *Molinski v. Burnett* (1912), 152 App. Div. 428, 137 N. Y. Supp. 259.

§ 2998. Juror's oath.

Effect of failure to swear jury.—Where both parties to an action were present at the trial and were examined and cross-examined, and their attorneys who took part in the impaneling of the jury announced that it was satisfactory, examined the witnesses and at the close of the evidence summed up, and the jury returned a verdict of no cause of action, the

failure of the justice to swear the jury is, under § 3063, at most an irregularity, and the failure to take the objection in the court below is a waiver of the right to do so on appeal from a judgment in favor of defendant. *Collinson v. Wier* (1915), 91 Misc. 501, 154 N. Y. Supp. 951; *Becker v. Becker* (1915), 92 Misc. 382, 156 N. Y. Supp. 995.

§ 3007. Rendition of verdict; plaintiff need not be called.

When plaintiff entitled after submission to jury to discontinuance on payment of costs, see *Connolly v. Empire United Railways Co.* (1914), 88 Misc. 118, 151 N. Y. Supp. 653.

§ 3013. Judgment of non-suit.

When judgment to be rendered.—When justice bound to render judgment of non-suit, see *Leonard v. Rima* (1913), 82 Misc. 358, 144 N. Y. 447.

§ 3017. Transcript of judgment; docketing the same.

Judgment in municipal court of New York.—A judgment rendered in the municipal court of the city of New York for a sum of money and docketed in the county clerk's office the next day by filing of a transcript is good for twenty years from the time when the party recovering it was first entitled to a mandate to enforce it. *Grannis v. Ewell* (1912), 76 Misc. 484, 135 N. Y. Supp. 588.

The provisions of § 3017 limiting the time within which a transcript from a justice's court may be filed, apply to municipal court judgments and transcripts issued thereon. *Matter of Murphy* (1912), 150 App. Div. 460, 135 N. Y. Supp. 23.

The filing of the transcript with the county clerk makes it a part of the rec-

ords of the county court; and thereupon the transcript, the judgment entered thereupon, and all proceedings supplemental thereto are subject to the control of the county court, not only for the purpose of enforcing the judgment, but also to cancel, set aside or vacate as justice may require. *Moneyweight Scale Co. v. Price* (1915), 92 Misc. 730, 157 N. Y. Supp. 463.

The amendments of 1894 to this section and § 382, subdivision 7, were intended to make a judgment of a court not of record, when a transcript is filed and the judgment docketed in the county clerk's office, a judgment of the county court, and permit an action to be maintained thereon within twenty years. *Brownell v. Parsons* (1917), 220 N. Y. 483.

§ 3027. Renewal of execution.

The power of a justice of the peace to issue an execution after his term of office has expired does not apply to an execution against the wages or earnings of the

defendant under § 1391. *Furanz v. Tramontano* (1917), 177 App. Div. 52, 163 N. Y. Supp. 700.

§ 3043. Execution upon judgment docketed with county court.

City court of Poughkeepsie.—A judgment rendered by the city court of the city of Poughkeepsie for a sum less than \$25, exclusive of costs, is not a lien on the real property of the judgment debtor

under this section, although a transcript of said judgment was filed and docketed in the office of the county clerk. *Milan v. Kerlansky* (1914), 87 Misc. 15, 149 N. Y. Supp. 1048.

§ 3044. Justice's judgment reviewed by appeal.

The only method of obtaining a review of a judgment rendered by a justice of the peace is by notice of appeal under this section. *Stilwell v. Rowe* (1913), 83 Misc. 297, 145 N. Y. Supp. 1095.

Technical errors of practice are not a ground for reversal unless they affect a substantial right. *Gridley v. Wood* (1917), 180 App. Div. 831, 168 N. Y. Supp. 70.

§ 3045. Who may appeal; to what court appeal to be taken.

Reversal by county court on the facts.—The county court should reverse a judgment of a justice's court on the facts only when the judgment is so clearly against the weight of evidence that it can be seen that the justice could not reasonably have

arrived at the decision made. The county court is a court of review in such cases and not a court of original jurisdiction to determine the facts. *Bame v. Groat* (1916), 171 App. Div. 708, 157 N. Y. Supp. 750.

§ 3046. Appeal; when and how taken.

A county court only acquires power to consider and decide an appeal from a justice's court when the appeal is taken within the statutory twenty days from the date of the entry of the judgment in the justice's docket. *Bennett v. Cole* (1916), 173 App. Div. 521, 159 N. Y. Supp. 1001.

§ 3047. Service of notice upon justice; payment of costs and fee.

Service of the notice of appeal upon the justice, must be made by delivering it to him personally, or to his clerk, appointed pursuant to law, or by mailing such notice to the justice at his office in the manner prescribed *by service of notice by mail in section seven hundred and ninety-seven of this act; but if the justice is dead, or if neither he nor his clerk can, after reasonable diligence, be found within the county, service of the notice upon the justice may be made by delivering it to the clerk of the appellate court. Unless the justice is dead, the appellant must, at the time of serving the notice, pay to the person to whom it is delivered the costs of the action, included in the judgment, and the sum of two dollars, as the fee of the justice for making the return.

Amended by L. 1913, ch. 445, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "or by mailing such notice to the justice at his office in the manner prescribed by service of notice by mail in section seven hundred and ninety-seven of this act," in lines 3, 4 and 5.

Source.—Code of Proc., § 359, and part of § 354.

Service by mail.—Service of notices of appeal from a judgment of a justice of the peace on the respondent and the justice, by inclosing them in postpaid envelopes properly addressed, and depositing them in the post office at the place of residence of appellant's attorneys, is not sufficient, and the county court may, as a matter of right, dismiss the appeal. *Walker v. Lehigh Valley Railroad Co.* (1914), 163 App. Div. 153, 148 N. Y. Supp. 467.

§ 3048. Service of notice upon respondent.

Service of the notice of appeal upon the respondent may be made, by delivering it, in any part of the state, to the respondent personally, or in one of the following methods:

1. By leaving it at his residence, with a person of suitable age and discretion or by serving the notice upon the respondent by mail, or in case an attorney appeared for respondent at the trial, the notice may be served upon the attorney, either personally, or in the manner prescribed for service of notice by mail in section seven hundred and ninety-seven of this act.

2. If service cannot be made, with due diligence, upon the respondent, in the manner prescribed in the foregoing subdivision, the notice of appeal may be served upon him by delivering it to the clerk of the appellate court.

Amended by L. 1913, ch. 445, in effect Sept. 1, 1913. The amendment of 1913 materially changed this section.

Source.—Code of Proc., § 354, in part.

§ 3049. Amendment; when allowed.

Perfecting appeal.—Where the appellant, by affidavit, brings itself within the requirement of § 3049, it will be permitted to perfect the appeal by giving the undertaking *nunc pro tunc*. *J. & M. Electric Co. v. Centotella* (1912), 77 Misc. 670, 138 N. Y. Supp. 571.

Relief on motion to dismiss appeal.—

* So in original.

As the court is empowered to permit an omission in properly serving papers necessary to perfect an appeal to be supplied upon a direct motion for such relief, it may also give similar relief upon a motion to dismiss the appeal, as where the respondent seeks a dismissal because the appellant's service of an undertaking to perfect the appeal was not timely. *Maloy v. Bannon* (1915), 169 App. Div. 716, 155 N. Y. Supp. 712.

Failure to file undertaking.—Where, on appeal to the county court from a judgment in justice's court and for a new trial, defendant seasonably pays the costs and duly serves a notice of appeal, but inadvertently fails to file an undertaking, and thereafter plaintiff appears by a regular notice of appearance served by his attorney who also serves a notice of trial, defendant's motion for leave to file and serve the undertaking required by law

nunc pro tunc so as to perfect his appeal may be granted on payment of motion costs. *Eaton v. Potts* (1915), 96 Misc. 182, 159 N. Y. Supp. 515.

Inadvertent demand for new trial.—Where on appeal from a judgment rendered by a justice of the peace the appellant, through inadvertence, demands a new trial in the county court, his motion to amend his notice of appeal by eliminating therefrom such demand and that the case be transferred to the law calendar may be granted. However, the order granting the motion must provide in terms for presenting the rights of the respondent under § 3070 and may contain a direction to the justice of the peace to amend the return on appeal by adding thereto the evidence taken in the case. *Buckley v. Shapland* (1916), 96 Misc. 541, 161 N. Y. Supp. 950.

As to filing and service of undertaking *nunc pro tunc*, see note to section 3069.

§ 3050. Undertaking to stay execution upon judgment.

Section cited.—*Maloy v. Bannon* (1915), 169 App. Div. 716, 155 N. Y. Supp. 712.

§ 3053. Return.

A return giving the substance of what took place at the trial instead of the actual testimony is insufficient. *Dombek v. Carlson* (1917), 162 N. Y. Supp. 1106.

§ 3062. Hearing of appeal; dismissal thereof.

A county court can only consider and decide the appeal when it is brought on for argument by an eight days' notice. *Bennett v. Cole* (1916), 173 App. Div. 521, 159 N. Y. Supp. 1001.

§ 3063. Judgment.

Statements in affidavits.—On an appeal from a judgment of the justice's court, the county court cannot act upon any statements contained in an affidavit detailing occurrences at the trial. *Molinski v. Burnett* (1912), 152 App. Div. 428, 137 N. Y. Supp. 259.

Weight of evidence.—A judgment of the justice's court will not be reversed on appeal unless the judgment is so clearly against the weight of evidence, that it can be seen that the justice could not reasonably have arrived at the decision made. *Wears v. Johnson* (1912), 151 App. Div. 770, 136 N. Y. Supp. 316.

A county court has authority to affirm, modify or reverse the judgment of a city court, but not authority to order a new trial except where the judgment is contrary to or against the weight of evidence. *Lee v. Carson* (1916), 175 App. Div. 104, 161 N. Y. Supp. 509.

The power of a county court to reverse a judgment of a justice's court on the ground that it is contrary to and against the weight of evidence is to be exercised only when the judgment is so plainly

against the weight and preponderance of proof that it can be seen that such judgment could not reasonably have been rendered. *Case v. Ploutz* (1915), 90 Misc. 568, 154 N. Y. Supp. 914.

Idem; new trial.—A new trial will be granted upon the reversal of a judgment of a justice where the evidence does not support the judgment, but the plaintiff may be able to establish a cause of action. *King v. Murphy* (1914), 151 N. Y. Supp. 476.

A new trial may be ordered where the verdict is against the weight of evidence. *Brown v. Sullivan* (1913), 155 App. Div. 875, 139 N. Y. Supp. 555.

Evidence conflicting.—Where, though on the trial in justice's court the evidence is conflicting, there is testimony which if believed by the jury justifies their verdict in favor of defendant, it should not be disturbed on appeal under the authority conferred on the county court. *Becker v. Becker* (1915), 92 Misc. 382, 156 N. Y. Supp. 995.

Return set aside.—The provisions regarding a new trial seem to be confined to a case where there is evidence, if be-

lieved, to support an affirmance or a reversal, and, hence, do not apply where the return has been set aside. *Dombek v. Karlson* (1917), 164 N. Y. Supp. 349.

Judgment on counterclaim.—Where, in an action to recover \$39.60 for goods sold and delivered, defendant who pleads a counterclaim for \$15 admits that he is indebted to plaintiff in the sum of \$24.60 a judgment in defendant's favor on his counterclaim must be reversed. *King Paint Co. v. Lang* (1913), 82 Misc. 362, 144 N. Y. Supp. 444.

Power of county court to grant a judgment where complaint dismissed by justice.—Where a plaintiff filed a verified complaint in a justice's court, which, if the matters alleged therein are true, entitles

him to a judgment, and the defendant after a denial of his motion for a dismissal of the complaint refuses to file a verified answer, and the justice dismisses the complaint, the county court on appeal may, under this section grant a judgment in favor of the plaintiff. *Randall v. Osborn* (1914), 162 App. Div. 186, 147 N. Y. Supp. 691.

It is the duty of the appellate court to reverse a judgment according to the justice of the case and it may do so although no objection to improper evidence may have been made in the justice's court. *Schmidt v. Schweitzer* (1912), 137 N. Y. Supp. 807.

Section cited.—*Hone v. Burr* (1915), 91 Misc. 520, 155 N. Y. Supp. 377.

§ 3064. When new trial in justice's court may be directed.

Laches.—The judgment of a justice's court entered on the default of the defendant in appearing should not be set aside where the only excuse for the default is that the defendant was too busy to ascertain the date of the return day stated in the summons, and there is no proposed answer, but merely an affidavit that the goods sold to the plaintiff, and of which the defendant accepted the return, were not warranted by him as alleged by the plaintiff. *Hotchkiss v. King* (1913), 155 App. Div. 850, 140 N. Y. Supp. 495.

What amounts to failure to appear.—Where defendant was in the presence of the justice on the return of the summons, and was informed by the justice that he would have to file a verified written answer or judgment would be entered for the amounts claimed in the respective complaints, and defendant explained to the justice that he expected that one with

whom he had consulted would procure for him an attorney, but none was forthcoming, and after the lapse of some time the justice, who made no statement which misled the defendant, entered judgment in each case against him, it was held that the record showed that defendant had "failed to appear before the justice," within the meaning of this section, and had not, in his endeavor to have his day in court, "rendered a satisfactory excuse for his default." *Stilwell v. Rowe* (1913), 83 Misc. 297, 145 N. Y. Supp. 1095.

Summons served less than six days before return day.—Where a summons in a justice's court action was served five days before the return day, but the defendant failed to appeal from the judgment obtained within twenty days after the entry thereof, she could have relief. *Denovsky v. Bach* (1916), 93 Misc. 472, 158 N. Y. Supp. 442.

§ 3066. Costs; when awarded.

The court has no discretion as to costs where the appeal is disposed of under sub-

division 4. *Nassau Garage v. Dorn* (1916), 158 N. Y. Supp. 534.

§ 3068. When appellant may demand new trial in appellate court.

Surplusage.—The fact that the defendant in his notice of appeal did not erase from the blank used a demand for a new trial in the appellate court is immaterial, and the court may strike out the demand as surplusage. *Hotchkiss v. King* (1913), 155 App. Div. 850, 140 N. Y. Supp. 495.

Counterclaim wholly insufficient.—Although, on an appeal from a justice's

court, the appellant may demand a new trial in the appellate court where the judgment demanded by either party in his pleading exceeds fifty dollars, the rule does not obtain where a counterclaim upon which the right to a new trial is founded is demurrable as wholly insufficient. *Malloy v. Bannon* (1915), 169 App. Div. 716, 155 N. Y. Supp. 712.

§ 3069. Undertaking to be given.

Undertaking; appeal by plaintiff.—An appeal from a judgment and for a new trial in the county court must be perfected by the giving of an undertaking, though

the appeal is taken by plaintiff in whose favor the judgment was rendered. *J. & M. Electric Co. v. Centotella* (1912), 77 Misc. 670, 138 N. Y. Supp. 571.

Right to waive undertaking.—Where on appeal from a judgment rendered by a justice of the peace a new trial is demanded in the county court, the giving of an undertaking to stay execution, as provided by § 3050 of the code of civil procedure, at the time of the service of the notice of appeal is jurisdictional, and if not given the appeal will be dismissed, though by oral stipulation the giving of the undertaking has been waived. *Lauck v. Gorman* (1914), 85 Misc. 491, 148 N. Y. Supp. 931.

Filing undertaking nunc pro tunc.—Where a respondent makes an affidavit to the effect that he did not authorize his attorney to waive the filing of an undertaking, and that he did not know that it had been waived, and believes that it is necessary for the protection of his interests, the appellate court, under the provisions of § 3049 of the code of civil procedure may permit the filing and service of an undertaking *nunc pro tunc*, thus giving the respondent security and at the same time

preventing the hardship to appellant of the loss of his appeal. *Lauck v. Gorman* (1914), 85 Misc. 491, 148 N. Y. Supp. 931.

A defendant which has given a reasonable excuse for its default in failing to furnish the undertaking, should be permitted to file the undertaking *nunc pro tunc*. But where the default is the direct result of the carelessness of defendant's attorney, and the result of the appeal is to permit it to excuse its default and forfeit its appeal, terms should be imposed. *Harrison Bros. Co., Inc. v. Excelsior Bag Mfg. Co.* (1917), 180 App. Div. 790, 168 N. Y. Supp. 291.

Upon failure to give an undertaking perfecting an appeal to the county court for a new trial the appeal stands as one upon questions of law only, and it is error to dismiss it. *Harrison Bros. Co., Inc. v. Excelsior Bag & Mfg. Co.* (1917), 180 App. Div. 790, 168 N. Y. Supp. 291.

Section cited.—*Maloy v. Bannon* (1915), 169 App. Div. 716, 155 N. Y. Supp. 712.

§ 3070. Offer to compromise before return.

Effect on costs.—Where on appeal from a judgment of a city court for \$25, the county court orders a new trial in which the plaintiff recovers judgment for \$21.50 and neither party makes an offer of judgment as provided by this section, the plaintiff is entitled to costs. *Frisch v. Dussault* (1915), 166 App. Div. 357, 152 N. Y. Supp. 15.

§ 3071. Proceedings in appellate court.

Section cited.—*Short v. Corning & P. P.* St. Ry. (1915), 154 N. Y. Supp. 236.

§ 3135. General requisites of mandates.

Blank left in summons.—A summons issued by a justice of the peace with a blank therein either as to the date or otherwise is void under the requirement that such a summons must be "entirely

filled up" and delivered to an officer to be executed. *Title Guarantee & Trust Co. v. Johnson* (1916), 95 Misc. 101, 160 N. Y. Supp. 189.

§ 3144. Deposit of books and papers with town or city clerk.

A town clerk is not entitled to a fee for receiving books and papers deposited by retiring town officers or for filing papers

in criminal cases tried before a justice of the peace. *Attorney-General Rep.* (1913), page 114.

§ 3146. Town or city clerk to demand books, etc., upon death, etc., of justice.

If a justice of the peace dies, or his office becomes otherwise vacant, the town or city clerk must demand and receive all books and papers, which belonged to the justice in his official capacity, from any person having them in his possession, and such clerk may make and issue a transcript of a judgment so rendered by such a justice of the peace and appearing upon the docket of such justice of the peace so on file in his office, and issue an execution upon any such judgment which has not been docketed in the office of the county clerk, upon receiving his fees for the same, which shall

be the same now allowed a justice of the peace for issuing a transcript or transcripts, as the case may be, and such transcript or execution so issued by such clerk shall have the same force and effect as though the same had been issued by such justice of the peace during his term of office.

Amended by L. 1905, ch. 436, and L. 1916, ch. 448, in effect Sept. 1, 1916. The amendment of 1916 inserted lines 8 and 9 concluding with word "clerk," and words "or transcripts, as the case may be," and "or execution" in lines 11 and 12.

Source.—R. S., pt. 3, ch. 2, tit. 4, § 255.

§ 3151. Transfer of action; when justice is witness.

Affidavit showing justice to be material witness.—Although it is the duty of the justice in the first place to pass upon the sufficiency of an affidavit presented under this section, this does not give him the power to determine as to its truth or falsity, and to disregard it and proceed with the cause. *Frank v. Jaspin* (1914), 87 Misc. 9, 149 N. Y. Supp. 1053.

The defendant is entitled as a matter of strict legal right to have his case continued before another justice where the justice is a material witness, and the justice must make such continuation and may

not nullify the effect of the statute even to avoid the impropriety of continuing the case before the counsel of the defendant. *Davis v. O'Day* (1912), 137 N. Y. Supp. 411.

The filing of an answer by a tenant after the presentation of an affidavit under this section does not deprive him of the exception taken to the refusal of the justice to comply with the statute, directing the proceeding to be continued before another justice. *Frank v. Jaspin* (1914), 87 Misc. 9, 149 N. Y. Supp. 1053.

§ 3169. Proof necessary to obtain warrant of attachment.

Sufficiency of affidavit.—Under the requirement that the affidavit must show that the plaintiff is entitled to recover a sum stated therein "over and above all counterclaims known to the defendant," an affidavit stating "that deponent is justly entitled to recover from defendant the sum of \$5,000 over and above all counterclaims known to defendant," is fatally defective. The fact that the court may think that plaintiff meant to say "plaintiff" and not "defendant" cannot supply the want of al-

legation required by the code. *Reynolds v. Bean* (1912), 138 N. Y. Supp. 1104.

Insufficient affidavit.—Where in an action for services by an attorney the moving papers contain no statement of facts from which can be determined the nature or extent of the services alleged to have been rendered or their approximate value, they are clearly inadequate as a basis for an attachment, even though sufficient for the purpose of setting forth a cause of action. *Fine v. Lyons* (1913), 141 N. Y. Supp. 294.

§ 3188. Appeal from a judgment.

Amended judgment.—Where the judgment as originally entered precluded defendant from enforcing any claim against the estate of plaintiff's testator and was an effectual bar to defendant's counterclaim, and the judgment was amended by providing that instead of a dismissal of the counterclaim on the merits that it be

dismissed as a set-off but without prejudice to defendant's claim against plaintiff in a certain sum, the amendment was one of substance and affected an important right of defendant and it was entitled to take an appeal from said judgment. *Paoli v. East River National Bank* (1915), 90 Misc. 645, 154 N. Y. Supp. 192.

§ 3190. Time to appeal and proceedings thereupon.

Expiration of time.—Where an order denying a new trial, was not served on the defendant, an order denying his motion to settle the case on appeal will be reversed

on the ground that his time to appeal from the order denying the new trial had not expired. *Rohr v. Linch* (1912), 78 Misc. 45, 137 N. Y. Supp. 752.

§ 3191. Appeal to the appellate division of the supreme court in what cases.

Extending time.—The court has no power to extend the time to allow an appeal or open a default in serving notice

of appeal within the time limited by the Code. *Hamilton v. Mendham* (1912), 149 App. Div. 907, 133 N. Y. Supp. 977.

§ 3193. Idem; within what time taken.

Extending time.—The court has no power within the time limited by the Code. *Hamilton v. Mendham* (1912), 149 App. Div. 907, 133 N. Y. Supp. 977.

§ 3203. Jurisdiction in civil actions.

City judge not state officer.—The city judge of the city of Yonkers is a city, not a state officer, and the mayor of said city, not the governor of the state, has the power to fill a vacancy in said office by appointment. *People ex rel. Garrity v. Walsh* (1917), 181 App. Div. 118, 168 N. Y. Supp. 440.

§ 3213. Appeals.

Technical errors.—Technical errors in the admission of evidence which do not affect the merits may be disregarded on appeal from a judgment of the city court of Albany. *Bellman & Sanford v. Thacher* (1912), 151 App. Div. 387, 136 N. Y. Supp. 730.

TITLE V.**The city court of the city of Rochester.**

Title amended by L. 1918, ch. 493, in effect July 1, 1918. The amendment of 1918 substituted the words "city court" for the words "municipal court"

§ 3226. Provisions of chapter nineteen generally applicable to the court and judges.

The provisions of chapter nineteen of this act, excluding section three thousand and sixty-three, excluding article three of title eight, and excluding titles ten and eleven thereof, apply to the city court, civil branch, of the city of Rochester, and to the judges thereof; except so far as they are inconsistent with the next section, or with the charter of the city of Rochester or with any other statute applying to said court or the judges thereof as now existing or hereafter amended. For the purpose of applying the same, the court is deemed a justice's court; each judge thereof is deemed a justice of the peace; and the city of Rochester is deemed a town of Monroe county.

Amended by L. 1918, ch. 493, in effect July 1, 1918. The amendment of 1918 substituted the words "city court" in line 3 for the words "municipal court;" and inserted the words "civil branch" in line 3.

§ 3227. Appeals.

Appeals may be taken to the county court of Monroe county from judgments and orders of the city court, civil branch, of the city of Rochester and from orders of the judges thereof as provided in articles one and two of title eight of chapter nineteen of this act, and the provisions thereof, except section three thousand and sixty-three, apply to such appeals, except as herein expressly modified. The appeal must be heard on the return or a certified or stipulated copy thereof, and may be brought on for hearing in the county court in the same manner and on the same notice as motions are or may be brought on for hearing in said court, or may be put on the calendar of said court as provided in section three thousand and sixty-two of this act. An appellant may apply to the county court to

open a default as provided in section three thousand and sixty-four of this act, which application may be heard without the return unless otherwise ordered by the court; and an appellant may apply upon affidavits and the return to said court for a new trial or hearing upon the ground of newly discovered evidence; the court in either case may stay any or all proceedings under the judgment or order appealed from upon such terms as it deems proper, and may grant a new trial or hearing as hereinafter provided upon such terms as it deems proper. The county court and other appellate courts on such appeals must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits, and may affirm or reverse, wholly or partly, or modify, the judgment or order appealed from for errors of law or of fact, or because the judgment is excessive or insufficient or contrary to the evidence or contrary to law, and may, if necessary or proper, grant a new trial or hearing in the city court, civil branch, of the city of Rochester, or before a judge thereof, as may be proper, at a time designated by it, and thereupon the city court, civil branch, or judge must proceed, and adjournments may be granted, a jury trial demanded, and all other proceedings taken as if the action or proceeding had been commenced anew. A copy of the judgment or order granting a new trial or hearing must be served by the party entering it on the opposite party or his attorney at least two days before the time set for the new trial or hearing. When a new trial or hearing is granted the appellate court may in its discretion award costs of the appeal to either party absolutely or to abide the event.

Amended by L. 1918, ch. 493, in effect July 1, 1918. The amendment of 1918 substituted the words "city court" in line 2 for the words "municipal court;" and inserted the words "civil branch" in line 2.

§ 3228. When plaintiff entitled to costs of course.

5. In all actions hereafter brought in the supreme court, triable in the county of New York, which could have been brought, except for the amount claimed therein, in the city court of the city of New York, and in which the defendant shall have been served with process within the county of New York, the plaintiff shall recover no costs or disbursements unless he shall recover one thousand dollars or more. In all actions hereafter brought in the supreme court, triable in the county of Kings, which could have been brought, except for the amount claimed therein, in the county court of Kings county, and in which the defendant shall have been served with process within the county of Kings, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter originally brought in the supreme court, triable in the county of Albany, and in which the defendant is a resident of the county of Albany, which could have been brought, except for the amount claimed therein, in the county court of the county of Albany, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter originally brought in the supreme court, triable in the county of Rensselaer, and in which the defendant is a resident of the county of Rensselaer, which could have been brought, except for the amount claimed therein, in the county court of the

county of Rensselaer, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter brought in the supreme court, triable in the counties of Bronx and Queens, and in which the defendant is a resident of the county where the action is brought, which could have been brought, except for the amount claimed therein, in the county court of the counties of Bronx and Queens, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more. In all actions hereafter brought, triable in the supreme court or county court of a county contained wholly within a city of the first class, or in the city court of the city of New York, which could have been brought, except for the amount claimed therein, in the municipal court of the city of New York, and in which the defendant shall have been served with process within the city of New York, the plaintiff shall recover no costs or disbursements unless he shall recover two hundred and fifty dollars or more. The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under the next following section.

Subd. 5 added by L. 1904, ch. 557; amended by L. 1910, ch. 574; L. 1914, ch. 80; L. 1916, ch. 50, in effect Sept. 1, 1916. The amendment of 1914 added the fifth sentence relative to actions triable in the counties of Bronx and Queens. The sixth sentence formerly read: "In all actions hereafter brought in the supreme court, triable in the county of New York or the county of Kings, or in the city court of the city of New York or the county court of Kings county, which could have been brought, except for the amount claimed therein, in the municipal court of the city of New York, and in which the plaintiff shall recover no costs or disbursements unless he shall recover two hundred and fifty dollars or more." The amendment of 1916 added the fourth sentence.

Source.—Code of Proc., § 304, in part.

Intention of legislature.—When the legislature made the right to tax costs depend upon whether the action might have been brought in the county court, it necessarily repealed by implication any statutory provision making such right depend on whether the action might have been brought in the city court, and intended that if the action could not have been brought in the county court, costs are recoverable. *Henning v. Camacho* (1918), 181 App. Div. 856, 169 N. Y. Supp. 284.

Costs on appeal.—Where a judgment of the city court of the city of New York in favor of defendant is reversed on appeal, with costs to the appellant to abide the event, and on the new trial plaintiff recovers judgment for less than \$250, he is, nevertheless, entitled to tax the costs of the appeal. *Selden v. Block* (1915), 90 Misc. 579, 153 N. Y. Supp. 980.

Payment of costs before prosecuting second action.—The rule that the plaintiff must pay the costs incurred in an unsuccessful action before prosecuting a second action against the same defendant upon the same cause, is not confined to actions commenced in the same court, and is supported by the same reason, where the successive actions are brought in different states, as where they are brought in different courts in the same state. *Wolfe v. Blue Ribbon Auto & Carriage Co.*

(1915), 170 App. Div. 76, 153 N. Y. Supp. 1006.

Where a judgment obtained by an impecunious plaintiff in a county court was reversed on the sole ground that the trial court was without jurisdiction because the complaint demanded \$2,000, with interest, a motion to stay proceedings in an action thereafter brought in the supreme court upon the same cause of action because of the nonpayment of the costs of the former action will be denied as the granting of such motion would be "unjust and inequitable." *Halpern v. Langrock Bros. Co.* (1916), 93 Misc. 324, 157 N. Y. Supp. 1098.

The nonpayment of costs of a previous action will not authorize the stay of a subsequent action where the actions are not based on the same facts. Thus a cause of action for breach of promise of marriage will not be stayed because of the nonpayment of the costs of an action for the recovery of damages sustained by the plaintiff by reason of the defendant's breach of a contract whereby he agreed to support the plaintiff during her natural life, in consideration of the plaintiff agreeing not to bring an action for a breach of promise of marriage. *Sullivan v. Hoe* (1916), 97 Misc. 197, 162 N. Y. Supp. 761.

Action for penalty.—An action to recover a penalty being a penal one and the

defendant having died, it cannot be determined who is the prevailing party and as such entitled to costs. *People v. Newcomb* (1912), 75 Misc. 258, 135 N. Y. Supp. 151.

Necessity for statutory authority for costs.—Statutory costs are a matter of right, but authority for an item claimed must be found in the statute. *Friedman v. Borchardt* (1914), 161 App. Div. 672, 146 N. Y. Supp. 896.

Statute in force at time governs.—The right to costs is governed by the statute in force at the time the right to costs accrues which is the time of the termination of the proceedings. *Erie County v. Fridenberg* (1916), 161 N. Y. Supp. 401.

Waiver of right to costs.—Where, after the entry of a judgment on a verdict with costs, the parties stipulate that further proceedings in the action shall be discontinued, but that the judgment shall continue in force and that the defendant will pay the same in two installments, with a further proviso that, in the event he fails to pay, the plaintiff may issue execution and that any sums allowed on a motion to retax the costs shall be credited on the judgment, the plaintiff, by issuing execution to collect the second installment due under the stipulation, did not waive his right to costs. *Young v. Woop* (1914), 160 App. Div. 252, 145 N. Y. Supp. 535.

To whom costs payable.—Costs should be decreed as payable to the successful party, not to his attorneys. *Matter of Woolley* (1914), 162 App. Div. 330, 147 N. Y. Supp. 518.

Right of plaintiff to costs where mistrial directed at his request.—Where a mistrial is in no way the fault of the defendant but the discretion of the court is exercised in favor of the plaintiff to permit him to withdraw a juror, the plaintiff on securing judgment is not entitled to tax the items of fifteen dollars and thirty dollars for costs after notice and before trial and for the trial fee for the first trial. *Norton v. Erie R. Co.* (1913), 83 Misc. 159, 144 N. Y. Supp. 156.

Recovery of possession of real property.—Where, in an action to recover real property and damages for withholding the same, plaintiff recovers judgment for the possession of the property and for six cents damages for the unlawful withholding of the same, defendant who also recovered a verdict of six cents on a counterclaim for unlawful interference with its easement to maintain water mains, is not entitled to costs. *Peck v. Haverstraw Water Supply Co.* (1913), 81 Misc. 428, 142 N. Y. Supp. 765.

New trial in county court.—Where, on a new trial in the county court, upon an appeal from judgment rendered by a justice of the peace, plaintiff recovers judgment for less than \$50, he is not entitled to tax any costs. *Bell v. Lynch* (1913), 80 Misc. 683, 142 N. Y. Supp. 676.

In an action to foreclose a mechanic's lien with equitable relief subd. 4 does not apply. *Salerno v. Vogt* (1912), 78 Misc. 64, 138 N. Y. Supp. 664.

Costs in supreme court in New York county.—Where a resident of Kings county notified plaintiff's attorney that his attorney would accept service of all papers in New York county, and the plaintiff, a resident of New York county, recovers judgment for less than \$500, he is not entitled to costs, as the action might have been commenced either in the city court of city of New York or county court of Kings county. *Putnam's Sons v. Pickett* (1912), 77 Misc. 286, 135 N. Y. Supp. 817.

Idem; process served in Kings.—Where an action is brought in the supreme court of New York county, but process is necessarily served in Kings county, plaintiff is entitled to costs although the recovery is less than \$1,000.00. *Putnam's Sons v. Pickett* (1912), 152 App. Div. 814, 137 N. Y. Supp. 805.

Action in supreme court in Bronx county against defendant served in New York county.—Where a resident of the county of Bronx brings an action in the supreme court in said county against a nonresident of the state served in the county of New York to recover a balance of \$715 alleged to be due and owing and obtains a judgment for \$450, he is entitled to costs under subdivision 5. It was the intention of the legislature by the amendment of 1914 to subdivision 5 to make the right to tax costs in an action brought in the supreme court in Bronx county where the recovery was for \$50 or more, but less than \$500, depend upon whether or not the action might have been brought in the county court of Bronx county. *Henning v. Camacho* (1918), 181 App. Div. 856, 169 N. Y. Supp. 284.

The county court of the county of Queens has jurisdiction although the summons be served beyond that county. This section does not require that the summons be served within the county as is demanded in instances relating to the counties of New York and Kings. *Corsell v. Brooklyn Heights Railroad Co.* (1916), 173 App. Div. 895, 157 N. Y. Supp. 1051.

Application to Bronx county.—*Hollander v. Kovacs* (1917), 169 N. Y. Supp. 283.

The purpose of subdivision 5 of this section was to compel a resident plaintiff of the county of New York to bring his action in the city court, if the process of the court could be served on the defendant in the county. *Moraff v. Kohn* (1913), 157 App. Div. 648, 142 N. Y. Supp. 775.

Under subdivision 5 where a plaintiff who is a resident of the county of Kings sues a defendant who is a resident of said county in the county court instead of in the municipal court and recovers less than \$250, he loses costs, but is not required to pay costs, and the defendant is not entitled

to tax the same. *Lipshen v. Epstein* (1918), 183 App. Div. 806, 170 N. Y. Supp. 555.

Application to actions under the municipal court act of 1902, see *Post v. Levitan* (1914), 88 Misc. 334, 151 N. Y. Supp. 947.

Inability to serve nonresident defendant within New York county.—Plaintiffs, residents of the county of New York, who bring an action in the supreme court against a nonresident, should not be deprived of costs under the provisions of subdivision 5 upon the ground that the action could have been brought in the city court of New York, and that the recovery was less than \$1,000, where there is no proof that the defendant ever could have been served with process in the city of New York, in a prior action brought in the municipal court to recover upon the same claim. *Moscaklades v. Petri* (1918), 185

App. Div. 371, 173 N. Y. Supp. 233.

A voluntary appearance by non-resident defendants who have been served without the state, pursuant to an order for publication, is not equivalent to personal service within the county of New York, for the purpose of determining whether the plaintiffs are precluded from taxing costs on the theory that the action might have been brought in the city court, under subdivision 5 of this section. *Jacobs v. White* (1914), 164 App. Div. 111, 149 N. Y. Supp. 500.

Costs to be paid by directors of corporation.—The directors of a corporation, who are responsible for conditions which justify a representative action by a stockholder, should pay the legal fees and expenses of the defense of the action, instead of the corporation itself. *Godley v. Crandall & Godley Co.* (1912), 153 App. Div. 697, 139 N. Y. Supp. 236.

§ 3229. When defendant entitled to costs of course; rule as to two or more defendants.

Action for penalty.—An action to recover a penalty being a penal one and the defendant having died, it cannot be determined who is the prevailing party and as such entitled to costs. *People v. Newcomb* (1912), 75 Misc. 258, 135 N. Y. Supp. 151.

The right of the successful defendants to costs rests in the discretion of the court. Hence judgment should not be entered in favor of the successful defendant except by order of the court. The proper practice is for the successful defendant to apply to the court for permission to enter judgment. *Linn v. Nassau Electric R. Co.* (1913), 142 N. Y. Supp. 552.

Dismissal as to one defendant.—Where judgment is rendered against one of two defendants and the complaint dismissed as to the other without costs to such defendant, the discretion of the trial court in refusing to award costs to the successful defendant will not be disturbed where it does not appear that such defendant personally was put to any trouble or expense in the defense of the action. *Kelly v. St. Michael's Roman Catholic Church* (1912), 148 App. Div. 767, 133 N. Y. Supp. 328.

Dismissal of complaint and counterclaim.—Where at the trial both the complaint and the counterclaim are dismissed, the defendant is entitled to costs under § 3229, since no final judgment was rendered in favor of the plaintiff. *Gibbons v. Skinner* (1912), 150 App. Div. 706; 135 N. Y. Supp. 820.

Where plaintiff succeeds in action against one of three defendants in an action for malicious prosecution, there is no severance of action, and none of the defendants is entitled to costs as a matter of course. The taxation of a full bill of costs against the plaintiff should be disallowed. *Reade*

v. Halpin (1917), 180 App. Div. 161, 167 N. Y. Supp. 482.

Nonsuit as to one of two defendants.—Costs in an action for libel are regulated solely by ch. 21. A nonsuit, therefore, as to one of two defendants in such an action does not entitle the successful defendant to costs of course against the plaintiff. Whether or not she is to have an award of costs rests in the discretion of the court, and where application for the exercise of such discretion is not made to the trial justice, an order vacating a judgment entered in her favor is properly granted. *Kozlowski v. Gomolski* (1918), 224 N. Y. 510.

Judgment on pleadings.—Where a case noticed by both parties for trial has been upon the calendar for several terms for the purposes of trial and thereafter before trial the special term grants the defendant's motion for judgment on the pleadings, the defendant does not forfeit his right to costs which have accrued to him as prevailing party. He is entitled to costs before and after notice of trial and to term fees, but not to a trial fee. *Gallagher v. Surpluss* (1917), 177 App. Div. 793, 164 N. Y. Supp. 1060.

Although defendant defaulted and did not appear at the trial nevertheless he is entitled to costs where plaintiff does not recover more than fifty dollars. *Goldstein v. Dollard* (1916), 175 App. Div. 413, 161 N. Y. Supp. 901.

Costs where plaintiff recovers less than fifty dollars.—In an action in the city court of Mount Vernon a defendant is not entitled to costs because the plaintiff has recovered less than fifty dollars, for the statutes regulating said court provide that costs are recoverable only by the "pre-

vailing party." *Stacy v. Kruser* (1913), 172 App. Div. 525, 158 N. Y. Supp. 799.

Divorce; co-respondent serving no answer.—A co-respondent in an action for absolute divorce, who does not serve an answer, is not entitled to costs. *Mehlenbacher v. Mehlenbacher* (1912), 77 Misc. 343, 136 N. Y. Supp. 210.

Separate bills of costs.—Where judgment is demanded against defendants separately, and the defendants appear by separate attorneys, the allowance of separate bills of costs in favor of such defendants is well warranted. *Rook v. German-American Bank* (1912), 152 App. Div. 253, 136 N. Y. Supp. 1019.

§ 3230. When costs are discretionary.

Actions in equity.—Costs can only be awarded in pursuance of the provisions of some statute; in actions in equity costs rest in the sound discretion of the court, and are to be awarded or refused according to the justice of each particular case. *Osborn v. Cardeza* (1913), 208 N. Y. 131.

The award of costs in equitable actions is to be guided and regulated by a determination of all the issues. Until there has been such a determination in truth, and not merely in form, the power of the court survives, and the exercise of its discretion may be manifested by the final judgment, and a court of equity may give weight to a partial failure of the action in determining the incidence of costs. Hence where the question of damages was not

finally determined owing to the error in procedure, the question of costs is open and to be disposed of on final judgment. *Barnes v. Midland R. R. Terminal Co.* (1916), 218 N. Y. 91.

Two or more defendants.—Where judgment is rendered against one of two defendants and the complaint dismissed as to the other without costs to such defendant, the discretion of the trial court in refusing to award costs to the successful defendant will not be disturbed where it does not appear that such defendant personally was put to any trouble or expense in the defense of the action. *Kelly v. St. Michael's Roman Catholic Church* (1912), 148 App. Div. 767, 133 N. Y. Supp. 328.

§ 3234. Costs, where there are several issues of fact.

Two causes of action.—Where a complaint unites two causes of action and the plaintiff recovers on one and the defendant upon the other, so as to entitle each party to costs under § 3234, the defendant is not entitled to costs where the cause of action on which it succeeded is reversed, the court of appeals having left such costs to abide the event. *Taylor v. New York Life Ins. Co.* (1912), 148 App. Div. 815; 133 N. Y. Supp. 746.

Where plaintiff succeeds on some issues and fails on others, each party should tax his costs which should be offset in the final judgment. *Crown v. Goldstein Co., Inc.* (1918), 162 App. Div. 730, 170 N. Y. Supp. 147.

Certificate that substantial cause of action was the same upon each issue must be made by the justice or judge who pre-

sided at the trial, and a plaintiff who has failed upon one of the issues submitted cannot enter costs in a final judgment without obtaining such certificate. *Crown v. Goldstein Co., Inc.* (1918), 162 App. Div. 730, 170 N. Y. Supp. 147.

Separate verdicts to preserve right to costs.—Where a wife alleges two separate causes of action in negligence, claiming to have been twice injured by the defendant's negligence, and her husband brings an action for loss of services, pleading two separate causes, one relating to each injury, and the two actions are by consent tried together, the defendant, in order to preserve his statutory right to costs, is entitled to have separate verdicts rendered upon each cause of action. *Rott v. International Railway Co.* (1918), 185 App. Div. 191, 172 N. Y. Supp. 721.

§ 3236. Costs of a motion.

Costs to abide event.—Where the disbursements taxed were principally for printing the record, the greater part of which was occupied by the defendant's effort to establish that the officials of a county, charged with the duty of preparing jury lists and drawing a jury, would not fairly perform that duty, and with the plaintiff's reply to that charge, a contention which the defendant wholly failed to establish, the costs and disbursements awarded to the appellant should abide the event of the action. *Barnes v. Roosevelt*

(1915), 166 App. Div. 943, 151 N. Y. Supp. 322.

Costs of sheriff.—Under § 1423, which provides that upon granting the order of substitution the court in its discretion may require the indemnitors to pay the reasonable expenses of the sheriff, necessarily incurred before the order is granted, no costs will be allowed the sheriff whose counsel is a salaried officer of the county, but the court under § 3236 may award motion costs to the sheriff. *Coddington v. Harburger* (1912), 77 Misc. 211; 137 N. Y. Supp. 536.

Allowance for attorneys' services.—Upon a motion to confirm the report of the referee appointed to determine and report upon questions of fact arising upon accounts of receiver in foreclosure, the plaintiff's attorneys may not be granted an allowance for services rendered by them in connection with proceedings had to surcharge the receiver's account, and only motion costs can be allowed to the plaintiff. *Fine v. Clinton Realty Co.* (1918), 105 Misc. 318, 173 N. Y. Supp. 137.

Costs and damages.—The expenses of the reference, exclusive of counsel fees, are costs and not a part of the damages. The counsel fees incurred upon a reference to assess damages resulting from an injunction are part of the damages and recoverable as such, and must be so considered in enforcing the surety's liability. *Sarafin v. United States Fidelity & G. Co.* (1915), 152 N. Y. Supp. 737.

§ 3238. Costs upon appeal from final judgment.

Costs in court of appeals.—Where the court of appeals in its discretion awards or disallows costs, its determination applies to costs in that court only. *Fulton v. Krull* (1912), 151 App. Div. 142; 135 N. Y. Supp. 432.

Costs to abide event.—Where the plaintiff in an action for assault recovered a judgment which was reversed and a new trial ordered with costs to appellant to abide the event, and a judgment for plaintiff on the new trial was reversed and a new trial ordered with costs to appellant absolutely, defendant was not entitled to tax the costs of the first appeal unless it was finally successful in the action, other-

wise no one would be entitled to them. *Dobek v. Austro American Steamship Co.* (1914), 83 Misc. 641, 145 N. Y. Supp. 385.

Where a judgment in favor of plaintiff is reversed by the appellate division "with costs to abide the event," and on appeal from a judgment in favor of defendant on a new trial the appellate division directed judgment in favor of plaintiff for fifty dollars and as so modified affirmed the judgment for defendant, with costs to appellant. The plaintiff is entitled to tax the costs of both trials and both appeals. *Young v. Ingalsbe* (1913), 83 Misc. 176, 144 N. Y. Supp. 400.

§ 3240. Idem; in a special proceeding.

It was not the intention of the legislature by the amendment to § 154 of the highway law (laws of 1915, ch. 497), to take away the power of the court to allow an owner costs in a condemnation proceeding under such law unless the same can be allowed pursuant to the provisions of § 3372 of the code. That section, when made applicable to the highway law, should be given the same meaning and effect that it has in the code, and not be so construed as to prevent an award of costs to an owner in a condemnation proceeding where costs may be essential to secure to him just compensation for his property. The court is not given power, however, to grant an extra allowance of costs. *County of Erie v. Fridenberg* (1917), 221 N. Y. 389.

Costs in condemnation proceedings.—Where the owners of property condemned are under legal disability to convey, the provisions of § 3372, as to costs to the owner, where no offer of purchase has been made do not apply, and hence the court has no authority to direct the owner to recover costs under said section, but under such circumstances the court may award costs to the owner under § 3240 at the rates allowed in an action in the supreme court. *Matter of State of New York* (1912), 152 App. Div. 633, 137 N. Y. Supp. 485.

Idem; allowance against state.—In condemnation proceedings the court may not make an extra allowance against the state

under § 3372 where the owners of the property condemned are under legal disability to convey. However, the court may award costs under § 3240 at the rates allowed in an action in the supreme court. *Matter of State of New York* (1912), 152 App. Div. 633, 137 N. Y. Supp. 485, aff'd 207 N. Y. 582.

Idem; street opening.—In a proceeding under the provisions of an act relating to the government of the city of Yonkers (laws of 1908, chap. 452) to acquire land for the purpose of laying out, opening and extending a public street it was held that there was authority under the provisions of this section to award costs to the property owner upon the confirmation of the report of the commissioners. *Matter of School Street* (1914), 162 App. Div. 158, 147 N. Y. Supp. 195.

Where the dismissal at special term of the petition of the city of New York for the appointment of commissioners in a condemnation proceeding to acquire title for the opening of certain streets was affirmed by the appellate division and the court of appeals, the latter decision affirming the order of the appellate division "with costs," but one bill of costs can be allowed. *Matter of City of New York* (1916), 96 Misc. 42, 160 N. Y. Supp. 9.

Idem; under rapid transit act.—The code provision relating to costs in condemnation proceedings has no application to the rapid

transit act, but costs in proceedings thereunder may be awarded as provided in § 3240 of the code. *Matter of Law* (1913), 208 N. Y. 25.

Where a special statute providing for condemnation proceedings is silent as to costs they may be awarded under this section. *Matter of Saw Mill River Road* (1912), 152 App. Div. 788, 137 N. Y. Supp. 825.

Seizure of liquor.—Where in seizure proceedings, the person claiming title to liquors interposes an answer, the matter becomes a special proceeding in which costs

are allowable to the prevailing party under the provisions of § 3240. *Farley v. Sixteen Bottles Champagne* (1912), 153 App. Div. 502, 138 N. Y. Supp. 276.

Incompetent; counsel fees.—Where the committee of an incompetent in the dutiful administration of his trust has incurred counsel fees and other expenses, the court, in its discretion, may provide for the payment thereof; but it cannot so do in the absence of any proof whatever on the subject. *Matter of Maxwell* (1916), 218 N. Y. 88.

§ 3241. Costs against the state; how paid.

In an action to register a title, brought by a corporation against the people of the state of New York, costs are not allow-

able against the defendant. *Jamieson & Bond Co. v. Reynolds* (1915), 169 App. Div. 107, 154 N. Y. Supp. 836.

§ 3245. Costs; against a municipal corporation.

Application to actions in justice's court.—The provision that costs cannot be awarded to the plaintiff in an action against a municipal corporation, unless the claim upon which it is founded has been presented for payment within ten days before the commencement of the action, does not apply to actions commenced in a jus-

tice's court, nor is the plaintiff's right to costs affected by the fact that the defendant has appealed to the county court, where, after a trial resulting in a non-suit, a new trial was granted resulting in a verdict for the plaintiff. *Bradley v. Village of Union* (1914), 164 App. Div. 735, 150 N. Y. Supp. 735.

§ 3246. Idem; by or against an executor, etc.

Where action accrues to personal representative as distinguished from one accruing to decedent.—Where a cause of action accrues to the personal representatives of the decedent, as distinguished from a cause of action which accrued to the decedent, whether the personal representative prosecutes the action in his name individually or in his representative capacity, it is to be deemed, for the purpose of taxation of costs, an action by him individually, and if the action be brought in his representative capacity, and he be unsuccessful, the costs may be taxed against him individually without an application to the court. *Leavitt v. Scholes Co.* (1913), 210 N. Y. 107, rev'g 148 App. Div. 78, 132 N. Y. Supp. 1033.

Priority of claim for costs against executor.—Where executors fail to recover in a suit brought by them for rent alleged to be due under a lease given by their testator, which claim did not exist at the time of the testator's death, and the defendants are awarded costs, the judgment is entitled to priority in payment, being an expense of administration, even though the estate is insolvent. *Matter of Friedlander* (1914), 160 App. Div. 475, 145 N. Y. Supp. 679.

Priority of costs over claims of general creditors.—It is well settled that costs

against executors, administrators, assignees for the benefit of creditors and receivers are payable out of the estate and have priority over the claims of general creditors. *Matter of Carnegie Trust Co.* (1914), 161 App. Div. 280, 146 N. Y. Supp. 809.

Application for costs.—*O'Connor v. Healey* (1916), 96 Misc. 278, 161 N. Y. Supp. 582.

Persons authorized to sue; action against state superintendent of banks.—In an action against the state superintendent of banks and a trust company in the process of liquidation to enforce the payment of claims, the superintendent is "a person expressly authorized by statute to sue or to be sued" within the meaning of this section, and costs recovered by the plaintiff are entitled to payment as preferred claims. *Matter of Carnegie Trust Co.* (1914), 161 App. Div. 280, 146 N. Y. Supp. 809.

Where act of officer is wilful violation of statute.—Where on review of the determination of assessors pursuant to statute it appears that a majority have voted to disallow a claim contrary to the statute and the direction of the court, they will be held personally liable for costs. *People v. Hennessy* (1913), 159 App. Div. 814, 144 N. Y. Supp. 879.

§ 3247. Costs, in case of transfer, etc., of cause of action.

Real party in interest.—An application for an order, requiring the real party in interest to pay costs, may be made either by a notice of motion or an order to show cause. *Chambers v. Bacon* (1912), 153 App. Div. 194, 138 N. Y. Supp. 337.

Liability of partner made defendant in action against third person by other parties.—In an action for breach of contract, a defendant, originally a partner of the plaintiff when the contract was made, and who was made defendant because he refused to join in the action, cannot be charged with costs recovered by the defendant, who was alleged to have made the breach of contract. This, because the plaintiff was not the transferee of the cause of action, and the defendant sought to be charged with costs did not procure the institution of the suit, and also because he was a party to the action, and it did not become his property by transfer. *Moore v. Vulcanite Portland Cement Co.* (1914), 160 App. Div. 673, 146 N. Y. Supp. 95.

Second action by assignee of plaintiff in first action.—Where, after the entry of a judgment dismissing the complaint, with costs to the defendant, another action is commenced in another county for the same cause and against the same defendant by assignees of the cause of action and the trustee in bankruptcy of the original plaintiff, all of whom were beneficially interested in the first suit, it was held that

the defendant's motion for a stay of proceedings pending the payment of costs in the first action should be granted. *Heofle v. American Laundry Machinery Co.* (1914), 161 App. Div. 679, 146 N. Y. Supp. 621.

Assignment as collateral.—Where a fire insurance policy was assigned solely as collateral security for the payment of loans, the assignee cannot be compelled to pay the costs of an action on the policy brought by the assignor. *Samuels v. Austin Fire Insurance Co.* (1916), 175 App. Div. 396, 163 N. Y. Supp. 901.

Where the commencement of an action is induced by another for his own purposes it is "brought" by him so as to render him liable for costs. *Moore v. Vulcanite Portland Cement Co.* (1917), 220 N. Y. 320.

Contempt for disobedience of order.—Where it is clear that the disobedience of an order directing payment of a sum of money by the respondent as a person beneficially interested, in an action brought by plaintiff as assignee of respondent, defeats the remedy of plaintiff in the action, the court is in duty bound to punish respondent as for a contempt under § 770 of the judiciary law; should it thereafter appear that respondent was unable to pay the amount so directed to be paid he may apply for relief under § 775 of the judiciary law. *Basch v. Associated Features Booking Co., Inc.* (1915), 92 Misc. 450, 156 N. Y. Supp. 162.

§ 3251. Amount of costs generally.

Costs in court of appeals.—Where the court of appeals in its discretion awards or disallows costs its determination applies to costs in that court only. *Fulton v. Krull* (1912), 151 App. Div. 142, 135 N. Y. Supp. 432.

Costs of sheriff.—Under § 1423, which provides that upon granting the order of substitution the court in its discretion may require the indemnitors to pay the reasonable expenses of the sheriff, necessarily incurred before the order is granted, no costs will be allowed the sheriff whose counsel is a salaried officer of the county, but the court under § 3236 may award motion costs to the sheriff. *Coddington v. Harburger* (1912), 77 Misc. 211, 137 N. Y. Supp. 536.

Stenographer's minutes.—When defendant not entitled to tax disbursements for expense of procuring stenographer's minutes of former trial. *Vogel Co. v. Reinhardt* (1915), 89 Misc. 606, 153 N. Y. Supp. 906.

Affirmance of judgment overruling demurrer which was heard as a contested motion.—On an affirmance by the court of appeals of a judgment of the appellate

division overruling a demurrer to an answer, which demurrer was heard at special term as a contested motion, pursuant to § 976 of the code of civil procedure, the successful party is entitled to tax the costs provided by this section (sub. 5), which are thirty dollars for all proceedings before argument, and sixty dollars for the argument. *Vogel Co. v. Wolff* (1914), 160 App. Div. 31, 145 N. Y. Supp. 1085.

Demurrer overruled.—Where a demurrer to a complaint was noticed for argument at a motion term and plaintiff upon a decision overruling a demurrer prepared findings, interlocutory judgment, etc., but no note of issue was filed, no calendar made up and no trial fee paid to the clerk, the usual items of costs after notice and before trial and a trial of an issue of law must be disallowed in plaintiff's bill of costs. *Palito v. New York State Railways* (1915), 91 Misc. 674, 155 N. Y. Supp. 926.

Failure to prosecute.—Costs upon dismissal of complaint for failure to prosecute. *The Bowery Bank of N. Y. v. Hart et al.* (1911), 148 App. Div. 887, 132 N. Y. Supp. 1119.

Verdict set aside.—Where a trial judge grants a new trial upon the ground that the verdict is contrary to the evidence, costs should not be imposed upon the litigant to whom the relief is afforded unless the judge determine that there has been fault or omission on the part of said litigant. *Post v. Kerwin* (1912), 150 App. Div. 321, 134 N. Y. Supp. 714.

Amendment of complaint.—Where at the first trial of an action, a jury was withdrawn at plaintiff's request, defendant upon finally succeeding in the action is entitled to tax the costs paid to him by the plaintiff under an order allowing an amendment to the complaint, upon payment of the taxable costs to date. *Vogel Co. v. Reinhardt* (1915), 89 Misc. 606, 153 N. Y. Supp. 906.

Amendments to case.—A case made by defendant containing the evidence on the trial cannot be treated as a bill of exceptions by simply naming it as such, and plaintiff who prepared and served amendments to the same is entitled to tax as part of his costs an item of twenty dollars. *Jackson v. Strong* (1915), 91 Misc. 429, 154 N. Y. Supp. 886.

Verdict on second trial.—Where a plaintiff does not oppose a motion to set aside a verdict in his favor, but consents to the entry of an order granting a new trial, and on a second trial a verdict is entered in his favor, and judgment entered thereon, the taxation in his favor of costs and disbursements in the first trial in addition to costs and disbursements in the second trial, and also the sum of \$25 as costs under subdivision 3 of this section should be affirmed. *Capozzi v. Bulkley* (1913), 156 App. Div. 55, 141 N. Y. Supp. 117.

On new trial.—Where a judgment of the city court of the city of New York in favor of the defendant is reversed on appeal, with costs to the appellant to abide the event, and on the new trial the plaintiff recovers judgment for less than \$250, he is not entitled to tax, as part of the costs on appeal, an item of \$25 for proceedings after granting a new trial" under subdivision 3. *Selden v. Block* (1915), 90 Misc. 579, 153 N. Y. Supp. 980.

Stay for failure to pay costs of previous action.—Nonpayment of costs in an action entitles the defendant in whose favor they are awarded to stay all proceedings in a subsequent action brought by the same plaintiff upon the same cause of action, unless there be special facts and circumstances which would make the stay unjust and inequitable. *Simms v. Carter & Weeks Stevedoring Co.* (1915), 169 App. Div. 582, 155 N. Y. Supp. 440.

Mistrial after summing up and before charge; costs on retrial.—Where the trial of a cause was not completed owing to the illness of a juror occurring after the

summing up and before the charge to the jury, plaintiff, who again noticed the cause for trial and obtained a verdict, is entitled to tax two fees "after notice and before trial," under this section. *Patrick v. New York State Railways* (1914), 85 Misc. 473, 148 N. Y. Supp. 928.

Trial costs.—In an action where the parties are not entitled to a jury as a matter of right, the interposition of a jury to aid the conscience of the court is in no sense a trial of the action so as to authorize the allowance of trial costs. *Winsor v. Bush* (1916), 162 N. Y. Supp. 265.

Trial fee.—In an action to foreclose a tax lien, a reference or hearing of evidence in court which is merely auxiliary to an application for judgment by default for failure to plead is not a "trial," and the allowance of a trial fee is improper. *City Tax Lien Co., Inc. v. Murray* (1915), 91 Misc. 119, 154 N. Y. Supp. 300.

Additional defendants; no affidavit of service.—An item in a bill of costs of fourteen dollars for additional defendants will be reduced to twelve dollars where although there were eight defendants the judgment-roll shows no affidavit of service on one of them. *City Tax Lien Co., Inc. v. Murray* (1915), 91 Misc. 119, 154 N. Y. Supp. 300.

The effect of reserving decision upon a motion to dismiss the complaint at the close of plaintiffs' case, renewed at the conclusion of the evidence and submitting specific questions of fact to the jury, is to call for a special verdict, and plaintiffs on entering judgment upon a verdict directed in their favor are entitled to tax the costs allowed to either party on an application for judgment on a special verdict. *Baas v. Lawrence* (1917), 98 Misc. 572, 162 N. Y. Supp. 959.

A finding of the jury in the negative upon the issue of adultery in an action for divorce is not a "special verdict" in the proper sense of the words, and the successful defendant upon his application at special term for judgment upon such finding is not entitled to tax in his bill of costs twenty dollars before argument and forty dollars for argument. *Anderson v. Anderson* (1918), 103 Misc. 427, 170 N. Y. Supp. 612.

On reversal of an order denying application for an injunction pendente lite plaintiff is entitled to \$10 costs only, the sums of \$20 and \$40, under subd. 4, being allowed only on an appeal from or the granting or refusing a motion for a new trial. *Bayards Products Co., Inc. v. Gross* (1917), 167 N. Y. Supp. 528.

Subdivision 3 applies only to an appeal from a judgment in an action brought in a court of record. *Standard Scale Supply Co. v. City of New York* (1917), 165 N. Y. Supp. 81.

§ 3252. Additional allowance to plaintiff in foreclosure, partition, etc.

An action is commenced, so far as to charge a defendant with additional costs under this section, by the service of summons although the complaint is not served until after a tender has been made. *Moran v. Midville Realty Co.* (1915), 162 N. Y. Supp. 117.

Action for partition.—Although the total allowance given by the court in an action

for partition cannot exceed five per cent. upon the value of the property involved, this does not include the statutory allowances under this section which follows a recovery "as a matter of course." *Johnston v. Johnston* (1914), 165 App. Div. 24, 151 N. Y. Supp. 65.

Section cited.—*Gottscho v. Burger* (1916), 161 N. Y. Supp. 784.

§ 3253. Additional allowance to either party in difficult cases, etc.

The basis of an extra allowance is "the value of the subject matter involved." *Hathorn v. National Carbonic Gas Co.* (1917), 179 App. Div. 425, 165 N. Y. Supp. 1044.

Discretion of court.—The additional allowance provided for in this section is a matter for the court's discretion. *Moran v. Midville Realty Co.* (1915), 162 N. Y. Supp. 117.

Examination of ancient documents.—Where an action of ejectment involved difficult and extraordinary questions of fact, the research and examination of ancient documents, records and histories of the seventeenth century and the production by the plaintiff of more than seventy exhibits, an order granting the plaintiff an extra allowance of costs will not be disturbed on appeal. *Town of North Hempstead v. Oelsner* (1912), 148 App. Div. 779, 133 N. Y. Supp. 319.

Difficult and extraordinary negligence case.—Where the plaintiff's intestate, while in defendant's service as a mining foreman at the bottom of a shaft more than 1,000 feet deep, was fatally injured by a large rock which fell or was shot from the unprotected side of the shaft, as the result of an explosion, though it appeared in evidence that many precautions were taken by defendant to prevent injuries, and the first trial to recover damages occupied two days and the jury disagreed, and the second trial occupied three days, and the judgment for the plaintiff was reversed as being against the weight of evidence and a new trial granted which occupied eleven days, and on each trial the issues were sharply contested and depended largely upon expert testimony, it was held, that the case was difficult and extraordinary within this section and that plaintiff should be granted an extra allowance of five per cent. on the verdict. *Colligan v. New York* (1914), 83 Misc. 573, 144 N. Y. Supp. 1049.

Motion for an additional allowance denied because case was neither difficult nor extraordinary. *Herrman v. Leland* (1914), 163 App. Div. 515, 148 N. Y. Supp. 643; *Troughton v. Digmire Holding Co., Inc.* (1919), 105 Misc. 638, 173 N. Y. Supp. 659.

Excess conditions.—An order in an ac-

tion in the city court of New York allowing plaintiff \$73 disbursements and expenses incurred is in violation of the express provision of this section, being in excess of \$5.00. *Stanley Hoisting Co. v. Capitol Realty & Const. Co.* (1914), 149 N. Y. Supp. 523.

A defendant who did not file an answer, but through his attorneys was helpful to the court upon the trial and submission of a case, is entitled to an allowance. *Hudson Navigation Co. v. Union Trust Co.* (1917), 164 N. Y. Supp. 702.

Extra allowance.—An action by the city of New York to recover of a bidder and the surety the damages fixed by the bond is not so difficult and extraordinary as to justify an extra allowance of costs to the successful defendants. *City of N. Y. v. Seely-Taylor Co.* (1912), 149 App. Div. 98, 133 N. Y. Supp. 808.

An extra allowance will be stricken out on appeal where the judgment is reversed and the complaint dismissed. *Pringle Brothers v. Philadelphia Casualty Co.* (1912), 153 App. Div. 180, 138 N. Y. Supp. 330.

Extra allowance disallowed because of no basis on which to compute it. *Diamond Expansion Bolt Co. v. U. S. Expansion Bolt Co.* (1917), 177 App. Div. 554, 164 N. Y. Supp. 433.

After costs have been adjusted, including extra allowances, and judgment entered, an application by another defendant for an extra allowance cannot be entertained under rule 45 of the general rules of practice. *Hudson Navigation Co. v. Union Trust Co.* (1917), 164 N. Y. Supp. 702.

Extra allowance as depending on award of costs.—Where the costs of the trial of the issues on a reference in an action for an injunction are not awarded, the court cannot give an extra allowance under this section. *Barnes v. Midland Railroad Terminal Co.* (1914), 161 App. Div. 621, 146 N. Y. Supp. 1033.

Allowance on leave to serve supplemental answer.—Allowance to plaintiff upon granting leave to defendant to serve supplemental answer may be made by the court by virtue of its general, equitable and discretionary powers, but not as an extra allowance under § 3253. *Halfmoon*

Bridge Co. v. Canal Board (1914), 213 N. Y. 160.

Applicable to water act.—While § 3253 is expressly made applicable to the so-called water act as to the amount of counsel fees, § 3254 is not applicable and an amount in excess of two thousand dollars may be allowed. *Matter of Simmons* (Hill View Reservoir, Sec. No. 1) (1912), 151 App. Div. 444, 135 N. Y. Supp. 921.

Idem; counsel fees.—The statute which provides for an additional water supply for the city of New York, authorizes allowances for counsel fees to property owners who have not appeared in the proceedings and also to the attorneys for owners who have appeared but the amount of the counsel fee which may be allowed to any individual owner to whom an award is made is limited to \$2,000. *Matter of Simmons* (1913), 208 N. Y. 69.

Partition suit; percentage allowance.—If an allowance of five per cent. of the value of the property partitioned be made to the plaintiff, no allowance may be made to any defendant. If the plaintiff be allowed less than five per cent., the defendants may be granted a per cent. allowance which, added to the allowance made to the plaintiff, must not exceed five per cent. of the value of the property. *Servin v. Perry* (1915), 153 N. Y. Supp. 3.

In condemnation proceedings.—An additional allowance cannot be granted under this section in a proceeding to condemn land for a street opening. *Matter of School Street* (1914), 162 App. Div. 158, 147 N. Y. Supp. 195.

In action to foreclose mechanic's lien.—The plaintiff in an action to foreclose a mechanic's lien is entitled to an allowance under this section, for § 43 of the lien law provides that the provisions of the code of civil procedure, relating to actions for the foreclosure of a mortgage on real property apply to actions in a court of record, to enforce mechanic's liens on real property. *McLaughlin v. Mendelson* (1913), 160 App. Div. 37, 144 N. Y. Supp. 1073.

Allowance of percentages in an action to foreclose a mechanic's lien, see *Taylor v. Maynard* (1914), 145 N. Y. Supp. 324; *Federal Parquetry Mfg. Co., Inc. v. Halenbeck* (1918), 172 N. Y. Supp. 242.

Extra allowance in action to foreclose mechanic's lien limited to \$10. *Greenberg v. Marsh* (1917), 101 Misc. 18, 167 N. Y. Supp. 102.

Judgment on pleadings.—While ordinarily the court will not grant an extra allowance in a case which has not actually gone to trial on the merits, it may make such allowance although the complaint was dismissed on a motion for judgment on the pleadings, if the case be exceptional. *Assets Collecting Company v. Myers* (1915), 170 App. Div. 265, 155 N. Y. Supp. 1088.

Unfounded action with several complaints, answers, replies and motions.—The court will make an extra allowance where the complaint demanding over \$1,000,000 damages for an alleged fraudulent conspiracy to throw a business firm into bankruptcy was dismissed on motion, where there were three complaints in the action with corresponding answers and replies and a large number of various kinds of motions and the plaintiff has put the defendants to the expense and trouble of defending an unfounded action for extravagant damages. *Assets Collecting Co. v. Myers* (1915), 170 Misc. 265, 155 N. Y. Supp. 1088.

Partnership accounting.—Extra allowance of costs to plaintiff in suit for partnership accounting disallowed. *Cohen v. Elias* (1917), 176 App. Div. 763, 163 N. Y. Supp. 1051.

On settlement in foreclosure the plaintiff's attorney may justly include in his bill of costs one-half of the full allowance which might be granted, and the court may grant the full discretionary allowance on settlement in a proper case. The proper practice is to deposit the sum in dispute and submit the matter of granting or refusal of the discretionary allowance to the court by stipulation. *Gottscho v. Burger* (1916), 161 N. Y. Supp. 784.

Action for breach of agreement to obtain renewal of lease was sufficiently long and involved questions of fact so intricate as to justify the trial court in making an extra allowance of costs to the plaintiff. *Udansky v. Lane* (1918), 184 App. Div. 140, 171 N. Y. Supp. 563.

§ 3254. Allowances under the foregoing sections limited.

Counsel fees under water supply act.—The statute which provides for an additional water supply for the city of New York, authorizes allowances for counsel fees to property owners who have not appeared in the proceedings and also to the attorneys for owners who have appeared but the amount of the counsel fee which may be allowed to any individual owner to whom an award is made is limited to

\$2,000. *Matter of Simmons* (1913), 208 N. Y. 69.

Not applicable to water act.—While § 3253 is expressly made applicable to the so-called water act as to the amounts of counsel fees, § 3254 is not applicable and an amount in excess of two thousand dollars may be allowed. *Matter of Simmons* (Hill View Reservoir, Sec. No. 1) (1912), 151 App. Div. 444, 135 N. Y. Supp. 921.

§ 3256. Disbursements to be included in bill of costs.

Foreign corporation.—A foreign corporation, which has been ordered to file an undertaking as security for costs, cannot tax as a disbursement the amount paid to a surety company for furnishing the undertaking, there being no statutory authority therefor. *Louisville Lumber Co. v. Smith* (1912), 154 App. Div. 386, 139 N. Y. Supp. 357.

Cost of unofficial search as disbursement.—Certain official searches, and those made by title insurance companies organized under the laws of this state, are authorized by this section, and no disbursements for other searches can be taxed: *expressio unius, exclusio alterius*. Hence, where a suit to foreclose a tax lien on real property, pursuant to the provisions of the Greater New York charter, is discontinued before issue joined, on condition that the defendant pay costs, the plaintiff is not entitled to charge the defendant for disbursements for an unofficial search or for an examination of title. *Friedman v. Borchardt* (1914), 161 App. Div. 672, 146 N. Y. Supp. 896.

Right to disbursements under stipulation.—Where on a reference the parties enter into a stipulation providing that certain fees shall "be taxed as a disbursement in the action" and the referee finds that the plaintiff is not entitled to costs, the plaintiff cannot tax such fees as disbursements because the allowance of disbursements depends upon the recovery of costs. *Megrue v. Megrue* (1913), 160 App. Div. 817, 144 N. Y. Supp. 957.

Foreclosure of tax lien; title searches.—The plaintiff in a suit to foreclose a tax lien cannot recover as a disbursement the expenses of an examination of the title, and an item of ninety dollars for searches based on a report on title, such as a title company issues when it insures a title for the guidance of the attorneys in closing the title, must be disallowed, but upon proof of the reasonable costs of a foreclosure search by a title company or of necessary official searches the court will determine what will be allowed for

searches. *City Tax Lien Co., Inc. v. Murray* (1915), 91 Misc. 119, 154 N. Y. Supp. 300; *Pines v. Consolidated Briarwood Estates* (1916), 106 Misc. 450, 174 N. Y. Supp. 713.

Where an infant by his guardian interposes an answer in an action to foreclose a lien and proof is taken upon the hearing, a trial fee may be taxed in the plaintiff's bill of costs, and the expense of title company searches not including charges for an examination of the title to the property may be taxed as a disbursement. *Pines v. Heaslip* (1917), 106 Misc. 454, 174 N. Y. Supp. 714.

Idem; stenographer's fees.—In a suit to foreclose a tax lien, an item for stenographer's fees for taking minutes on the reference should not be allowed as disbursements, where the reference is before an official referee, as the fees are required to be paid by the county under § 116 of the judiciary law. *City Tax Lien Co., Inc. v. Murray* (1915), 91 Misc. 119, 154 N. Y. Supp. 300.

The fees of an official stenographer of the court do not come within the classification of necessary disbursements which can be taxed as a part of the costs of the successful party in an action in the court. *Van Valkenburgh v. Bishop* (1917), 164 N. Y. Supp. 86.

Appeal from two orders; cost of printing records.—Where the appellate division affirmed an order staying a plaintiff's proceeding until he pays the cost of a former action, but reversed another order staying his proceedings permanently if he failed to pay the costs within twenty days, and the appeals from these two orders were presented on separate records, the plaintiff, although successful on one appeal, cannot tax the cost of printing both records. A motion for retaxation should be granted on which the plaintiff should only be allowed disbursements for printing the record on the appeal in which he was successful, and the proportionate cost of printing the points applicable thereto. *Begiebing v. Jagerhuber* (1915), 167 App. Div. 579, 152 N. Y. Supp. 783.

§ 3258. When defendant entitled to increased costs.

Act done by command of public officer.—An action for damages for injury to water pipes laid in a highway by a contractor for the improvement of a state highway on a contract with the state under the direction of the commissioner of

highways is based on an act done by the command of a public officer and a successful defendant is entitled to increased costs. *Fernald v. Walker* (1914), 148 N. Y. Supp. 399.

§ 3262. Costs; how taxed. Allowances, etc.; how computed.

Disbursements.—An award of costs upon a judgment in an action or upon a final order or decree in a special proceeding carries with it the taxable disbursements,

but in other cases disbursements cannot properly be taxed unless expressly awarded by the order allowing costs. *Moses v. Moses* (1915), 154 N. Y. Supp. 555.

Retaxation.—Where leave has been granted to serve a second amended complaint upon terms that the plaintiff should pay the defendant "a full bill of costs to date," and the first amended complaint has been served upon similar terms and the costs paid, and the clerk refuses to tax any part of the bill upon the granting of the second amendment, except ten dollars costs, the defendant is entitled to a retaxation of costs. It is the common practice for the court upon granting a

motion instead of specifying the exact amount of costs, to award "a full bill of costs to date," merely to insure against inadvertently fixing a sum which might exceed the taxable amount. *National Surety Co. v. Seach* (1918), 183 App. Div. 110, 170 N. Y. Supp. 661.

Duty of the clerk of the court to insert in the judgment or final order, the amount of costs as taxed. *People ex rel. R., S. & E. R. R. Co. v. Moroney* (1918), 224 N. Y. 114.

§ 3264. Retaxation.

Retaxation to reduce amount allowed for printing case on appeal to appellate division.—Where, on a motion by the plaintiff, after judgment by the court of appeals in favor of the defendant, to retax the costs so as to reduce the amount for printing the case on appeal to the appellate division, it appeared that on the taxation there was submitted to the clerk an affidavit which stated that proof of the case on appeal, including a copy of exhibits, etc., was submitted to the plaintiff's attorney and no objection was made; that subsequently a printed copy of the record was submitted to the court and allowed by it; that there was also submitted the affidavit of the company which printed the record, to the effect that the

work was performed in the usual manner, and that the prices charged were reasonable and just; that other affidavits were submitted tending to show that the prices charged were reasonable and proper; that on behalf of the plaintiff there were submitted the affidavit of its attorney, which merely stated that he objected to the allowance of the sum stated for printing the case, and the affidavit of a printer that the charge made was unreasonable, and that, although the defendant has not actually paid the bill for printing, it has incurred the obligation, the motion for a retaxation should be denied. *Dunn v. City of New York* (1915), 168 App. Div. 147, 153 N. Y. Supp. 248.

§ 3265. Review of taxation.

Trial fee.—Where, on a call of the calendar, a case was announced ready by defendant but the plaintiff stated that he would discontinue and pay costs there was

no "trial" and defendant was not entitled to tax a trial fee in his bill of costs. *Harris v. Pudney* (1916), 93 Misc. 470, 158 N. Y. Supp. 440.

§ 3268. When defendant may require security for costs.

Foreign corporation.—A foreign corporation, which has been ordered to file an undertaking as security for costs cannot tax as a disbursement the amount paid to a surety company for furnishing the undertaking, there being no statutory authority therefor. *Louisville Lumber Co. v. Smith* (1912), 154 App. Div. 386, 139 N. Y. Supp. 357.

In the case of a foreign corporation where the facts set forth in the affidavit are not disputed nor the motion opposed, the motion should be granted in view of § 3272. *Charles H. Welling Co. v. Platt* (1918), 173 N. Y. Supp. 460.

Waiver.—Where the defendant answers before he makes his motion to compel the plaintiff to give security for costs, his right to require such security is waived. *W. A. Ives Mfg. Co. v. Smith & Hemenway Co.* (1915), 166 App. Div. 910, 151 N. Y. Supp. 275.

Waiver by laches.—The right of a defendant in an action brought in a county

court by one residing without the county, to require security for costs, although absolute, may be waived by laches. *Tedeschi v. Bacigalupo* (1915), 89 Misc. 153, 151 N. Y. Supp. 649.

Excuse for delay.—The court may in its discretion grant an order requiring security for costs to be given, even after the service of the answer, when a reasonable excuse for delay is shown. *Tedeschi v. Bacigalupo* (1915), 89 Misc. 153, 151 N. Y. Supp. 649.

Waiver of right to demand security.—Where the plaintiff is a non-resident, neither waiver nor laches may be predicated solely on the fact that the defendant waited a week after answering before making a motion that plaintiff give security for costs. *Denison v. Denison* (1914), 85 Misc. 498, 147 N. Y. Supp. 175.

Security for costs of action brought on behalf of nonresident infant.—Where an action on behalf of a nonresident infant plaintiff is brought by a guardian *ad litem*

who is a resident of this state the plaintiff cannot be required to give security for costs, for the resident guardian is liable for the plaintiff's costs under § 469. If the resident guardian *ad litem* is not financially responsible his appointment may be vacated. *Blumenthal v. Alexander* (1916), 176 App. Div. 184, 162 N. Y. Supp. 403.

A guardian *ad litem* remains responsible for the costs of the action, under § 469, notwithstanding the amendment of this section which took away the defendant's right to require security to be given. *Tropeano v. Grimaldi* (1916), 173 App. Div. 534, 159 N. Y. Supp. 1025.

Although the guardian *ad litem* of an infant plaintiff is responsible for costs he is not required to give security therefor. *McGovern v. New York Telephone Co.* (1917), 100 Misc. 177, 165 N. Y. Supp. 480.

Where a trustee in bankruptcy has no assets except a claim upon which he is

about to bring an action, and there seems to be no prospect of his succeeding, he should be required to give security for costs. *Uhr v. Coulter* (1916), 172 App. Div. 413, 158 N. Y. Supp. 512.

In an action by a trustee in bankruptcy to recover the share of income payable to the bankrupt by the defendant as trustee for her under a last will, the plaintiff may be required to give security for costs; if the cause of action sued on arose before plaintiff's appointment as trustee in bankruptcy. *Poskanzer v. Bullock* (1917), 101 Misc. 590, 168 N. Y. Supp. 461.

The municipal court of the city of New York has power to require security for costs under §§ 3268-3279. *Gary v. Chambers Bros., Furriers, Inc.* (1918), 103 Misc. 257, 169 N. Y. Supp. 1051.

This section applies to the municipal court of the city of New York. *Charles H. Welling Co. v. Platt* (1918), 173 N. Y. Supp. 460.

§ 3269. Security for costs; after action commenced.

Absence is not equivalent to non-residence, see *Ball v. Randall* (1914), 87 Misc. 194, 149 N. Y. Supp. 595.

§ 3272. Order to give security.

Where security for costs is required to be given, the court in which the action is pending, or, except in a case specified in the last section, a judge thereof, upon due proof, at any time, by affidavit, of the facts, must make an order requiring the plaintiff, within a time specified, either to pay into court, the sum of two hundred and fifty dollars, to be applied to the payment of the costs, if any, awarded against him, or, at his election, to file with the clerk an undertaking, and to serve a written notice of the payment or of the filing upon the defendant's attorney; and staying all other proceedings, on the part of the plaintiff, except to review or vacate the order, until the payment or filing, and notice thereof, and also, if an undertaking is given, the allowance of the same.

Amended by L. 1915, ch. 635, in effect Sept. 1, 1915. The amendment of 1915 inserted the words "at any time," in line 3.

Source.—R. S., pt. 3, ch. 10, tit. 2, § 3, in part.

Security in double amount.—An order requiring security for costs in an amount double that authorized by § 3272 and 3263 is irregular and should be reversed. *Stefano v. Peekskill Lighting & Railroad Co.* (1912), 149 App. Div. 745, 134 N. Y. Supp. 204.

The obvious purpose and effect of the amendment of 1915 is to abrogate the rule heretofore prevailing, so that defendant can no longer be held to have waived his absolute right to security, merely because he has omitted to move before answering any action. The amendment is merely a regulatory one, and since no contrary intent is expressed in

the amendment itself, it must be construed as operative upon litigations pending when it was adopted. *Belch v. Delaware & Hudson Co.* (1916), 173 App. Div. 867, 160 N. Y. Supp. 74.

The amendment of 1915 authorizes the application to compel a foreign corporation to give security for costs at any time. Hence such an application will not be denied because of a delay of six months after the commencement of an action. *Hungarian General Credit-Bank v. Titus* (1916), 175 App. Div. 507, 161 N. Y. Supp. 1078.

Laches.—In the absence of a valid excuse for delay defendant's failure to re-

quire plaintiff to give security for costs will be deemed such laches as will amount to a waiver of his right to such security. An *ex parte* order requiring plaintiff to deposit \$250 or in lieu thereof to give an undertaking to secure defendant his costs if successful, granted more than a year after service of the answer, will be vacated on motion because of laches. *Hopkins v. Cohen* (1916), 96 Misc. 657, 161 N. Y. Supp. 1104.

In the case of a foreign corporation a motion under § 3288 should be granted where the facts in the affidavit are not disputed nor the motion opposed. *Charles H. Welling Co. v. Platt* (1918), 173 N. Y. Supp. 460.

A county judge has no power to grant an order denying security for costs in an action pending in the supreme court. *Gates v. Gates* (1918), 171 N. Y. Supp. 1036.

§ 3276. Order to give additional security. Proceedings.

Circumstances of surety precarious.—Where the sole surety, a corporation, has been taken possession of by the state superintendent of insurance for the purpose of liquidation, an application to require

plaintiff to furnish additional security will be granted. *Crystallglass & Syphon Bottle Mfg., etc. v. Faerber, Silberman & Co., Inc.* (1917), 167 N. Y. Supp. 578.

§ 3287. Fees of certain officers to be taxed upon demand.

Application.—Likewise, a defense that no notice, as required by this section, demanding that he, as sheriff, tax his costs, charges and expenses in the action in which the attachment was granted, was served upon him, must also fail as said section

applies only where there has been collection on an execution or a settlement of the action. *Philippine Vegetable Oil Co. v. Pitou* (1919), 105 Misc. 634, 173 N. Y. Supp. 812.

§ 3296. Referee's fees generally.

Application.—*Lecky v. Winston* (1919), 186 App. Div. 642, 174 N. Y. Supp. 645.

The fees of a referee in an action or special proceeding are regulated by this section and are limited to \$10 for each day necessarily spent in the business of reference unless a stipulation in excess of that sum is entered into. Where no such stipulation has been entered into the referee is entitled only to the fee fixed by statute, and in that case it is incumbent upon him to show that the time spent on the reference was necessarily required. *Churchill v. Coyne* (1915), 152 N. Y. Supp. 993.

Right of referee to fees does not accrue until completion of reference and filing or delivery of report. *Voron v. Chait* (1917), 101 Misc. 366, 167 N. Y. Supp. 657.

Referee party aggrieved.—A referee appointed to hear and determine and who by stipulation of parties is to receive a certain sum per hour for his services, is entitled to be heard upon a motion to retax costs, where his fees as originally taxed were reduced by about one-half, for he is a party aggrieved. *Cohen v. Rothschild* (1918), 183 App. Div. 439, 170 N. Y. Supp. 761.

Where there is no effectual stipulation the compensation of a referee is limited

to the rate prescribed. *Conway v. Farish-Stafford Company* (1915), 166 App. Div. 941, 151 N. Y. Supp. 1110.

Acceptance of fees before completion of case.—Where a referee, appointed to hear and determine the issues after the plaintiff has moved to amend his complaint to include further items of damage, which would probably involve the taking of considerable additional testimony, requested that both sides give security for the payment of the referee's and stenographer's fees, which the plaintiff was unable to do, and also accepted his fee from the defendant before the reference was completed, he should be removed, and his report vacated and set aside. Under ordinary circumstances a referee's right to his fees does not accrue until he has completed the reference and filed or delivered his report. He should not request or accept payment so long as there remains any duty of a judicial nature for him to perform. *Ament v. Schubert Piano Co.* (1916), 172 App. Div. 423, 158 N. Y. Supp. 532.

Voluntary dissolution of corporation; the proceeding is a special one, and the provisions of the code apply. *Matter of French* (1918), 181 App. Div. 719, 168 N. Y. Supp. 988.

§ 3297. Idem; upon sales of real property.

Plaintiff bidding in property.—A referee is not entitled to any commissions under this section where the plaintiff in foreclosure bids in the property. *Brighton*

Heights Development Co. v. Interboro Home Builders Co. (1914), 87 Misc. 225, 149 N. Y. Supp. 496.

Amount of fees.—Where property sold

under the final judgment in foreclosure of a junior mortgage only brought a hundred dollars over prior incumbrances, the referee is only entitled to fees to the amount of nine dollars plus his expenses for making the sale. *Harburger v. St. John's A. M. E. Church* (1914), 87 Misc. 227, 149 N. Y. Supp. 516.

On a sale in foreclosure of real property the referee's fees cannot exceed fifty dollars, although there have been two sales of the property one of which has been set aside, and no disbursements for posting notices of sale can be allowed beyond the two dollars provided by statute. *Salisbury v. Dibble* (1917), 100 Misc. 191, 165 N. Y. Supp. 375.

The fees and disbursements of a referee in foreclosure are the same as those allowed a sheriff on a sale of real property under a judgment, and where the property is sold for \$10,000 or more, the limit of \$50 does not apply. *Palmatier v. Catskill Mountain Railway Co.* (1918), 102 Misc. 570, 170 N. Y. Supp. 118.

Where a sale on foreclosure realizes more than \$10,000, but it does not appear that any unusual services were rendered by the referee, or that he was put to unusual trouble, the fifty-dollar fee is ample compensation, and an order granting him additional compensation will be reversed. *Chisholm v. Hopson* (1918), 182 App. Div. 856, 170 N. Y. Supp. 163.

§ 3301. Clerk's fees in civil actions generally.

Improper charges.—What charges for services and disbursements by a county clerk are improper. *People ex rel. Hawley v. Howard* (1912), 152 App. Div. 621, 137 N. Y. Supp. 496.

For services rendered as clerk of the supreme or county court the clerk is limited to the fees specifically prescribed by statute. *People v. Sutherland* (1912), 207 N. Y. 22, rev'g 147 App. Div. 668, 132 N. Y. Supp. 588.

Liability for receiving fees without authority.—A county clerk who, under the supposed authority of this section, and in apparent reliance upon a court decision, which was subsequently reversed, demanded and received a fee for the certification of the stenographic minutes of a trial, is liable under § 67 of the public officers law, for treble damages. *Willett v. Devoy* (1915), 170 App. Div. 203, 155 N. Y. Supp. 920.

§ 3304. Fees of county clerks generally.

Improper charges.—What charges for services and disbursements by a county clerk are improper. *People ex rel. Hawley v. Howard* (1912), 152 App. Div. 621, 137 N. Y. Supp. 496.

Section cited.—*Wadsworth v. Board of Supervisors of Livingston County* (1913), 217 N. Y. 484.

§ 3305-a. Fees for certifying prepared copies.

Whenever there shall be presented to any public officer for certification or exemplification, a previously prepared legibly typewritten or printed copy of any document, paper, book or record in such officer's custody, the fees in such case, for certification or exemplification, shall be at the rate of three cents for each folio; but the minimum total charge for certification or exemplification in all cases shall be twenty-five cents.

Added by L. 1914, ch. 345, in effect Sept. 1, 1914.

§ 3306. Fees of register and other clerks.

The register of any county, or the clerk of any court of record, is entitled for any services specified in section thirty-three hundred and four, which he is authorized to perform, to the fees specified therein, subject to the qualifications therein contained, unless a different fee therefor is fixed by statute.

Amended by L. 1915, ch. 625, in effect May 14, 1915. The amendment of 1915 inserted the words "unless a different fee therefor is fixed by statute," at the end of the section.

Source.—New.

§ 3306-a. Fees of county clerk for entries of moneys deposited with county treasurer.

Fee for filing.—A clerk of the supreme court, who is also the county clerk, acts therefor under § 3306a. *Coe v. Champlain* as a court clerk in filing and entering an order requiring a party to give security | *Graphite Co. (1913)*, 154 App. Div. 518, 139 N. Y. Supp. 329.

§ 3307. Sheriff's fees.

A sheriff is entitled, for the services specified in this section, to the following fees:

1. For serving a summons with or without either a copy of the complaint, or a notice specified in section four hundred and nineteen or section four hundred and twenty-three of this act, one dollar; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be one dollar and fifty cents; or for serving or executing an order of arrest, or any other mandate, for the service or execution of which no other fee is specially prescribed by law, except a subpoena, one dollar; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be four dollars, for each person served or as to whom it is executed; and for necessary traveling to serve or execute the same, six cents for each mile traveled, going and returning; the traveling fees to be computed from the court house of the county; or, if there are two or more court houses, from that nearest to the place of service or execution. But where two or more mandates are delivered to a sheriff, to be served upon or executed against one person, at one time, in one action or special proceeding; or where a mandate is served upon or executed against two or more persons, in one action or special proceeding, and in the course of one journey; the sheriff is entitled, in all, to six cents only, for each mile traveled.

2. For levying a warrant of attachment, against the property of a defendant, issued as prescribed in title third of chapter seventh of this act, or for executing a requisition to replevy one or more chattels, one dollar; except that in the counties of New York, Kings, Bronx, Queens and Richmond it shall be five dollars; and, also, such additional compensation, for his trouble and expenses, in taking possession of and preserving the property, as the judge, issuing the warrant, or in case of a replevin, as the court or a judge thereof allows, and the judge or court may make an order requiring the party liable therefor to pay the same to the sheriff. For making and filing a description of real property, or an inventory of personal property attached, twenty-five cents for each folio; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents for each folio; for each necessary copy thereof, twelve cents for each folio; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be twenty cents for each folio; together with such compensation to the appraisers, as the judge issuing the warrant allows, not exceeding two dollars to each appraiser, for each day actually employed. For advertising, during the pendency of the action, personal property attached, the same fees as are allowed to a sheriff for advertising personal property for sale, by virtue of an execution. If the action is settled, either before or after judgment, the sheriff is entitled to poundage, upon the value of the property attached, not exceeding the sum at which the settlement is made.

3. For a copy, necessarily made by him, of a summons or other mandate, or of a complaint, affidavit, or other paper served by him, where no fee therefor is specially prescribed by law, twelve cents for each folio; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be twenty cents for each folio.

4. For notifying jurors to attend a trial term of a court of record, fifty cents for each cause placed upon the calendar for trial by a jury, to be paid by the party first putting the cause on the calendar for that term. But the sheriff is not entitled to more than one dollar and fifty cents for calendar fees in one action. The clerk shall not put a cause upon the calendar, for trial by a jury, until the fee specified in this subdivision, is paid to him, for the use of the sheriff. And where the cause is tried at a subsequent term, without a new note of issue, as prescribed in section nine hundred and seventy-seven of this act, the party moving the trial must pay to the clerk, for the use of the sheriff, the calendar fee or fees remaining unpaid. No sheriff who receives an annual salary in whole or in part for his services shall be entitled to the fees provided by this subdivision, and in all counties where the sheriff receives such annual salary, the clerk shall place all causes upon the calendar for trial without the payment or collection of any fee therefor.

5. For notifying jurors drawn to attend upon a writ of inquiry, or to try the validity of a claim to personal property, seized by virtue of a warrant of attachment or an execution, or in obedience to a precept issued by commissioners appointed to inquire concerning the incompetency of a person to manage himself or his affairs, in consequence of idiocy, lunacy, or habitual drunkenness, or in any case not provided for in the last preceding subdivision of this section, including the making and return of the inquisition when required, for each juror notified, twenty-five cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents for each juror notified. For attending a jury when required, in such a case, two dollars; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be five dollars.

6. For receiving an execution against property, entering it in his books, searching for property, and postage on the return, when made through the post-office, fifty cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be one dollar and fifty cents. If required by the sheriff, that fee, together with his fee for returning the execution, must be paid, by the person in whose behalf the execution is issued, at the time when it is delivered to the sheriff, who is not bound to execute it unless the fee is so paid. For mileage upon an execution, for each mile, going only, ten cents; to be computed as prescribed in subdivision first of this section.

7. For collecting money by virtue of an execution, a warrant of attachment, or an attachment for the payment of money in an action, or a special proceeding; or by virtue of a warrant for the collection of money, issued by the comptroller, or by a county treasurer; in any county, except New York, Kings, Bronx, Queens, Richmond or Westchester, three per centum upon the sum collected, not exceeding two hundred and fifty dollars, and two per centum upon the residue of the sum collected; and in either of the counties of New York, Kings, Bronx, Queens, and Richmond five per

centum upon the first one thousand dollars collected; two and one-half per centum on the next nine thousand collected; and one per centum on all sums over and above ten thousand dollars, in the county of Westchester, two and one-half per centum upon the sum collected not exceeding two hundred and fifty dollars, and one and one-quarter per centum upon the residue of the sum collected; and also, where an execution is stayed after a levy, by order of the court or otherwise, or where a levy is upon a live animal, or speedily perishable property, such additional compensation, for his trouble and expenses in taking care of and preserving the property, as the court or a judge thereof allows. Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made, and to the additional compensation, if any, provided for in this subdivision.

8. For advertising real or personal property for sale, by virtue of an execution, warrant of attachment, or other warrants specified in the last preceding subdivision, two dollars, unless it is stayed or settled before sale; and in that case, one dollar.

9. For making duplicate certificates of the sale of real property, by virtue of an execution, twenty-five cents for each folio. For drawing and executing a conveyance, upon a sale of real property, two dollars, except that in the counties of New York, Kings, Bronx, Queens and Richmond it shall be five dollars to be paid by the grantee. The sheriff is also entitled to the printer's fees, as prescribed by law, paid by him for the publication, not more than six weeks, of a notice of the sale of real property, and he may require the party directing the sale to advance the printer's fees, in which case he must repay the same out of the proceeds. Where the notice is published more than six weeks, or the sale is postponed, the expense of continuing the publication, or of publishing the notice of postponement, must be paid by the person requesting it. Where two or more executions against the property of one judgment debtor are in the hands of the sheriff, at the time when the property is first advertised, the sheriff is entitled to printer's fees upon only one execution, and he must elect upon which execution he will receive the same.

10. For returning any mandate, which he is required by law to return, twelve cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be twenty-five cents. For a certified copy of an execution, and of the return of satisfaction thereupon, delivered as prescribed in section twelve hundred and sixty-six of this act, twenty-five cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents.

11. For posting and publishing the notice of sale, selling, and conveying real property, in pursuance of a direction contained in a judgment, the like fees, as for the same services upon the sale of real property by virtue of an execution; but where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation cannot exceed fifty dollars.

12. For taking a bond for the liberties of the jail one dollar. For taking any other bond, or any undertaking which he is authorized to take, fifty cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be one dollar, and the notary's fees to any affidavit

or acknowledgments. For a certified-copy of such a bond or undertaking, twenty-five cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents.

13. For executing any mandate, requiring him to put a person into possession of real property, other than a warrant specified in subdivision eighteen of this section, and removing the person in possession, one dollar and fifty cents, except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be five dollars and the same travel fees as upon the service of a summons.

14. For each person committed to or discharged from prison, in an action or a special proceeding, one dollar, to be paid by the person at whose instance he is imprisoned. For attending before an officer for the purpose of surrendering a prisoner, or receiving into custody a prisoner surrendered, in exoneration of his bail, including all his services upon such a surrender or receipt, one dollar.

15. For attending a view, two dollars for each day, and for traveling, going and returning, eight cents for each mile.

16. For bringing up a prisoner, upon a writ of habeas corpus to inquire into the cause of detention, one dollar and fifty cents; and for traveling to and from the jail, twelve cents for each mile. For bringing up a prisoner, upon any other writ or habeas corpus, the same fees; and for attending the court or judge thereupon, one dollar for each day. The sheriff is entitled, in addition to the sums specified in this subdivision, to his actual and necessary expenses.

17. For any services, which may be rendered by a constable, other than those specially provided for in this section, the same fees as are allowed by law to a constable for those services.

18. For executing a warrant, to remove any person from lands, belonging to the people of the state, or to Indians, such a sum as the comptroller audits and certifies to be a reasonable compensation.

19. For giving notice of any general or special election, to all the officers, to whom he is required by law to give such a notice, one dollar for each town or ward, in addition to the expense of publishing the notices, as required by law; payable from the county treasury.

20. For notifying constables to attend a court, fifty cents for each constable notified.

21. For attending a term of a court, which he is required by law to attend, for each day, three dollars.

22. In the county of New York where a levy has been made under a warrant of attachment and the warrant of attachment is vacated or set aside by order of the court, the sheriff is entitled to poundage upon the value of the property attached not exceeding the amount specified in the warrant, and such additional compensation for his trouble and expense in taking possession and preserving the property as the judge issuing the warrant allows, and the judge or court may make an order requiring the party at whose instance the attachment is issued to pay the same to the sheriff; and in such county when said attachment has been otherwise discharged by order of the court, he shall be entitled to the poundage aforesaid and to retain the property levied upon until his fees and poundage are paid by the party at whose instance the attachment is discharged.

23. In the county of New York where an execution has been vacated or set aside, the sheriff is entitled to poundage upon the value of the property levied upon not exceeding the amount specified in the execution, and the judge or court may make an order requiring the party liable therefor to pay the same to the sheriff.

Amended by L. 1884, ch. 462; L. 1894, ch. 407; L. 1907, ch. 253; L. 1915, ch. 565; L. 1917, ch. 265, in effect April 27, 1917. The amendment of 1915 inserted all specific provisions relative to New York, Kings, Bronx, Queens and Richmond counties. The amendment of 1917 added subdivisions 22 and 23.

Source.—Subd. 1, L. 1871, ch. 415, § 1, subd. 1, as amended by L. 1872, ch. 26; subd. 2, R. S., pt. 3, ch. 10, tit. 3, § 38 (27th and 28th clauses), Code of Proc., § 243, last sentence; subd. 3, R. S., pt. 3, ch. 10, tit. 3, § 38 (6th clause); subd. 4, R. S., pt. 3, ch. 10, tit. 3, § 38 (18th clause); subd. 5, R. S., pt. 3, ch. 10, tit. 3, § 38 (19th, 20th, 21st clauses), L. 1871, ch. 415, § 1, subd. 7; subd. 6, L. 1850, ch. 225, § 1, L. 1871, ch. 415, subd. 4, in part, R. S., pt. 3, ch. 10, tit. 3, § 38 (last clause); subd. 7, L. 1871, ch. 415, § 1, subd. 4, first sentence; subd. 8, R. S., pt. 3, ch. 10, tit. 3, § 38 (10th clause); subd. 9, R. S., pt. 3, ch. 10, tit. 3, § 38 (11th, 13th, 14th clauses), L. 1871, ch. 415, § 1, subds. 4, 5; subd. 10, R. S., pt. 3, ch. 10, tit. 3, § 38 (8th clause), L. 1860, ch. 6, § 1, in part; subd. 11, L. 1847, ch. 280, § 77, Code of Proc., § 309, as amended L. 1876, ch. 431; subd. 12, L. 1871, ch. 415, § 1, subds. 2, 3, 7; subd. 13, L. 1871, ch. 415, § 1, subd. 6; subd. 14, R. S., pt. 3, ch. 10, tit. 3, § 38 (25th, 33d clauses), L. 1871, ch. 415, § 1, subd. 8; subd. 15, R. S., pt. 3, ch. 10, tit. 3, § 38 (26th clause), L. 1871, ch. 415, § 1, subd. 9; subd. 16, R. S., pt. 3, ch. 10, tit. 3, § 38 (22d, 23d, 24th clauses); subd. 17, R. S., pt. 3, ch. 10, tit. 3, § 38 (32d clause); subd. 18, R. S., pt. 3, ch. 10, tit. 3, § 38 (30th clause); subd. 19, R. S., pt. 3, ch. 10, tit. 3, § 38 (31st clause); subd. 20, R. S., pt. 3, ch. 10, tit. 3, § 38 (34th clause); subd. 21, R. S., pt. 3, ch. 10, tit. 3, § 38 (35th clause), L. 1871, ch. 415, § 1, subd. 11.

A sheriff in collecting from a judgment debtor the sum set forth in a warrant issued against him in proceedings supplementary to an execution, and under which he was arrested, acts under an attachment for the payment of money (judiciary law, § 762) and is entitled to deduct his fees or poundage from the amount collected. *White v. Griffenhagen* (1916), 95 Misc. 84, 160 N. Y. Supp. 187.

When sheriff not entitled to fees in receiving money under attachment.—A sheriff by virtue of a warrant of attachment received from the defendant in the action, the plaintiff herein, a certain amount in cash in place of the property attached, the same to be held and deposited by him in a certain bank subject to the further order of the court. The attachment was discharged by an order which directed the sheriff to deliver to the defendant in the attachment, the property so attached and remaining in his hands, but he returned only a portion of the money claiming the balance as fees. Held, that the facts did not show a collection of money by virtue of the attachment and that in an action of conversion for the amount retained by the sheriff, a defense that he was entitled thereto under subd. 7 must fail. *Philippine Vegetable Oil Co. v. Pitou* (1919), 105 Misc. 634, 173 N. Y. Supp. 812.

Fees allowed by law must be tendered witness on service of subpoena. *Todd v. Silk Association of America* (1917), 100 Misc. 403, 167 N. Y. Supp. 1079.

Notice to sheriff that his right of poundage may be protected under subdivision 23. *Friedman v. Gibbons* (1917), 101 Misc. 356, 167 N. Y. Supp. 685.

Under subdivision 7, where premises sold in foreclosure are in a county included, the referee is entitled to the amount allowed a sheriff to be computed only upon the cash received by him. *Palmatier v. Catskill Mountain Railway Co.* (1918), 102 Misc. 570, 170 N. Y. Supp. 118.

Under subdivision 22, as amended by L. 1917, ch. 265, the sheriff of the county of New York is entitled to poundage when a levy has been made under a warrant of attachment and the attachment is vacated; and he is entitled to retain the property levied upon until his fees and poundage are paid. *Gotham National Bank v. Hickox* (1917), 100 Misc. 372.

Conflicting statute.—The special statute (L. 1890, ch. 523, § 17, as amended by L. 1892, ch. 418), which was applicable only to the sheriff of the county of New York and which allowed him poundage on attached property even though the warrant of attachment be discharged by order of the court, conflicts, is inconsistent with and was expressly repealed by § 3307, as amended by L. 1915, ch. 565, which covers every contingency of said special statute as amended and makes no provision for poundage under the same circumstances. *Murdoch v. Griffenhagen* (1917), 100 Misc. 252, 165 N. Y. Supp. 351.

§ 3311. Stenographer's fees.

Except where otherwise agreed, or when special provision is otherwise made by statute, a stenographer is entitled, for a copy fully written out from his stenographic notes of the testimony, or any other proceeding, taken in an action, or a special proceeding in a court of record, or before a judge or justice thereof, and furnished, upon request, to a party or his attorney, to the following fees for each folio: In a trial term of the supreme court, or at a special term of the supreme court in the third, fourth, fifth, sixth, seventh or eighth judicial districts, six cents; in any other court or courts, ten cents; and for the copy of the testimony required to be made in any proceeding for the record of the surrogate's court of the counties of New York, Bronx, Kings and Erie, ten cents; and the surrogate may order that the fees for such record copy be paid out of the estate to which the proceeding relates.

Amended by L. 1885, ch. 517; L. 1886, ch. 350; L. 1887, ch. 399; L. 1891, ch. 356; L. 1895, ch. 946; L. 1915, ch. 198; L. 1916, ch. 160, in effect Sept. 1, 1916. The amendment of 1915 inserted the reference to the county of Bronx. The amendment of 1916 inserted the reference to the county of Erie.

Source.—Code of Proc., § 256, in part; L. 1864, ch. 46, § 2, in part; L. 1865, ch. 170, § 7, in part, as amended by L. 1867, ch. 796, § 2; L. 1866, ch. 422, § 2, in part; L. 1867, ch. 271, § 2, in part; L. 1868, ch. 765, § 5, in part; L. 1869, ch. 626, § 1, in part; L. 1871 ch. 700, § 2, in part, as amended by L. 1872, ch. 139, § 1; L. 1874, ch. 57, § 2, in part.

§ 3312. Compensation of deputy sheriffs and constables attending courts.

A constable or a deputy sheriff is entitled, for attending a sitting of a court of record, pursuant to a notice from the sheriff, to a fee for each day's actual attendance, in any county in the state, to be fixed by the board of supervisors thereof, and mileage as allowed by law to trial jurors in courts of record; and in any county where the court or grand jury holds evening or night sessions, the board of supervisors may provide for additional compensation to be allowed to each constable or deputy sheriff for each evening or night session actually attended by him. Such fees must be paid by the county treasurer, upon the production of the certificate of the clerk, stating the number of days and evenings that the constable or deputy sheriff attended. If a constable or deputy sheriff attending a sitting of a court of record pursuant to a notice from the sheriff is unable to reach his home upon the day he is excused from attendance, he shall be entitled to compensation for an additional day, and the clerk shall certify accordingly upon satisfactory proof of such fact by affidavit. But the provisions of this section shall not be applicable to the counties of Kings, New York and Erie. All other acts or sections of acts conflicting herewith are hereby repealed.

Amended by L. 1881, ch. 122; L. 1889, ch. 48; L. 1896, ch. 420; L. 1899, ch. 525; L. 1903, ch. 487; L. 1904, ch. 162; L. 1905, ch. 304; L. 1906, ch. 117; L. 1909, ch. 174; L. 1913, ch. 257; L. 1917, ch. 158, in effect Sept. 1, 1917. The amendment of 1913 added to third sentence. The amendment of 1917 inserted the second clause of the first sentence.

Source.—R. S., pt. 3, ch. 10, tit. 3, § 40; L. 1860, ch. 427; L. 1864, ch. 371; L. 1873, ch. 165.

§ 3314. Supervisors may make allowance to grand and trial jurors.

1. In the counties within the city of New York the board of aldermen may direct that a sum not exceeding three dollars, and in any other county the board of supervisors, may direct that a sum, not exceeding four dollars in addition to the fees prescribed in the last section, or in any other statutory provision, be allowed to each grand juror, and each trial juror for each day's attendance at a term of a court of record, of civil or criminal jurisdiction, held within their county, and in any county wherein a court holds evening or night sessions, or in any county in which the grand jury holds evening or night sessions, the board of supervisors may direct that a sum, not exceeding one dollar and fifty cents in addition to the fees prescribed in this section or the last section, or in any other statutory provision, be allowed to each grand juror and to each trial juror for each evening or night's attendance at a term of a court of record of civil or criminal jurisdiction held within their county. If a different rate is not otherwise established as herein provided, each juror is entitled to five cents for each mile necessarily traveled by him in going to and returning from the term; but such board of aldermen or board of supervisors may establish a lower rate.

2. A juror is entitled to mileage for actual travel once in each calendar week during the term, except: a. That in the counties of Queens, Rockland and Orange, grand and trial jurors may be paid four cents a mile for each mile necessarily traveled in going to and returning for each day of actual travel during the term in lieu of any other mileage. The sum so established or allowed must be paid by the county treasurer upon the certificate of the clerk of the court, stating the number of days that the juror actually attended, and the number of miles traveled by him in order to attend. If a juror in attendance at a term of a court of record cannot reach his home upon the day he is excused from attendance, he shall be entitled to compensation for an additional day, and the clerk shall certify accordingly upon satisfactory proof of such fact by affidavit. The amount so paid must be raised in the same manner as other county charges are raised. b. In Westchester county, the board of supervisors may direct that a sum equal to the actual necessary carfare paid out by grand and trial jurors in going to and returning for each day of actual necessary travel, during the term, be paid such grand and trial jurors in lieu of any other mileage and in addition to the compensation that may be allowed under subdivision one of this section. The sum so established and allowed, must be paid by the county treasurer upon the certificate of the clerk of the court, stating the number of days the juror actually attended, and the amount of carfare actually paid out by him for each day of actual travel, to be evidenced by the affidavit of said juror which affidavit is to be attached to the certificate of the clerk.

Amended by L. 1897, ch. 23; L. 1898, ch. 393; L. 1899, ch. 439; L. 1900, ch. 585; L. 1903, ch. 247; L. 1904, ch. 161; L. 1906, chaps. 77, 334; L. 1907, ch. 148; L. 1913, ch. 257; L. 1917, ch. 209; L. 1918, ch. 638; L. 1919, ch. 108, in effect March 27, 1919. The amendment of 1913 added the last sentence but one. The amendment of 1917 subdivided the section and inserted all of the first sentence after the word county in line 7. The amendment of 1918 substituted the words "four dollars" in line 4 of subdivision 1 for the words "three dollars." The amendment of 1919 added subdivision b to subdivision 2.

Source.—R. S., pt. 3, ch. 10, tit. 3, § 37, in part; L. 1866, ch. 307; L. 1874, ch. 460.

§ 3317. Fees of printers.

Except as otherwise specially prescribed by law, the proprietor of a newspaper is entitled, for publishing summons, notice, order, citation or other advertisement, required by law to be published, other than the session laws, for each folio, to seventy-five cents for the first insertion, and fifty cents for each subsequent insertion. In counties containing wholly or partially cities of the first or second class, except in the city of New York, the proprietor of a newspaper is entitled for publishing such notices, matters and advertisements aforesaid, other than the session laws for each folio, to one dollar for the first insertion, and seventy-five cents for each subsequent insertion. And in the city of New York to twelve cents per agate line of thirty ems for each insertion. If such notices, matters and advertisements aforesaid, other than the session laws, are printed in type other than agate, the proprietor of a newspaper shall be entitled to the number of lines such notices, matters and advertisements would occupy if set in agate thirty ems to the line. The compensation for publishing the session laws must be fixed by the board of supervisors at not more than fifty cents for each folio.

Amended by L. 1900, ch. 407; L. 1914, ch. 185; L. 1919, ch. 480, in effect Sept. 1, 1919. The amendment of 1914 inserted the words "except in the city of New York," in line 6; and added the third and fourth sentences. The amendment of 1919 added the words "of second" in line 6.

Source.—L. 1859, ch. 252; L. 1869, ch. 831; L. 1874, ch. 416.

Payment for publication of the laws of the state in the state paper should be at the rate of \$.75 per folio. Attorney-General Rep. (1912), page 97.

§ 3318. Witnesses' fees generally.

Application.—Quinby v. Ellithorp (1918), 170 N. Y. Supp. 969.

Witness fees will be disallowed where it does not sufficiently appear that the witnesses subpoenaed were material and necessary, and where they were not sworn, although is court. Lalla v. Bulkley (1913), 156 App. Div. 57, 141 N. Y. Supp. 118.

Travelling fees on adjournment.—Where a trial was adjourned on Friday afternoon

until the following Monday afternoon, and material witnesses for plaintiff who were under subpoena and in attendance, went to their homes about fifty miles and returned at the adjourned hour, their mileage fees for returning to their homes and for coming back should be disallowed. Booth v. Kerbaugh (1913), 82 Misc. 57, 143 N. Y. Supp. 624.

§ 3320. Receiver's commissions; cost of bonds; trustees' commissions.

A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his necessary expenses, to such commissions, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed allows. But if in any case the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may, in its or his discretion, allow said receiver such a sum, not exceeding one hundred dollars, for his commissions as shall be commensurate with the services rendered by said receiver. Any receiver, assignee, guardian, trustee, committee, executor, administrator or person appointed under section one hundred and eleven of the real property law or under section twenty of the personal property law required by law to give a bond as such may include as a part of his necessary expenses, such reasonable sum, not exceeding one per centum per annum upon the amount of such bond paid his surety thereon, as such court or judge allows. Except as otherwise

prescribed in regard to a testamentary trustee, a trustee of an expressed trust is entitled, and two or more trustees of such a trust are entitled, to be apportioned between or among them according to the services rendered by them respectively, as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars, at the rate of two and one-half per centum. For receiving and paying out all sums of principal above eleven thousand dollars, at the rate of one per centum. And for receiving and paying out income in each year, at the like rates. In all cases a just and reasonable allowance must be made for the necessary expenses actually paid by such trustee or trustees. If the value of the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each such trustee is entitled to the full commission on principal, and on income for each year, to which a sole trustee is entitled, unless the trustees are more than three, in which case three full commissions at the rates aforesaid must be apportioned between or among them according to the services rendered by them respectively. If the instrument creating the trust provides specific compensation for the services of the trustee or trustees, no other compensation for such services shall be allowed unless the trustee or trustees shall, before receiving any compensation for such services, by a written instrument duly acknowledged, renounce such specific compensation.

Amended by L. 1892, ch. 465; L. 1899, ch. 94; L. 1902, ch. 404; L. 1904, ch. 755; L. 1909, ch. 65; L. 1915, ch. 631, in effect May 14, 1915. The amendment of 1915 inserted in the words "Except as otherwise prescribed in regard to a testamentary trustee" at the beginning of the fourth sentence.

Source.—Code of Proc., § 244, final clause of subd. 4.

Passive trust.—The provision covering the commissions of trustees, where the instrument of trust provides no specific compensation, does not apply where the trust is passive. *Miami Valley Gas & Fuel Co. v. Mills* (1913), 157 App. Div. 542, 142 N. Y. Supp. 862.

Compensation prescribed by trust deed.—Where a deed of trust provides that the trustee "shall be entitled to and shall have just compensation for all services he may render in connection with the trust" he is not entitled to compensation under this section. *Miami Valley Gas & Fuel Co. v. Mills* (1913), 157 App. Div. 542, 142 N. Y. Supp. 862.

Right of special guardian on sale of undivided interest of infants in certain real estate to deduct and retain the premium paid by him on his bond. *Matter of Molinari* (1913), 82 Misc. 663, 144 N. Y. Supp. 217.

Where the receiver's commissions exceed \$100 the court has no power to grant him an extra allowance. *Society for Relief, etc. v. McDaniel* (1914), 148 N. Y. Supp. 951.

Trustees accounting in surrogate's court have commissions allowed in accordance with § 2753, and not in accordance with this section. *Matter of Grossman* (1915), 92 Misc. 656, 156 N. Y. Supp. 268.

The estate of a deceased testamentary cotrustee who died prior to the taking

effect of the amendment of 1914, is entitled under this section, then in force, to receive one-half commissions on all principal received and on all principal paid out, and like commissions on all income received and on all income paid out each year during the period of his trusteeship. *Matter of Bushe* (1918), 183 App. Div. 834, 171 N. Y. Supp. 406.

Order leaving no funds to pay commissions.—Where the effect of an order granted, in a suit by a receiver, directing him to pay certain costs, is to leave no funds wherewith to pay his commissions, the order will be reversed and the application to pass his account will be remitted with direction to fix his compensation and to fix an allowance for counsel fees including services of the respondent upon the appeal from said order, but excluding services rendered upon the receiver's appeal, taken without leave of the court, and in connection with motions for leave to appeal to the appellate division. Such allowances should first be paid from the fund in the receiver's hands and such amount as remains should be paid to the respondent. *Smith v. Alderman* (1918), 105 Misc. 223, 172 N. Y. Supp. 682.

Receiver appointed at request of trustee in bankruptcy.—The compensation of a receiver appointed by the supreme court of this state at the request of a trustee

in bankruptcy to protect the bankrupt's property for the benefit of his creditors is controlled by this section. The supreme court will not direct a sale by such receiver of the assets of a bankrupt's estate in order to pay his claim for compensation. *Hull v. Fifty-Second Street Storage House, Inc.* (1915), 167 App. Div. 860, 153 N. Y. Supp. 850.

Priority of payment.—While upon an accounting the supreme court may fix the

amount of the compensation of a receiver appointed at the request of a trustee in bankruptcy, even though its order may not be binding upon the bankruptcy court, it has no power to determine whether the amount so fixed should be given priority of payment by the bankruptcy court. *Hull v. Fifty-Second Street Storage House, Inc.* (1915), 167 App. Div. 860, 153 N. Y. Supp. 850.

§ 3321. Fees of county treasurer and chamberlain of New York.

Fees of officers.—In computing the amount of the fees to which a county treasurer or city chamberlain is entitled for paying out money paid into county said

computation should be made only upon the sum of money actually paid out. *Attorney-General Rep.* (1912), page 532.

§ 3332. This title applies to civil cases only.

Improper charges.—What charges for services and disbursements by a county clerk are improper. *People ex rel. Hawley*

v. Howard (1912), 152 App. Div. 621, 137 N. Y. Supp. 496.

§ 3332-a. Exemption of counties comprising Greater New York.

The provisions of sections thirty-three hundred and one, thirty-three hundred and four, thirty-three hundred and five-a, subdivision four of section thirty-three hundred and seven and section thirty-three hundred and thirty-two of this chapter shall not apply to the county clerks of the counties of New York, Kings, Bronx, Queens and Richmond.

Added by L. 1917, ch. 677, in effect Sept. 1, 1917.

§ 3332-b. Fees of county clerks in counties comprising Greater New York.

Except where a greater fee is allowed by another statute for the same service, the county clerks of the counties of New York, Kings, Bronx, Queens and Richmond are entitled for the services specified in this section to the following fees to be paid in advance:

1. Upon the trial of an action, or the hearing upon the merits of a special proceeding, excepting litigated motions and applications for writs, from the party bringing it on, one dollar.
2. For placing a cause on the special term calendar for the trial of an issue of fact in the supreme court, three dollars.
3. For placing a cause on the trial term calendar in the supreme court, three dollars.
4. For placing a cause on the trial calendar of the county court, three dollars.
5. For entering judgment in the action or entering a final order in the special proceeding, except non-recorded orders on litigated motion and applications for writs, one dollar, and ten cents for each name that the judgment or order directs that it be docketed against.
6. For taxing a bill of costs, fifty cents.
7. For certifying, except in criminal cases, a prepared copy of an order, record or other paper entered or filed in his office, five cents for each folio but the minimum total charge shall be twenty-five cents.
8. For preparing and certifying a copy of an order, record or other paper entered or filed in his office, fifteen cents for each folio.
9. For a certified transcript of the docket of a judgment or other lien, twenty-five cents.

10. For filing a transcript of judgment, twenty-five cents, and ten cents additional for each name against which the judgment is docketed.

11. For searching for and certifying to an incumbrance upon real property, or any record in his office, for which search is made, for each year the sum of fifteen cents, for each name and for each kind of conveyance, lien or record searched, except that he shall be entitled to a minimum fee of twenty-five cents for each search made.

12. For filing a transcript, and making an entry as prescribed in section twelve hundred and fifty-eight of this act, twenty-five cents.

13. For issuing an execution upon a judgment, a transcript whereof, or of the docket of which, has been filed in his office, fifty cents, to be paid by the party at whose request the execution is issued.

14. For filing and recording notice of pendency of action, notice of attachment against real property or amending the same, one dollar, and five cents additional for each name indexed against and twenty-five cents for each additional block in which the notice is to be entered.

15. For cancelling such notice or a notice filed in his office as prescribed in section six hundred and forty-nine of this act, fifty cents, and twenty-five cents for each additional block in which notice is entered.

16. For recording any instrument not otherwise provided for herein which must or may be legally recorded by him, ten cents for each folio.

17. For filing a certificate of satisfaction of judgment, fifty cents.

18. For affixing and indexing a notice of foreclosure of a mortgage, as prescribed in section twenty-three hundred and ninety of this act, fifty cents.

19. For entering a minute that a mortgage has been foreclosed, ten cents.

20. For filing a modification of or entering a satisfaction, assignment, reversal, cancellation or amendment of a lien, twenty-five cents.

21. For sealing any paper, when required, twenty-five cents.

22. For filing and docketing notice of a mechanic's lien, twenty-five cents, and ten cents per name additional for each and every person, firm or corporation against whose name the lien is to be docketed, and in addition twenty-five cents for each additional block under which the lien is to be indexed.

23. For filing and entering specifications and all other papers relating to a lien against a vessel, one dollar.

24. For filing any paper deposited with him for safe keeping, twenty-five cents.

25. For every certificate issued by him, the fee shall be twenty-five cents.

26. For inquiring into, determining and certifying the sufficiency of the sureties of a sheriff, fifty cents.

27. For attending upon the canvassing of votes given at an election, two dollars.

28. For drawing the necessary certificates of the result of the canvass, eighteen cents for each folio; and for the necessary copies thereof, nine cents for each folio.

29. For entering, in the minutes of the county court a license to keep a ferry, and for a copy thereof, one dollar.

30. For taking and entering a recognizance, from any person authorized to keep a ferry, twenty-five cents.

31. For filing a building loan contract or any modification thereof,

fifty cents, and five cents per name additional for docketing against each and every person, firm or corporation against whose name an entry is to be made, and for each block under which the instrument is to be indexed, twenty-five cents.

32. For filing and entering a summons in an action or a petition in any proceeding in the supreme or county court as required by section twelve hundred and forty-five-a of this act, fifty cents, except that no charge shall be made for filing a petition for the appointment of a guardian ad litem.

33. For filing and entering an order directing the city chamberlain to pay out money, fifty cents.

34. For filing, certificate showing deposit with city chamberlain or referee's report showing surplus, fifty cents.

35. For issuing a certificate of appearance and notice of claim filed, fifty cents.

36. For producing papers, documents, books of records on file in his office, under a subpoena duces tecum, if within the county where the public office is situated, fifty cents; if within any other county, one dollar additional for each day or part thereof, the messenger is detailed from the office, in addition to mileage fees of eight cents per mile and the necessary expenses of messenger.

37. For filing a certificate of qualification as medical examiner in lunacy, one dollar.

38. For filing and indexing a certificate of appointment as commissioner of deeds, fifty cents.

39. For filing and indexing any bond and undertaking in any action or proceedings, except bonds or undertakings on assignments, injunctions and attachments of property in the county of New York, fifty cents.

Added by L. 1917, ch. 677; amended by L. 1918, ch. 316, in effect Sept. 1, 1918. The amendment of 1918 materially changed subdivision 39.

§ 3332-c. Exemption of counties comprising Greater New York.

The provisions of section thirty-three hundred and four shall not apply to the registers of the counties of New York, Kings and Bronx, nor to the county clerks of Queens and Richmond when acting as recording officers.

Added by L. 1917, ch. 467, in effect Sept. 1, 1917.

§ 3332-d. Fees of recording officers in counties comprising Greater New York.

The registers of the counties of New York, Kings and Bronx, and the county clerks of the counties of Queens and Richmond, when acting as recording officers, are entitled for services specified in this section, to the following fees to be paid in advance:

1. For recording any instrument, fifteen cents for each folio.
2. For indexing or entering any instrument upon the block index, fifty cents for each block indexed against.
3. For filing a certificate of satisfaction of a mortgage, twenty-five cents; for entering a minute of such satisfaction, twenty-five cents; for examining each assignment of such mortgage, twenty-five cents; and an

additional charge of twenty-five cents for each record of discharge entered upon the block or alphabetical index.

4. For filing any paper other than satisfaction, chattel mortgage, bill of sale, conditional bill of sale or other instrument affecting chattels, twenty-five cents.

5. For filing and indexing a certificate of the appointment of a notary public or of a commissioner of deeds, twenty-five cents.

6. For the production for examination within the office of any filed paper affecting chattels, five cents.

7. For sealing any paper when required, twenty-five cents.

8. For every certificate issued by the register, or county clerk when acting as register, twenty-five cents.

9. For searching and certifying the title to, or an incumbrance or lien upon real property, five cents per year for each name against which the search is made, and five cents for each separate piece or parcel of property not consisting of contiguous lots, and five cents additional for each return made of any conveyance or lien found.

10. For preparing and certifying a copy of a paper filed or recorded in the office, fifteen cents for each folio.

11. For certifying a prepared copy of a paper filed or recorded in the office, ten cents for each folio.

12. For filing a chattel mortgage, an absolute or conditional bill of sale of chattels, an agreement affecting chattels, or a copy of the foregoing, or a notice of lien on merchandise, or an assignment of any such instrument, ten cents.

13. For examining each instrument as above stated, upon the filing of an assignment thereof for a cross reference thereto, ten cents.

14. For entering a chattel mortgage or other instrument affecting chattels, in each book as prescribed by law, ten cents for each party to the instrument. When the amount involved in a chattel mortgage or other instrument affecting chattels is one hundred thousand dollars or more, the fee for filing and entering the same, or any renewal thereof, shall be one dollar for each one hundred thousand dollars or fraction thereof, as set forth in the instrument. Every instrument affecting chattels must be endorsed on the face thereof with the character of the instrument, the names of all the parties thereto, and the location of the property affected thereby.

15. For searching the index books for a chattel mortgage or other instrument affecting chattels, upon a request specifying the names and periods to be searched, five cents for each month for each name.

16. For issuing a receipt for a chattel mortgage, bill of sale, conditional bill of sale, or other instrument affecting chattels, or a certificate for a copy of any such instrument twenty-five cents.

17. For filing and indexing each map, fifty cents, and twenty-five cents for each square foot or major part thereof of map surface.

18. For copying any map which he may record, copy or certify, such reasonable fees for the service as may be fixed by the register, or county clerk when acting as register, subject to the revision of the supreme court, by which the same may be taxed.

19. For returning recorded instruments by mail, five cents for each instrument, and for any other papers, the necessary postage.

20. The register, or county clerk when acting as register, may fix the fee for any service rendered by him, and for which no fee is herein specified, subject to review by the supreme court.

Added by L. 1917, ch. 467, in effect Sept. 1, 1917.

§ 3333. Definition of action.

A proceeding to compel the awarding of damages under a statute providing for the construction of a bridge which provides for an award of damages to the abutting owners is neither an action nor a special proceeding within the meaning of the code.

People v. Zucca (1914), 160 App. Div. 578, 145 N. Y. Supp. 754.

Section cited.—*Spielberg v. Canadian Steamship Lines, Ltd.* (1917), 98 Misc. 304, 162 N. Y. Supp. 610.

§ 3334. Idem; "special proceeding."

Enforcement or protection of a right.—Under §§ 3333, 3334, any application for the enforcement or protection of a right that is not an action is deemed a special proceeding. *Matter of Haydon v. Carroll* (1918), 184 App. Div. 161, 171 N. Y. Supp. 601.

Proceedings in appellate division relat-

ing to attorneys are special proceedings. *Matter of Mathot* (1917), 222 N. Y. 8.

Proceedings against an estate in bankruptcy are special proceedings. In re *Flower* (1917), 167 N. Y. Supp. 778.

Section cited.—*Spielberg v. Canadian Steamship Lines, Ltd.* (1917), 98 Misc. 304, 162 N. Y. Supp. 610.

§ 3343. Miscellaneous definitions and rules of construction.

Warrant of attachment.—Where a final judgment is rendered in favor of a defendant, a warrant of attachment issued against it in the action is wholly annulled, unless there be a stay of proceedings suspending the annulment, or the warrant is revived by the reversal or vacating of the judgment. *Flick v. Wyoming Valley Trust Co.* (1912), 149 App. Div. 546, 133 N. Y. Supp. 1066.

An injunction order, although a judge's order in form, is, in effect, an order of the court, under §§ 606 and 3343, and willful disobedience thereof may be punished as a criminal contempt under subdivision 3 of § 750 of the judiciary law. *People ex rel. Empire Leasing Co. v. Mecca R. Co.* (1916), 174 App. Div. 384, 161 N. Y. Supp. 241.

Personal injury; term applied, see *Gorlitzer v. Wolffberg* (1913), 208 N. Y. 475.

A municipal corporation is a domestic corporation within the contemplation of the provisions of subd. 18 and is a resident of the state and of the county wherein it has its principal place of business. *Uvalde Asphalt Paving Co. v. City of New York* (1912), 149 App. Div. 491, 134 N. Y. Supp. 50.

Domestic corporation.—Where a railroad corporation was organized under the laws of the United States for the purpose of constructing a railroad in states other than the state of New York, and the char-

ter and certificate of incorporation did not specify where the main office of the corporation should be located, but did specifically authorize the incorporators to meet in the city of New York to elect directors, etc., and said company has for many years maintained at all times its executive offices in the city of New York, where all the annual meetings of stockholders and directors have been held, it is a domestic corporation under the terms of subdivision 18 for the purpose of determining whether its property is subject to attachment as a foreign corporation. And this is so although the general offices for the actual operation of the railroad plant are located in the foreign states through which the railroad runs and although its revenues are there received and disbursed. *Gould v. Texas & Pacific Ry. Co.* (1917), 176 App. Div. 818, 163 N. Y. Supp. 479.

Domicile of corporation.—For the purposes of judicial procedure the residence or domicile of a corporation is the seat of the government, and it makes no difference where the administrative departments and the physical property of the corporation happen to be located. *Gould v. Texas & Pacific Ry. Co.* (1917), 176 App. Div. 818, 163 N. Y. Supp. 479.

Execution is a process of the court. *Schley v. Andrews* (1919), 225 N. Y. 110.

The word judgment refers to a civil

action. *People ex rel. R. S. & E. R. R. Co. v. Moroney* (1918), 224 N. Y. 114.

Special proceeding.—Proceedings in the appellate division relating to the attorneys are special proceedings. *Matter of Mathot* (1917), 222 N. Y. 9.

Criminal cases.—Proceedings under the

code of civil procedure have no relation to criminal cases. *People v. Redmond* (1919), 225 N. Y. 206.

Section cited.—*Planten v. National Nassau Bank* (1916), 174 App. Div. 254, 160 N. Y. Supp. 297.

§ 3347. Costs in case of transfer, etc., of cause of action.

3. In chapter fifth, sections four hundred and forty-six, four hundred and forty-nine, four hundred and fifty, four hundred and fifty-four, four hundred and fifty-five, and four hundred and fifty-eight to four hundred and sixty-eight, both inclusive. and in chapter sixth, section five hundred and thirty-two, apply to an action commenced, in any court of the state.

4. The remainder of chapters fifth and sixth, apply only to an action commenced in a court of record.

Subdivision 3 amended by L. 1893, ch. 642; L. 1913, ch. 485, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "and in chapter sixth, section five hundred and thirty-two," and omitted at the end of the subdivision the words "on or after the first day of September, eighteen hundred and seventy-seven."

Source.—New.

Subdivision 4 amended by L. 1893, ch. 642; L. 1913, ch. 485, in effect Sept. 1, 1913. The amendment of 1913 materially changed this subdivision.

Source.—New.

Inapplicable.—By § 3347 (4), § 484 relating to the joinder of causes of action in the same complaint is inapplicable to the municipal court of the city of New York. *Mackey v. Royal Bank of New York* (1912), 78 Misc. 145, 137 N. Y. Supp. 929.

Subdivision 6 makes § 751 applicable to all courts of record. *Matter of People v. Maltbie* (1918), 184 App. Div. 743, 172 N. Y. Supp. 483.

The City Court of the City of New York has jurisdiction to entertain and dispose of equitable defenses interposed in common-law actions, except that it may not give affirmative judgment for a defendant upon a counterclaim which demands only equitable relief. *Oppenheimer v. Trebla Realty Co.* (1913), 154 App. Div. 593, 139 N. Y. Supp. 894.

Section cited.—*Kriegelman v. Ariewitz* (1915), 155 N. Y. Supp. 355.

§ 3348. Id.; what deemed commencement of action, etc.

Supplementary proceedings are not commenced by the mere signing of an order without service thereof. *Matter of Dorf-*

man v. Jacobs (1917), 100 Misc. 592, 166 N. Y. Supp. 403.

§ 3358. Condemnation of real property; terms defined.

Petitioner.—If a petitioner in condemnation proceedings knows that one is an equitable owner of property sought to be condemned, it must treat him as owner. *Champlain & Sanford Railroad Co. v. Ost-*

lander (1912), 151 App. Div. 752, 136 N. Y. Supp. 1012.

Section cited.—*Matter of Public Service Com.* (1916), 217 N. Y. 61.

§ 3359. Proceedings to be taken as prescribed in this title.

In a condemnation proceeding, which is purely statutory, the court possesses only such jurisdiction and powers as are expressly conferred by statute, and such other incidental powers as may be necessary to effectuate the scheme of the statute. *Matter of Bronx Parkway Commission* (1917), 99 Misc. 397, 164 N. Y. Supp. 9.

Under the condemnation law, which does not expressly authorize such procedure,

the question of the ownership, as between conflicting claimants, of property to be condemned, cannot be determined upon a motion before the commissioners of appraisal have made their award; such a method of trial is not a necessary incident to the power conferred upon the court by the condemnation law. *Matter of Bronx Parkway Commission* (1917), 99 Misc. 397, 164 N. Y. Supp. 9.

§ 3360. Petition to be presented; contents thereof.

Failure to agree.—As a condition precedent to the appointment of commissioners in condemnation proceedings the condemnor must prove that it has failed to agree with the owner upon a price for the purchase of the land after an effort made in good faith. *Matter of New York, Westchester & Boston R. Co.* (1912), 151 App. Div. 50, 135 N. Y. Supp. 234.

The consent of the public service commission to a proposed change of grade by a railroad corporation is not one of the allegations required to be set forth specifically by the provisions of this section. *Long Island R. Co. v. Sherwood* (1912), 136 N. Y. Supp. 752.

Statement of public use and facts showing necessity. *Flood Abatement Commission v. Merritt* (1916), 94 Misc. 388, 158 N. Y. Supp. 289.

Failure of commissioners to attempt to come to an agreement of purchase with an owner before instituting condemnation proceedings.—Where the Bronx parkway commission, pursuant to the requirements of the statute, agreed to pay a certain landowner \$73,000 for lands to be taken if the agreement received the approval of the board of estimate and apportionment

of the city of New York and the supervisors of Westchester county (which approvals the statute did not require the commission to obtain), and thereafter, not having obtained an approval of the offer, served an offer to purchase the lands for \$56,000 on the thirtieth day of December, and on the following day, December thirty-first, the commission verified a petition for the condemnation of the land and served the same on the third day of January following (one of the intervening days being Sunday, and the other New Year's day), the commission has failed to show that it has been unable to agree with the owner as to the amount of compensation, so as to authorize the condemnation proceedings, and a judgment of condemnation should be reversed. Under the circumstances the alleged offer to purchase was perfunctory and not a genuine attempt to come to an agreement with the owner as required by the statute. *Matter of Bronx Parkway Commission* (1917), 176 App. Div. 717, 163 N. Y. Supp. 882.

Subdivision 3 cited.—*Matter of Public Service Comm.* (1916), 217 N. Y. 61.

§ 3361. Notice to be annexed to petition; service of.

Place of trial should be laid and continued where the property is located.

Manhattan Railway Co. v. Farrell (1917), 180 App. Div. 200, 167 N. Y. Supp. 526.

§ 3364. Appearance of parties generally.

Appearance but no answer.—Where the defendant in condemnation proceedings has appeared but failed to answer and a judgment of condemnation has been entered, the effect is the same as though an

answer had been interposed and a trial had of the issues raised. *New York Central & H. R. R. Co. v. Reusens* (1912), 151 App. Div. 458, 135 N. Y. Supp. 919.

§ 3365. Answer; what to contain.

Section cited.—*Matter of Public Service Comm.* (1916), 217 N. Y. 61.

§ 3367. Trial; case; exceptions.

Appearance but no answer.—Where the defendant in condemnation proceedings has appeared but failed to answer and a judgment of condemnation has been entered, the effect is the same as though an answer had been interposed and a trial had of the issues raised. *New York Central & H. R. R. Co. v. Reusens* (1912), 151 App. Div. 548, 135 N. Y. Supp. 919.

Application.—The practice provided for

in the condemnation law must be followed only after the appointment of commissioners, when the proceedings are for damages for the change of sidewalk grade in conformity with the provisions of the village law. *Lester v. Village of Blaisdell* (1912), 137 N. Y. Supp. 491.

Section cited.—*Matter of Public Service Comm.* (1916), 217 N. Y. 61.

§ 3369. Judgment; costs to defendant; commissioners.

A commissioner is not an interested party merely because he is attorney for another railroad which owns the majority

of the stock of the plaintiff, there being no proof of bias or prejudice. *Matter of New York, Westchester & Boston R. Co.*

(1912), 151 App. Div. 50, 135 N. Y. Supp. 234.

Final judgment.—A judgment dismissing the petition entered on a decision in favor of the defendant is a final judgment, but the judgment directing the appointment of commissioners entered on a decision in favor of plaintiff is interlocutory. *Marshall v. Hatfield* (1912), 138 N. Y. Supp. 733.

Necessity for statutory authority for awarding costs.—Statutory authority must be found to justify the court in awarding either costs or allowances in a special proceeding for the condemnation of land for a public improvement. *Matter of School Street* (1914), 162 App. Div. 158, 147 N. Y. Supp. 195.

Time of taxation of costs.—Where, in condemnation proceedings the defendants by answer deny the petitioners' legal right to maintain the proceeding and a referee determines the issue in favor of the petitioners, they are not entitled to tax costs

until the entry of the order finally determining the proceeding. *Matter of N. Y. Municipal Railway Corporation* (1916), 176 App. Div. 197, 162 N. Y. Supp. 495.

Scope of order.—The supreme court has power to make an order directing the commissioners of appraisal to ascertain, in addition to the compensation to be made to the owners for the property to be taken for the public use specified, any damages which the defendant owners may have sustained and may thereafter sustain by reason of any entry upon and use by plaintiff of the defendants' property. *Matter of Manhattan Railway Company* (1916), 217 N. Y. 682.

Charter provision requiring one of the commissioners of appraisal to be a resident of the city is unconstitutional where lands outside the city are to be taken. *Matter of City of Rochester* (1918), 184 App. Div. 369, 171 N. Y. Supp. 12.

See also notes to Section 3240.

§ 3370. Duties and powers of commissioners.

The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpoenas and administer oaths to witnesses; a majority of them may adjourn the proceeding before them, from time to time in their discretion. Whenever they meet, except by appointment of the court or pursuant to adjournment, they shall cause at least eight days' notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proof and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the supreme court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services for every day they are actually engaged in the performance of their duties, and their necessary expenses to be paid by the plaintiff; provided, that in proceedings within the counties of New York and Kings such commissioners shall be entitled to such additional compensation not exceeding twenty-five dollars for every such day, as may be awarded by the court, and provided that in proceedings instituted by a village or any board thereof under this title such

commissioners shall be entitled to such additional compensation, not exceeding five dollars for every such day, as may be awarded by the court.

Added by L. 1890, ch. 95; amended by L. 1898, ch. 384; L. 1913, ch. 232, in effect Sept. 1, 1913. The amendment of 1913 inserted the words "and provided that in proceedings instituted by a village or any board thereof under this title such commissioners shall be entitled to such additional compensation, not exceeding five dollars for every such day, as may be awarded by the court," at the end of the section.

Property rights tortiously or otherwise unlawfully invaded may not be adjusted in this purely statutory proceeding. The power of the commissioners is confined to ascertaining and determining the compensation which should justly be made for the property and rights sought to be acquired. *Matter of N. Y. Municipal R. Corporation v. Weber*, 179 App. Div. 245, 166 N. Y. Supp. 542.

City board.—The court is without power to alter a decision of the city board as to lands to be condemned, and a motion to conform the condemnation proceeding to said resolution must be granted. *Matter of City of New York (East 177th St.)* (1913), 80 Misc. 346, 141 N. Y. Supp. 231.

§ 3371. Confirmation of report; rehearing; deposit.

Decisions of commissioners outside their power or direction not deemed approved.—The determinations of the commissioners in condemnation proceedings as to the matters within their power to decide are the only conclusion of their report which will be confirmed. Any arbitrary or unfounded decision outside of power or direction is not deemed to be approved by the court upon confirming the report. An award in condemnation proceedings of a gross sum to a life tenant in lieu of the value of his life estate in the property sought to be taken is unauthorized, and the formal confirmation of the report of the commissioners does not save the award. *Matter of Tucker* (1918), 104 Misc. 617, 172 N. Y. Supp. 701.

Grounds on which confirmation may be refused.—Confirmation will not be refused for error in excluding or receiving evidence or for error in law other than the adoption of a wrong principle in estimating damages. *Matter of Mechanicsville Bridge Co.* (1913), 83 Misc. 331, 145 N. Y. Supp. 1058.

Setting aside order of confirmation.—Damages in condemnation proceedings are to be awarded as of the date of the award, but if, after the making of the award, and even after confirmation the property sought to be acquired is damaged, it would seem that the loss should fall upon the owner, and that the court has power to set aside an order of confirmation and remit the matter for a new appraisal. *Matter of People of State of New York* (1913), 81 Misc. 324, 142 N. Y. Supp. 949.

When report may be set aside for inadequacy.—To set aside an award for inadequacy the evidence must disclose that the award is grossly inadequate and such as shocks the sense of justice. *Matter of Mechanicsville Bridge Co.* (1913), 83 Misc. 331, 145 N. Y. Supp. 1058.

Modification not allowed.—The only power of the supreme court is to confirm

or set aside the report of commissioners; such report cannot be modified by striking out part of the award and confirming as modified. *People v. Dawson* (1914), 87 Misc. 588, 150 N. Y. Supp. 679.

Additional evidence on resubmission.—Where upon an application to confirm the report of commissioners appointed to make an award for the condemnation of rights to maintain telegraph poles in the highway in front of private property, the court rejects the report because the proper measure of damages was not adopted, and directs that the commissioners "reconsider the matters heretofore submitted to them and make and file a new report," the commissioners should take up the question of compensation *de novo* and should consider additional evidence as to damage offered by the defendant. *New England Telegraph Co. v. Neiger* (1915), 167 App. Div. 402, 152 N. Y. Supp. 1085.

Applies to proceedings under the highway law. *Matter of State of New York* (1912), 152 App. Div. 633, 137 N. Y. Supp. 485.

Provisions of special statute control.—A final order of confirmation of the report of the commissioners together with payment of compensation as directed therein are prerequisites to the vesting of title to the land condemned. Under the special or local law authorizing the construction of intercepting sewers in the city of Syracuse (laws 1907, ch. 356, § 5) title to the property is acquired by the city and the owner summarily divested of his estate in the land anterior to a consideration of the value by the commissioners or the order of confirmation of their report of the same, and the taking is thus complete. Such repugnancy between the two statutes results in a construction that the special act must be held to be an exception to or qualification of the prior general law. *Matter of City of Syracuse* (1918), 224 N. Y. 201.

Charter provisions not providing for confirmation.—The provisions of the charter of the city of Rochester relating to condemnation of lands outside of city are unconstitutional in that they make no pro-

vision for the confirmation by a court of the report of the commissioners. *Matter of City of Rochester* (1918), 184 App. Div. 369, 171 N. Y. Supp. 12.

§ 3372. Offer to purchase by plaintiff; costs; additional allowance.

Application of section.—Where the owners of property condemned are under legal disability to convey, the provisions of § 3372 as to costs to the owner, where no offer of purchase has been made do not apply, and hence the court has no authority to direct the owner to recover costs under said section, but under such circumstances the court may award costs to the owner under § 3240 at the rates allowed in an action in the supreme court. *Matter of State of New York* (1912), 152 App. Div. 633, 137 N. Y. Supp. 485.

Rapid transit act.—The Code provision relating to costs in condemnation proceedings has no application to the rapid transit act, but costs in proceedings thereunder may be awarded as provided in § 3240 of the code. *Matter of Low* (1913), 208 N. Y. 25.

Costs determined by statute.—A referee appointed to determine issues raised in a condemnation proceeding has no power over the question of costs. The right to costs is determined by the statute. While the proceeding to fix compensation is an assessment of damages and not a trial, it is made the basis for a bill of costs as for a trial. *Marshal v. Hatfield* (1912), 138 N. Y. Supp. 733.

Costs of successful petitioner.—Although § 3369 contains no express provision for costs to a successful petitioner and deals only with the costs of a defendant who is successful in obtaining a dismissal of

the petition, the successful petitioner may tax his costs under § 3372 on the entry of the final order. *Matter of N. Y. Municipal Railway Corporation* (1916), 176 App. Div. 197, 162 N. Y. Supp. 495.

Extra allowance.—In condemnation proceedings the court may not make an extra allowance against the state under § 3372 where the owners of the property condemned are under legal disability to convey. However, the court may award costs under § 3240 at the rates allowed in an action in the supreme court. *Matter of State of New York* (1912), 152 App. Div. 633, 137 N. Y. Supp. 485, *aff'd* 207 N. Y. 582.

This section when made applicable to the highway law should be given the same meaning and effect therein that it has in the code, and should not be so construed as to prevent an award of costs to an owner in a condemnation proceeding, where costs may be essential to secure just compensation, for the property taken. *County of Erie v. Fridenberg* (1917), 221 N. Y. 389.

A nonresident is not entitled to costs in a proceeding instituted under the highway law to acquire lands for county highway. *Erie County v. Fridenberg* (1916), 161 N. Y. Supp. 401.

Section 3240 does not modify this section. *Erie County v. Fridenberg* (1916), 161 N. Y. Supp. 401.

§ 3373. Judgment, how enforced; delivery of possession of premises; when writ of assistance to issue.

Entering judgment.—The provisions of § 3373 for entering judgment for the amount of the award and enforcement by execution have no application, since the method in which the award can be col-

lected is exclusively that pointed out by the statute (highway law, § 266). *Matter of State of New York* (1913), 207 N. Y. 582.

§ 3374. Abandonment and discontinuance of proceeding.

Service of notice of motion.—A motion for leave to discontinue condemnation proceedings served within the thirty days specified by § 3374 is timely although the motion may be heard after said time has expired. *New York, Ontario & Western R. Co. v. Nelson* (1912), 152 App. Div. 245, 186 N. Y. Supp. 514.

Local act.—Where the right to discon-

tinue condemnation proceedings under a special act is not governed thereby, it is governed by this section. *Matter of Commissioners of Palisades Interstate Park* (1915), 166 App. Div. 443, 151 N. Y. Supp. 977.

Section cited.—*Matter of City of Syracuse* (1918), 224 N. Y. 201.

§ 3375. Appeal from final order; stay of proceedings.

Appeal where no motion to dismiss has been made.—Although an appeal may not lie from a judgment granting the right to condemn real property, except through appeal from the final order on the coming in of the report of the commissioners, it may be entertained where no motion to dismiss has been made. *Champlain & Sanford Railroad Co. v. Ostrander* (1912), 151 App. Div. 752; 136 N. Y. Supp. 1012.

An appeal from an interlocutory order appointing commissioners may be taken only where it plainly appears that the taking was not for a permitted public use or was otherwise in excess of the right of eminent domain. *County of Orange v. Storm King Stone Co.* (1917), 180 App. Div. 208, 167 N. Y. Supp. 806.

Waiver of right to appeal.—Where a claimant in condemnation proceedings, after filing a notice of appeal from an order confirming a report of commissioners of estimate and appraisal of the city of New York, serves a notice upon the comptroller, demanding immediate payment of an award which had been made to him, and states therein that he does not thereby waive or abandon the appeal, and the city pays the amount of the award, the receipt

stating that the sum is in full payment, and that the payee will lose his right of appeal, the acceptance waives the right of appeal, notwithstanding the claimant's attempt to reserve it. *Matter of City of New York* (1915), 168 App. Div. 58, 151 N. Y. Supp. 407.

Order appointing referee.—Where, upon the return day of a motion for the appointment of commissioners, the defendants appear, make preliminary objections, and interpose an answer, an appeal from an order appointing a referee to hear and determine the issues raised by the petition and answer, is unauthorized. *Staten Island Rapid Transit R. Co. v. Rosenberg* (1913), 157 App. Div. 472, 142 N. Y. Supp. 585.

The Bronx Parkway Commission Act directs that condemnation proceedings instituted thereunder are to be in the manner provided in the code. Therefore an appeal by a defending landowner does not lie from the judgment of condemnation, which a defendant can review only through an appeal from the final order. *Matter of Bronx Parkway Commission* (1917), 180 App. Div. 909, 167 N. Y. Supp. 1089.

§ 3378. Conflicting claimants.

Payment into court by stipulation of parties.—Determination of rights. *O. & H. R. R. Co. v. Cottle* (1917), 102 Misc. 30, 168 N. Y. Supp. 463.

§ 3379. Party in possession may stay on giving security.

Section cited.—*Millbrook Co. v. Gambier* (1917), 176 App. Div. 870, 878, 163 N. Y. Supp. 1025.

§ 3380. Temporary possession pending proceedings.

Failure to answer.—Where the defendant has failed to answer in condemnation proceedings, the court is without power to award the plaintiff immediate possession on giving security, as § 3380 provides only for cases in which an answer has been interposed. *New York Central & H. R. R. Co. v. Reusens* (1912), 151 App. Div. 458, 135 N. Y. Supp. 919; *Matter of Village of Canton v. Allen* (1917), 180 App. Div. 273, 167 N. Y. Supp. 665.

Immediate possession.—A railroad in condemnation proceedings may be awarded immediate possession of the lands on giving security, although the answer puts in issue the necessity of the acquisitions of the lands for public use. *Long Island Railroad Co. v. Jones* (1912), 151 App. Div. 407, 135 N. Y. Supp. 954.

What must appear to secure immediate possession.—Before a petitioner is entitled to temporary possession of lands under this section, pending condemnation proceedings, he must show specific facts from which the court can be satisfied that the possession of the premises is immediately necessary for the prosecution of the public improvement. Hence, where the only evidence to the effect that the public interests will be prejudiced by delay is the affidavit of the attorney for the petitioner and of the assistant engineer, stating in substance that it is necessary to have the immediate possession of the property to work upon, temporary possession should not be granted. *Central New England R. Co. v. Whitley* (1913), 159 App. Div. 468, 144 N. Y. Supp. 270.

When value of land is stated in affidavit.

—Where an answer in condemnation proceedings fails to state the value of the land, but in an affidavit presented in opposition to a motion by the petitioner for temporary possession the value is claimed to be a certain amount, the court is unauthorized to grant immediate possession, except upon deposit of such sum. *Central New England R. Co. v. Whittley* (1913), 159 App. Div. 468, 144 N. Y. Supp. 270.

§ 3382. Practice in cases not herein provided for.

Denial; information and belief.—In condemnation proceedings brought by a railroad company, an answer which merely denies any knowledge or information sufficient to form a belief as to plaintiff's incorporation, raises no issue, for the provisions of § 1776 apply to condemnation proceedings. *Long Island Railroad Co. v. Jones* (1912), 151 App. Div. 407, 135 N. Y. Supp. 954.

§ 3383. Repeal; exception as to New York city.

Rapid transit act.—The provisions of the code of civil procedure do not apply to condemnation proceedings brought under the provisions of the rapid transit act. *Matter of City of New York* (1914), 163 App. Div. 10, 147 N. Y. Supp. 1057.

INDEX

	SEC.		SEC.
Abatement and revival.		Actions—Continued.	
See <i>Death of Parties.</i>		officers, by specified	1926
abatement, action for penalty does		designation in summons	1929
not survive death of party . . .	764	official bonds, by private person . .	1963
action not to abate if cause sur-		penal bond	1915
vives	755	penalty or forfeiture, recovery of.	1888
no abatement by death after ver-		part of penalty	1898
dict	764	people, in behalf of, attorney-gen-	
part of cause of action surviving	759	eral may maintain	1948
reversal on law, action for wrong		public funds illegally obtained, for.	1969
not abated by death	764	limitation of action	1973
verdict after death of party		real property situate without state,	
void	765	place of trial of actions relating	
revival, cross-action	760	to	982a
death of one of several parties . .	758	recognizance, on, interest	1966
party jointly liable	758	taxpayer's, against public officer . .	1925
sole party	757	trial, place of, governed by place	
devolution of liability	756	where subject-matter situated . .	982
proceedings to bring in party . . .	760	Administrators.	
supplemental pleadings	760	See <i>Executors and Administrators; Surro-</i>	
survivors, by or against	758	gates' Code.	
transfer of interest	756	Adverse possession.	
Account.		relation of landlord and tenant . . .	373
bill of particulars	531	Affidavit.	
current, limitation of action	386	on file, as evidence	922
how pleaded	531	who may take	812
Accounting.		Albany county.	
See <i>Partnership; Surrogates' Code.</i>		note of issue, new note not to be	
city court of city of New York, jur-		filed for succeeding term	977
isdiction	315	notice of trial, new notice not to be	
complaint	481	served for succeeding term	977
Action.		surrogate's court, stenographer . . .	2495
defined	3333	Alienation of affections.	
Actions.		limitation of action	382
See <i>Chattels, Creditors, Real Property.</i>		Allegation.	
association, of seven or more per-		See <i>Complaint; Pleadings.</i>	
sons, actions by or against . . .	1919	Allowances.	
attachment, by sheriff	655	appeal to court of appeals	191
causes to be separately stated . . .	483	Amendments.	
commenced by service of summons.	416	See <i>Answer; Complaint; Demurrer;</i>	
commencement, notice of no per-		Pleadings.	
sonal claim	423	Ancillary guardians.	
personal service of summons. how		See <i>Surrogates' Code.</i>	
made	426	Ancillary letters.	
what deemed	3348	See <i>Surrogates' Code.</i>	
counterclaim deemed	974	Annulment.	
defendant, appearance	421	action on ground of physical inca-	
forfeiture	1962	pacity	1753
incompetents, committees may			
maintain	2340		
joint debtor, judgment against . . .	1932		
judgment, action on regulated . . .	1913		
letters patent, to vacate	1957		
libel, when action for, cannot be			
maintained against newspaper . .	1907		

	SEC.		SEC.
Annulment—Continued.		Answer—Continued.	
on ground of force, fraud, etc...	1750	when defendant not excused from verifying answer to charge of fraud	529
when former husband or wife liv- ing	1745	when objection may be taken by..	498
when party under age of consent.	1744		
where party a lunatic.....	1747		
where woman under sixteen.....	1742		
alimony, expenses, costs, how awarded	1769		
cases when action may be main- tained	1743		
children, custody and maintenance. enforced by punishment for con- tempt	1771		
sequestration	1772		
counterclaim, what deemed.....	1770		
incompetent, committee may not maintain action	2340		
judgment can be rendered only by court	1229		
how far conclusive	1754		
regulations, interlocutory	1774		
summons and complaint, indorse- ment	1774		
summons, service of, by publication	438		
support of plaintiff.....	1771		
enforced by punishment for con- tempt	1773		
sequestration	1772		
Answer.		Appeals.	
See <i>Counterclaim; Practice Regulations.</i>		See <i>Court of Appeals; City Court of City of New York; Exceptions; Justices' Courts; Supreme Court; Surrogates' Code.</i>	
acceptance, motion to compel.....	421	auxiliary orders not appealable...	190
affirmative judgment, when defend- ant to demand	509	case, how made and settled.....	997
amendment by court	723	when heard without.....	998
of course, application, affidavit of attorney	542	when necessary	997
effect	542	costs upon appeal from final judg- ment	3238
prior amendment, effect	542	defects in proceeding may be sup- plied	1303
service of amended answer....	543	dismissal of appeal by appellate di- vision acting as affirmance.....	190
effect	543	how taken	1300
verification of proposed amended answer	542	inferior courts, from.....	1340
condemnation proceedings	3365	limitation of time.....	1341
contents	500	interlocutory judgment may be re- viewed	1316
copy answer, service on co-defend- ant	521	judgment on	1317
defendant must demur or answer.	487	when entered	1345
defenses, defendant may interpose several	507	mandamus, appeal from order to appellate division	1356
immaterial errors, disregarding....	723	from writ of	2087
irrelevant matter, motion to strike out	545	new trial, motion for, upon judges' minutes	999
justices' courts	2938	appeal from order	999
objection when deemed waived....	499	notice of, to specify interlocutory judgment	1301
partial	508	order, appeal from when made out of court	1348
plaintiff may demur to.....	494	when entered	1345
sham defenses to be stricken out..	538	orders, mode of enforcing affirmed or modified	1320
supplemental	544	papers to be transmitted to appel- late court	1315
time, stipulation extending.....	421	persons entitled to become parties to	1296
last day falling on Sunday.....	422	question certified to court of ap- peals	190
usury, setting up, sufficiency.....	536	remarks or comments of judge, sub- ject to review	1323a
verification by one of defendants..	523	restitution, when awarded.....	1323
proposed amended answer.....	542	stay of proceedings	1310
remedy for want of.....	528	to appellate division, appeal from final judgment after affirmance of interlocutory judgment or denial of new trial; review in court of appeals	1350
		appeal papers	1353
		appeals from judgment.....	1346
		orders	1347
		made in a special proceeding..	1356
		hearing	1355
		limitation of time	1351
		order to stay proceedings.....	1351
		transfer to another department.	1355
		to court of appeals, allowances....	191
		appeal from final judgment ren- dered after affirmance of inter- locutory judgment	1336

	SEC.		SEC.
Appeals—Continued.		Assignee.	
entry of order.....	191	cost of bond.....	3320
fraud alleged.....	191	Assignment.	
judgment absolute.....	194	See <i>Judgments.</i>	
jurisdiction of civil cases.....	190	Associations.	
limitation, exceptions and conditions.....	191	See <i>Unincorporated Associations.</i>	
notice of entry of judgment, service.....	191	Attachment.	
questions brought up for review.....	1337	action in name of plaintiff and sheriff.....	677
remittitur.....	194	by sheriff.....	655
review of questions of fact.....	191	alimony, may be attached when necessary only.....	644
of law.....	191	certificates of stock in foreign corporations, when subject to attachment.....	647
review of order of affirmance of appellate division.....	190	city court of city of New York, proof necessary to obtain warrant of attachment.....	3169
security to perfect.....	1326	defendant, additional provision for relief.....	710
court may limit amount.....	1312	foreign corporation, unpaid subscription.....	646
to stay execution directing conveyance.....	1330	granted in what actions.....	635
sureties, exceptions to.....	1335	affidavit, sufficiency.....	635
justification.....	1335	judgment in principal action, how satisfied.....	708
two actions pending.....	191	duty of sheriff.....	708
unanimous decision.....	191	when enforceable against attached property.....	707
weight of evidence.....	191	warrant of, effect of final judgment.....	709
when reversal presumed not to be on question of fact.....	1338	granted by whom.....	638
to supreme court, where and how heard.....	1344	in what actions.....	635
undertaking, action upon.....	1309	when.....	638
when adverse party has died.....	1297	motion to vacate or modify.....	682
when party may appeal.....	1294	how made.....	683
writ of prohibition from order of appellate division.....	1356	undertaking.....	682
from writ of.....	2101	proof of granting.....	642
		security, modification of.....	682
		undertaking.....	682
		what must be shown to procure.....	636
Appeals, court of.		Attorney-general.	
See <i>Court of Appeals.</i>		action in behalf of people, may maintain.....	1948
Appearances.		compulsory judicial settlement, may petition for.....	2727
defendants.....	421	dower, to represent people in action for.....	1598
general.....	421, 423	voluntary judicial settlement, when to be cited.....	2730
special.....	423	Attorneys.	
Appellate division.		action against, complaint.....	481
See <i>Supreme Court.</i>		death or disability, proceedings thereupon.....	65
Arbitrations.		necessity for notice.....	65
arbitrators, additional.....	2367	not to disclose communications.....	835
oaths.....	2369	Avoidances.	
award, motion to vacate.....	2374	See <i>Counterclaim; Pleadings.</i>	
authentication, etc., required.....	2372	Bail.	
to confirm.....	2373	See <i>Arrest.</i>	
judgment, entry.....	2378	action on bond.....	596
what controversies may be submitted.....	2366		
when submission cannot be made.....	2365		
Arrest.			
See <i>Bail.</i>			
order of, motion to vacate.....	548		
proof necessary to procure.....	557		
affidavits, contents.....	557		
security.....	559		
when must be vacated.....	558		
right to, depends upon nature of action.....	549		
supersedeas.....	572		

	SEC.		SEC.
Bail—Continued.		Buffalo.	
appeal to court of appeals from order on writ of habeas corpus and certiorari, admission to.....	2062	See <i>Superior Court of Buffalo.</i>	
deposit, how disposed of.....	585	Calendar.	
return upon giving bond.....	585	classification of issues.....	977
sheriff when liable as.....	587	note of issue to be entered on....	977
surrender of defendant.....	591	preparation and distribution.....	977
undertaking	575	Case.	
Bankrupts.		See <i>Exceptions; Trial.</i>	
discharge of judgment against....	1288	Certificate.	
Bawdy-houses.		certificate on file, as evidence.....	922
summary proceedings for removal of tenants	2231	Certiorari.	
petition	2237	See <i>State Writs.</i>	
Bill of particulars.		amendment of proceedings when mandamus appropriate remedy. 2148a	
See <i>Account; Pleadings.</i>		application for writ, where and how made	2127
Board of claims.		how and to whom made.....	2017
See <i>Court of Claims.</i>		cases where issued from supreme court	2123
abolished	263	where writ may issue.....	2120
clerk continued	266	it cannot issue.....	2122
determination, force and effect of..	263	cause of detention, to inquire into appeals	2058
jurisdiction transferred to court of claims	264	by people	2059
stenographer continued	266	directed, to whom.....	2129
Bonds.		discharge in civil cases.....	2034
See <i>Surrogates' Code.</i>		when to be granted.....	2043
Bonds and undertakings.		prisoner may controvert return, proofs thereupon	2039
affidavits of surety or party.....	812	proceedings on irregular commitment	2035
approval by court or judge.....	812	on return	2031
arrest in civil proceedings.....	559	when not allowed.....	2016
bonds to people or public officer for benefit of suitor	814	when prisoner to be remanded..	2031
change of party not affected by... 815		costs	2143
examination of sureties.....	813a	final order upon hearing.....	2141
form	812	origin of writ	1991
further protection in certain cases. 813a		papers on return.....	2005
injunction	611	questions not to be determined....	2140
official, action upon by private person	1888	return, when and how made.....	2134
penal, action upon.....	1915	how compelled, fees.....	2135
petition by surety to be relieved..	812	third person made party.....	2137
sealed, limitation of action.....	381	time for review, limitation.....	2125
Books.		who entitled to prosecute.....	2015
See <i>Justices' Courts; Surrogates' Code.</i>		Chattels.	
discovery, court may direct.....	803	actions relating to.....	1689
of account, production.....	867	city court of city of New York, removal of action to recover to supreme court	319a, 319b
Breach of promise of marriage.		complaint	481
limitations of actions.....	382	recovery, when action cannot be maintained	1690
removal of action to recover damages for	319a	replevin, answer of title in third person	1723
to supreme court.....	319b	claim of title by, indemnity to sheriff	1711
Bronx county.		by third person.....	1709
docket books, current.....	1245a	damages when chattel injured... 1722	
note of issue, new note not to be filed for succeeding term.....	977	defendant may demand judgment for return	1725
notice of trial, new notice not to be served for succeeding term.....	977	history of remedy.....	1689
preferred causes, motion for.....	793	judgment, docketing	1730
		execution	1731

	SEC.		SEC.
Chattels—Continued.		Complaint.	
how chattel to be replevied	1700	<i>See Answer; Pleadings; Practice Regulations.</i>	
plaintiff's undertaking	1699	accounting	481
reclamation by defendant	1704	administration, pleading representa-	
sheriff, indemnity to	1711	tive capacity	481
sureties, exception to	1703	agreements, how alleged	481
taking how stated in complaint	1721	allegations, indefinite	546
replevy, plaintiff may require sher-		irrelevant matter	545
iff to replevy	1694	sufficiency	481
affidavit required	1695	amendments by court	723
		of course	542
City court of city of New York.		second application	542
action for breach of promise of		attorney, action against	481
marriage, removal to supreme		automobile, action for injuries by	481
court	319a, 319b	bill of particulars	481
judgment for sum exceeding		building loan	481
\$2,000. removal to supreme		causes of action to be separately	
court	319a, 319b	stated	483
to enforce lien, removal to su-		joinder	484
preme court	319a, 319b	chattels, ownership and demand	481
to recover chattels, removal to		checks, breach of agreement to pro-	
supreme court	319a, 319b	cure indorsement and delivery	481
appeals from	1344	commissions	481
amended judgment	3188	conclusions not sufficient	481
time	3190, 3191, 3193	conspiracy	481
confession of judgment, filing with.	1275	construction	481
demand of judgment for more than		contents	481
\$2,000	315	contract, actions on	481
judgment, vacation in certain cases.	319b	conversion	481
jurisdiction	315	conveyances, action to set aside	481
action against city	315	copy, failure to serve	480
action for accounting	315	when to be served with summons	420
constitutionality of amendment of		creditors' action	481
1911	315	decendent's estate	481
limited	316	deeds, breach of covenant	481
mandates, what may be executed		demurrage charges	481
without city	338	dismissal for neglect to proceed	822
marine causes, removal to supreme		to serve summons	821
court	319a, 319b	easements	481
removal of causes to supreme		employees, services	481
court	319a, 319b	employers' liability	481
replevin, removal of action to su-		equitable cause of action	481
preme court	319a, 319b	facts to be alleged	481
warrant of attachment, proof neces-		foreign corporations	481
sary to obtain	3169	fraud	481
		goods sold and delivered	481
City courts.		guaranty	481
<i>See Inferior City Courts; Yonkers.</i>		husband and wife, recovery of goods	
		sold wife	481
Claims.		immaterial errors, disregarding	723
<i>See Court of Claims.</i>		indecent assault	481
Claims, court of.		insane person, action on bond for	
<i>See Court of Claims.</i>		release	481
		insurance	481
Clerks of court.		justices' courts	2936
fees generally	3301	libel	481
fees when performing functions of		matrimonial actions	1774
county clerks	3306	mechanic's lien	481
oaths and affidavits may be taken		money had and received	481
before	842	mortgage foreclosure	481
		negligence	481
Commission.		nuisance	481
<i>See Depositions.</i>		partition	481, 1542
		partnership	481
Commissioner of deeds.		personal injuries	481
oaths and affidavits may be taken		physicians, services	481
before	842	prayer for relief	481
		principal and agent	481

	SEC.		SEC.
Complaint—Continued.		Consolidating causes.	
private injury	481	when allowed in same court	817
promissory note	481	by plaintiff	819
property, exchange	481		
purchase of land	481	Conspiracy.	
real property, injury by overflow	481	complaint, contents	481
rent, action for	481	demurrer	488
separation agreement	481		
service by publication, application		Constables.	
for judgment	1212	fees when attending court	3312
services	481		
slander	481	Construction.	
stockholders' actions	481	rules of	3343
supplemental	544		
taxpayers' action	481	Contempts.	
trusts	481	criminal, power of justice of the	
variances, how provided for when		peace	2870
material	539		
workmen's compensation	481	Continuation.	
		proceedings commenced before an	
		other judge	26
Comptroller.		Contracts.	
money paid into court, examination		judgments taken by default in cer-	
of books of depositories	744a	tain actions upon contracts	1216
annual reports to	753		
		Contributory negligence.	
Condemnation proceedings.		to be pleaded and proven by defend-	
abandonment and discontinuance of		ant	841b
proceeding	3374		
answer, contents	3365	Controversies.	
appeal from final order; stay of		See <i>Arbitrations.</i>	
proceeding	3375	submission of, without process	1279
appearance of parties generally	3364	subsequent proceedings	1281
application to New York City rapid			
transit act	3388	Conversion.	
attorney's claim, payment into		action for, limitation	382, 383
court of amount to secure	743	complaint	481
award of damages, limitation of			
proceeding to compel	382	Conveyances.	
claimants, conflicting	3378	of record, as evidence	935
commissioners, duties and powers	3370		
costs	3369	Convict.	
judgment	3369	not excluded as witness	832
how enforced	3373	proof of conviction	832
to bear entry	1211		
notice to be annexed to petition,		Coroner.	
service	3361	duties when sheriff a party	172
offer to purchase by plaintiff	3372		
costs	3372	Corporations.	
order when not final	190	actions relating to, action against	
partition, contents	3360	corporation upon a note	1778
petitioner defined	3358	corporate existence, proof when	
possession, party may stay in, on		unnecessary	1776
giving security	3379	foreign corporation, when suit	
practice in cases not herein pro-		may be maintained against	1780
vided for	3382	when suit may be maintained	
proceedings to be taken as pre-		by	1776
scribed	3359	complaint	481
report, confirmation	3371	stockholder's action, limitation	388
temporary possession pending pro-		county courts, when deemed resi-	
ceedings	3380	dents for purposes of jurisdiction	341
trial	3367	deposition, contents of affidavit in	
		application for	872
Conditions precedent.		domestic, service of summons upon	436
how pleaded	533	by publication	438
		foreign, certificates of stock, when	
Consideration.		subject to attachment	647
seal presumptive evidence	840		

	SEC.		SEC.
Corporations—Continued.		County clerks.	
limitations of actions against...	390	fees for entry of moneys deposited	
computation of period.....	390a	with county treasurer.....	3306a
service of summons upon....	431, 432	generally	3304
by publication	438	in Greater New York....	3332a, 3332b
how made	436	3332c, 3332d	
in justices' court	2879	oaths and affidavits may be taken	
unpaid subscriptions, attach-		before	842
ment	646	County courts.	
stockholders' actions, complaint..	481	defendants to be residents of	
misnomer, when waived.....	1777	county	340
		domestic corporations, when deemed	
		residents	341
		equitable relief	340
		joint-stock associations, when	
		deemed residents	341
		judge incapable to act, certificate of	
		disqualification	342
		judgments, opening	340
		jurisdiction, action against city of	
		New York	341
		co-extensive with supreme court.	348
		counterclaims	340
		demand for \$2,000.....	340
		limited	340
		railroads operating within county	341
		test	340
		summons, personal service on dom-	
		estic corporations	341
		joint-stock associations	341
Costs.		County judge.	
<i>See Surrogates' Code.</i>		<i>See Surrogates' Code.</i>	
additional allowances in difficult		justice of supreme court, exercise	
cases	3253	of duties	241
allowances limited	3254	County treasurer.	
amount general	3251	administrator, acting as.....	2593
certiorari, on hearing for writ....	2143	deposits of moneys and securities	
condemnation proceedings	3369, 3372	with	2699
court of claims, not to be taxed...	274	Court of appeals.	
defendant when entitled of course..	3229	appeals, allowances	191
to increased	3258	from judgments in actions tria-	
disbursements to be included.....	3256	ble by court.....	190
discretionary	3230	appeals to, appeal from final judg-	
executories, etc., by or against....	3246	ment rendered after affirmance	
final judgment, upon appeal from.	3238	of interlocutory judgment ..	1336
foreclosure, partition, etc., addi-		entry of order.....	191
tional allowance to plaintiff....	3252	final order in proceeding to com-	
justices' courts	3047	pel production of will.....	190
motion	3236	fraud alleged	191
municipal corporation, against....	3245	from final judgment after affirm-	
plaintiff when entitled of course..	3228	ance of interlocutory judgment	
security, after action commenced.	3269	or denial of new trial.....	1350
additional	3276	from order on writ of habeas	
defendant, when required to		corpus or certiorari, admission	
give	3268	to bail	2062
order to give	3272	from order of appellate division	
when defendant may require...	3258	affirming special term	191
special proceeding	3240	judgment absolute	194
state, against	3241	jurisdictional questions	190
taxation	3262	notice of entry of judgment, ser-	
retaxation	3264	vice	191
review	3265	question certified	190
transfer of cause of action....	3247, 3347	questions brought up for review.	1337
when several issues of fact.....	3234	remittitur	194
		review of question of fact.....	191
Counterclaim.			
<i>See Answer.</i>			
affirmative judgment, when defend-			
ant to demand.....	509		
allowance, rules respecting.....	502		
avoidances, plaintiff may set forth			
several	517		
deemed an action	974		
defendant may interpose several..	507		
defined	501		
demurrer to	495		
must specify grounds.....	496		
judgment, costs	503		
judgment when demand and count-			
erclaim are equal or unequal....	503		
plaintiff executor or administrator.	506		
reply, contents	514		
judgment upon failure.....	515		
where court may require.....	516		

	SEC.		SEC.
Court of appeals—Continued.		Court of claims—Continued.	
security to perfect.....	1326	re-established	263
to stay execution directing conveyance	1330	rules	265
sureties, exceptions to, justification	1335	sessions, adjourned	268
unanimous decision	191	conduct by one or more judges..	268
when reversal presumed not to be on question of fact.....	1338	sheriffs, duties	268
auxiliary orders, not appealable..	190	special	268
dismissal of appeal by appellate division operating as affirmance.	190	times and places of holding.....	268
errors of law	191	stenographers	266
jurisdiction in civil actions.....	190	expenses	280
limitation, exceptions and conditions	191	salaries	280
questions of law, review of.....	191	testimony, view of premises.....	268
questions of weight of evidence...	191		
review of order of affirmance of appellate division	190	Creditors.	
two actions pending	191	See <i>Surrogates' Code.</i>	
		judgment, action by, to what county execution must have issued....	1872
Court of claims.		when may maintain action....	1871
See <i>Board of Claims.</i>		limitation of action against executor, etc., on claim rejected.....	1822
attendant	266	next of kin, legatees, etc., action against	1837
expenses	280		
salary	280	Death.	
calendar practice	284	See <i>Negligence.</i>	
claims, disposition of conflicting and adverse	268a	presumption of in certain cases...	841
dismissal	284		
clerk, appointment	266	Death of party.	
bond	266	See <i>Abatement and Revival.</i>	
expenses	280	action for penalty does not survive for wrong not abated by death, when	764
salary	280	limitation of action, when person liable dies without state.....	403
commissioners of claims abolished.	263	part of cause of action surviving..	759
continuation for disposition of claims submitted	263	proceedings to bring in parties....	760
costs not to be taxed	274	testimony of deceased party.....	830
deputy clerks salaries.....	280	verdict after death void.....	765
determinations, number of judges to concur	268		
employees	266	Debtors.	
judges, additional to serve till 1918.	282	joint, judgment against.....	1932
assignment	283		
expenses	279	Decedent's estate.	
number, appointment, terms, qualifications	263	See <i>Executors and Administrators; Surrogates' Courts.</i>	
presiding judge	263	accounting, action for, complaint..	481
salaries	279	costs in action relating to.....	1836
judgment, number of judges to concur	268	creditor's action against next of kin and legatees	1837
validity	269	execution against executor, etc., leave to issue	1825
jurisdiction	264	against decedent's property.....	1380
damages, determination	264	executors, etc., actions by or against to be brought in representative capacity	1814
lands, validity of title.....	264	complaint	481
land, appropriation, notice of intention to be filed	264	foreign executors, etc., actions by or against	1836a
assignment of judges	283	heirs and devisees, when action for debts of decedent may be brought against	1844
messenger	266	legatee, action against executor, etc.	1819
minutes, testimony or paper furnished to attorney-general, no charge	280	limitation of action by creditor on rejected claim	1822
officers and employees.....	266	next of kin, etc., action against may be joint or several	1838
officers, salaries	280	personal and representative causes of action may be joined.....	1815
procedure	265		
authentication of decisions.....	265		
determination by judge, hearing testimony	265		

	SEC.		SEC.
Decedent's estate—Continued.		Depositions—Continued.	
real property, effect of application to sell	1845	evidence	911
receiver as successor of surviving executor, etc.	1869	how and upon what terms granted	889
wills, proof of lost	1865	interrogatories to be annexed	892
probate, complaint	481	letters rogatory	913
when action to establish may be brought	1861	open commission	897
when relating to real property	1866	parties may inspect	909
		return where to be kept	909
		when commission to issue	887
		witness's inability to attend, proof	882
Deceit.		Devises.	
action for, limitation	382	See <i>Decedent's Estate; Executors and Administrators.</i>	
Defendants.		Disbursements.	
See <i>Answer; Appearances; Attachment; Demurrer; Parties.</i>		to be included in bill of costs	3256
Defenses.		Discovery of books and papers.	
See <i>Answer; Counterclaim; Pleadings.</i>		court may direct	803
Definitions.		order	805
action defined	3333	petition	805
miscellaneous	3343	photographs included	803
Demurrer.		District attorney.	
amendment of pleadings, effect	542	when to act as surrogate	2478
amendments in certain cases after decision of demurrer	497	proof of authority, how made	2479
decision of court	1021	superseded	2481-2483
defendant must demur or answer	487		
may demur to reply	493	Divorce.	
filing not waiver of jurisdictional question	421	alimony, expenses, costs, how awarded	1769
grounds of objection to be specified	490	answer	1757
justices' courts	2939	cases when action may be maintained	1756
mandamus, to first writ	2073	children, custody and maintenance	1771
to return	2078	enforced by punishment for contempt	1773
objection when deemed waived	499	sequestration	1772
plaintiff may demur to answer	494	counterclaim, what deemed	1770
report of referee	1021	denied, when	1758
to counterclaim	495	judgment by default	1757
must specify grounds	496	can be rendered only by court	1229
when defendant may demur	488	regulations, interlocutory	1774
		regulations when action brought by husband or wife	1761
Depositions.		by wife	1759
See <i>Evidence; Orders; Real Property; Witnesses.</i>		service of summons by publication	438
adverse party infant or committee	895	summons and complaint, indorsement	1774
application for, contents of affidavit	872	support of plaintiff	1771
motions, to be used on	885	enforced by punishment for contempt	1773
of party or person expecting to be a party	870	sequestration	1772
of witness not a party	871	trial, mode of	1757
order for examination	873		
service	875	Docket.	
taking and returning	880	See <i>Judgments.</i>	
within state, for use without state, in what cases may be taken	914	Docket books.	
subpoenas to witnesses	915	See <i>Judgments.</i>	
taking and return	919	current, in New York and Bronx counties	1245a
without state, commission by consent	909	Documents.	
commission to examine wholly or partly upon oral questions	893	See <i>Evidence; Records.</i>	
commission or order to take	901		
directions for return of commission	892		

	SEC.		SEC.
Dower.		Evidence—Continued.	
<i>See Real Property.</i>		physicians not to disclose profes-	
Drunkards.		sional information	834, 836
<i>See Incompetents.</i>		records in certain offices, copies pre-	
Erie county.		sumptive evidence	933
note of issue, new note not to be		in surrogates' offices, searching	
filed for succeeding term.	977	and certifying	961
notice of trial, new notice not to be		seal presumptive evidence of con-	
served for succeeding term.	977	sideration	840
preferred causes, motion for.	793	unoccupied lands in actions for re-	
surrogate's court, officers and at-		covery of, injury to, etc.	960
tendants	2493	witness, when not excused from tes-	
public administrator	2595	tifying	837
stenographer	2495	Exceptions.	
Errors.		case, how made and settled.	997
errors of law.	191	when appeal heard without.	998
writ or process when not to vitiate.	24	when necessary	997
Escheats.		remarks or comments of judge, sub-	
<i>See Real Property.</i>		ject to review.	1323a
Evidence.		ruling excepted to, how reviewed.	996
<i>See Depositions; Exceptions; Real Prop-</i>		rulings that may be excepted to.	992
<i>erty; Subpoenas; Surrogates' Code;</i>		to findings of fact.	993
<i>Witnesses.</i>		when and how taken, after close of	
certificates on file.	922	trial	994
affidavits on file	922	during trial or on trial by jury.	995
attorneys not to disclose communi-		Executions.	
cations	835	<i>See Justices' Courts.</i>	
certificates on file.	922	against the person, execution	
contributory negligence to be		against property must be first	
pleaded and proven by defendant	841b	issued	1489
conveyances as	935	new execution when creditor dis-	
may be rebutted.	936	charges debtor after thirty	
convict not excluded as witness.	832	days	1494
proof of conviction.	832	when issued	1487
copies of records, etc., form of cer-		bailor, interest in goods pledged	
tificate	957	may be sold.	1412
death, presumption of in certain		bond, discharge by operation of	
cases	841	law	111
deceased or insane person or absent		claim of property by third person,	
nonresident, testimony of.	830	how tried	1418
documents, effect of failure to pro-		decendent's property, against	1380
duce on notice.	962	executors, etc., against, leave to is-	
from foreign countries, authenti-		sue	1825
cation	956	exemptions, additional	1391
on file in U. S. departments,		for benefit of family.	2670
copies as evidence.	944	set-off proceedings to compel.	2671
examination of party, when not al-		military pay, rewards, etc.	1393
lowed	829	imprisonment, limit	111
heirship in deeds, recitals as to.	841b	issuance after five years.	1377
husband and wife, not competent to		judgments enforceable by.	1240
testify against each other, ex-		justices' courts, renewal.	3027
ceptions	831	vacancy in office of justice.	3146
of party in interest not excluded		kinds	1364
from testifying	828	personal property, bound by.	1405
instruments that may be acknowl-		terms may be imposed on grant-	
edged	937	ing order for sale.	1423
laws of another state.	942	process of court.	1364
notary public's certificate.	923	property, description in notice of	
protest and memorandum	924	sale	1435
nurses, professional or registered,		public officer, against, when not to	
not to disclose professional infor-		issue	1931
mation	834, 836	real property, leasehold property	
ordinances as evidence.	941	subject to	1430
party in interest not excluded from		requisites	1366
testifying	828	sale, redemption avoids.	1448
		surrogate's court, stay by appeal.	2557
		wages and other income, against.	1391
		woman, against	1488

	SEC.		SEC.
Executors and administrators.		Funeral expenses.	
See <i>Decedents' Estates; Surrogates' Code.</i>		See <i>Surrogates' Code.</i>	
accounting, limitations of actions to		Garnishment.	
set aside	382	See <i>Executions.</i>	
action for, complaint	481	wages and other income	1391
actions by or against to be brought		General guardian.	
in representative capacity	1814	See <i>Surrogates' Code.</i>	
complaint	481		
costs	1836	Great Britain.	
administrator's action, limitation	383	probate of wills of citizens of the	
pleading representative capacity	481	United States, domiciled in	2608
bond, cost of	3320	Greater New York.	
costs by or against	3246	fees of county clerks, registers, re-	
counterclaim in action by	506	cording officers	3332a, 3332b
execution against, leave to issue	1825	3332c, 3332d	
executor's action, limitation	383	Guardians.	
foreign, action by or against	1836a	See <i>Surrogates' Code.</i>	
legatee or heir, action by to recover		ad litem, responsibility	469
distributive share	1819	in justices' courts	2887
limitation of action by creditor on		security	474
rejected claim	1822	appointment without application	477a
personal and representative causes		bonds, cost of	3320
of action may be joined	1815	Habeas corpus.	
receiver as successor of surviving		See <i>State Writs.</i>	
executor, etc.	1869	ad testificandum	2008
Fact.		qualified	2011
See <i>Issues.</i>		application, how and to whom made	2017
Fees.		cause of detention, to inquire into,	
See <i>Surrogates' Code.</i>		admission to bail, on appeal to	
certifying prepared copies	3305a	court of appeals	2062
civil cases, provisions applicable to		appeals	2058
only	3332	by people	2059
clerks of court, generally	3301	discharge in civil cases	2034
performing functions of county		when to be granted	2043
clerks	3306	prisoner may controvert return,	
constables attending courts	3312	proofs thereupon	2039
county clerks, entries of moneys de-		proceedings on irregular commit-	
posited with county treasurer	3306a	ment	2035
generally	3304	on return	2031
county treasurer and chamberlain		when not allowed	2016
of New York	3321	when prisoner to be remanded	2031
deputy sheriffs attending courts	3312	who entitled to prosecute	2015
Greater New York county clerks,		disobedience, proceedings	2028
registers, recording officers	3332a	other writs, application of article	2066
3332b, 3332c, 3332d		Habitual drunkards.	
jurors, additional	3314	See <i>Incompetents.</i>	
officers, certain, taxable on demand	3287	Heirs.	
printers	3317	See <i>Decedents' Estate; Executors and Ad-</i>	
receivers	3320	<i>ministrators; Surrogates' Code.</i>	
referee's, sales of real property	3297	Heirship.	
generally	3296	in deeds, recitals as to	841b
registers	3306	Hospital records.	
sheriff's, generally	3307	subpoenas duces tecum relating to	867a
stenographers'	3311	Husband.	
witnesses', generally	3318	See <i>Surrogates' Code.</i>	
Forcible entry and detainer.		Husband and wife.	
See <i>Real Property.</i>		not competent to testify against	
Forfeiture.		each other, exceptions	831
See <i>Penalty or Forfeiture.</i>		of party in interest, not excluded	
Fraud.		from testifying	828
limitation of action	382, 388	recovery of goods sold wife, com-	
Funds.		plaint	481
See <i>Public Funds.</i>			

	SEC.		SEC.
Idiots.		Injunction—Continued.	
<i>See Incompetents.</i>		time of granting.....	608
Imprisonment.		proof necessary to procure.....	607
<i>See Executions.</i>		right to depending on extrinsic facts	604
		on nature of action.....	603
Incompetents.		security on staying proceedings...	607
<i>See Depositions; Surrogates' Code.</i>		in other cases.....	620
committee of person, compensation.	2338	state officers, restrictions when	
expenses of commission.....	2333	sought to be restrained.....	605
order for commission.....	2327		
payment of judgment by.....	2321	Insane person.	
proceedings for appointment, no-		<i>See Incompetents.</i>	
tice	2325a	testimony	830
subject of inquiry by commis-			
sion	2335	Interlocutory proceedings.	
upon hearing for appointment.	2331	<i>See Pleadings; Practice Regulations.</i>	
upon verdict or return of com-			
mission	2336	Interpleader.	
security to be given by committee	2337	by order in certain cases.....	820
when foreign committee may be		in actions on contract.....	820a
appointed	2326		
committee of property, bond to be		Interpreters.	
given on sale, etc., of real prop-		Kings county surrogate's court....	2494
erty	2351		
approval of bond.....	2354	Interrogatories.	
actions, may maintain.....	2340	<i>See Depositions.</i>	
disposition of proceeds on sale,			
etc., of real property; ac-		Ireland.	
counting	2361	probate of wills of citizens of	
property on death of incompet-		United States, domiciled in.....	2608
ent	2344		
inventory and account..	2341, 2342	Issues.	
committees, bond, cost of.....	3320	defined	963
insane person, action on bond for		different kinds	963
release, complaint	481	either party may bring to trial....	980
summons, service upon.....	427	of fact, where triable.....	990
supreme court, jurisdiction	2320	triable by jury.....	968
witness, court may examine.....	850	when of right.....	970
		of law, where triable.....	990
Infants.		order of trial	966, 967
<i>See Depositions; Surrogates' Code.</i>		separate trial of one or more issues	973
defendant, when judgment cannot be		severance where issues of law and	
taken against	1218	of fact presented.....	1220
guardians ad litem for infants sued.	469	triable before one judge.....	976
security	474	triable by court.....	969, 972
guardians, bond, cost of.....	3320	trial by jury, when discretionary..	971
appointment without application.	477a	when of right.....	970
ad litem in justices' court.....	2887	trial, regulation in supreme court..	978
limitations of actions, exceptions			
as to	396	Joinder.	
personal service of summons upon.	426	<i>See Parties.</i>	
	427		
real property, sale, etc., contents of		Joinder of causes.	
petition	2350	<i>See Consolidating Causes.</i>	
disposition of proceeds; account-			
ing	2361	Joint debtors.	
witness, court may examine.....	850	<i>See Debtors.</i>	
Inferior city courts.		Joint-stock associations.	
appeal	3213	county courts, when deemed resi-	
		dents for purposes of jurisdiction	341
Injunction.		deposition, contents of affidavit in	
damages, how ascertained.....	623	application for	872
costs	623	service of summons upon.....	436
expenses not part of.....	623		
enforcement	1241		
granted by whom.....	606		
order, application to vacate or			
modify	627		

	SEC.		SEC.
Judges.		Judgments—Continued.	
See <i>Court of Claims; Surrogates' Code.</i>		enforceable by execution.....	1240
continuation of proceedings com-		by punishment for disobedience.....	1241
menced before another.....	26	entry.....	1236
county judge incapable to act.....	342	where entered.....	1345
oaths and affidavits may be taken		final, costs upon appeal.....	3238
before.....	842	how pleaded.....	532
remarks or comments, subject of		how taken after trial of issues of	
review.....	1323a	law and fact in same action...	1221
vacancies, etc., no discontinuances..	25	proceedings.....	1223
Judgment creditors.		infant defendant, when judgment	
See <i>Creditors.</i>		cannot be taken against.....	1218
Judgment debtors.		interest, to bear.....	1211
See <i>Supplementary Proceedings.</i>		interlocutory, may be reviewed...	1316
Judgment-roll.		notice of appeal to specify.....	1301
See <i>Judgments.</i>		judgment-roll, contents.....	1237
Judgments.		opinion of appellate division	
See <i>Condemnation Proceedings; Justices'</i>		deemed part of.....	1237
<i>Courts; Supplementary Proceedings.</i>		to be filed.....	1237
absolute on appeal to court of ap-		lien of, not in effect until docketed.	1250
peals.....	194	on real property.....	1251
action on regulated.....	1913	suspension upon appeal.....	1256
chattels, replevin.....	1730, 1731	limitations of actions, suspension on	
amount for plaintiff not to exceed		reversal of judgment.....	405
judgment demanded.....	1207	matrimonial actions, regulations, in-	
annulment in action for, how far		terlocutory.....	1774
conclusive.....	1754	matrimonial causes, judgment can	
limitation of action.....	388	be rendered only by court.....	1229
appeal from final judgment after		motion for on the pleadings.....	547
affirmance of interlocutory judg-		New York city court, execution	
ment or denial of new trial.....	1350	without city.....	338
appeals from to appellate division.	1346	on appeal.....	1317
appeals in actions triable by court.	190	proceedings after trial by court or	
application for in case of service by		referee of issue of fact.....	1228
publication.....	1212	real property, limitations of actions	369
assignment, clerk to file and note.	1270	action to determine.....	1644, 1645
city court of city of New York,		satisfaction-piece to be given on	
limit.....	315	payment.....	1261
amended judgment.....	3188	satisfaction when presumed.....	376
vacation in certain cases.....	319b	what constitutes judgment or de-	
conclusive on defendant served with-		creed.....	376
out state.....	443	separation, may be revoked.....	1767
confession of.....	1273	setting aside for irregularity, mo-	
entry.....	1275	tion for.....	1282
statement from.....	1274	severance where issues of law and	
to be filed.....	1275	of fact presented.....	1220
counterclaim, upon.....	503	special verdict, motion on.....	1233
upon failure to reply to.....	515	specific questions of fact, after jury	
county court, opening.....	340	trial of.....	1225
court of claims, number of judges		submission of controversy without	
to concur.....	268	process.....	1279
validity.....	269	taken by default in certain actions	
default, taken on, application.....	1214	on contract.....	1212
actions on contract.....	1212	verdict, interest on to be included	
proceedings.....	1215	in recovery.....	1235
defects cured by.....	721	Judicial settlement.	
defendants in default entitled to		See <i>Surrogates' Code.</i>	
notice.....	1219	Jurors.	
severally liable.....	456	See <i>Surrogates' Code.</i>	
discharge of judgment against		additional fees.....	3314
bankrupt.....	1261	justices' courts, oath.....	2998
dismissing complaint, effect.....	1209	mileage.....	3314
docket, how canceled.....	1260	Jury.	
docket books, current in New York		See <i>Surrogates' Code.</i>	
and Bronx counties.....	1245a	challenges, how tried.....	1180
		challenges in civil actions, peremp-	

	SEC.		SEC.
Jury—Continued.		Justices' courts—Continued.	
tory	1176	town where action must be brought	2869
damages in action to recover money,		transfer of action when justice wit-	
to assets	1183	ness	3151
discharge on failure to agree	1181	verdict, rendition	3007
partition, issues of fact triable by		Justices of the peace.	
jury	1544	oaths and affidavits may be taken	
trial by, how waived	1009	before	842
Jury trial.		Kings county.	
See <i>Issue; Surrogates' Code; Trial.</i>		See <i>Surrogates' Code.</i>	
Justices' courts.		note of issue, new note not to be	
adjournment by justice	2959	filed for succeeding term	977
on application of defendant	2961	notice of trial, new notice not to be	
of plaintiff	2960	served for succeeding term	977
answer	2938	preferred causes, motion for	793
appeals	3044	surrogate's court, interpreters	2494
amendment, when allowed	3049	Landlord and tenant.	
costs and fees	3047, 3066	relation as affecting adverse posses-	
court to which taken	3045	sion	373
hearing	3062	Lands.	
judgment where new trial not had		See <i>Real Property.</i>	
in appellate court	3063	claim for appropriation by state,	
new trial in justice's court may be		filing of notice of intention	264
directed	3064	injury to, complaint	481
proceedings in appellate court	3071	unoccupied, evidence in action for	
service of notice upon justice	3047	recovery of, injury to, etc.	960
upon respondent	3048	Laws.	
when appellant may demand new		of another state as evidence	942
trial in appellate court	3068	Legacies.	
offer to compromise	3070	See <i>Surrogates' Code.</i>	
undertaking to be given	3069	Legatees.	
to stay execution	3050	See <i>Surrogates' Code.</i>	
when and how taken	3046	creditor's action against	1837
bill of particulars	2942	Letters of administration.	
books and papers, deposit with		See <i>Surrogates' Code.</i>	
town or city clerk	3144	Letters of guardianship.	
complaint	2936	See <i>Surrogates' Code.</i>	
criminal contempt	2870	Letters patent.	
demurrer	2939	action to vacate	1957
executions upon judgments docketed		Letters testamentary.	
with county court	3043	See <i>Surrogates' Code.</i>	
renewal	3027	Libel.	
guardian ad litem	2887	complaint	481
joinder of causes of action	2937	pleadings	535
judgment where new trial not had		publication in newspaper, when ac-	
in appellate court	3063	tion cannot be maintained for	1907
judgments, transcript	3017	headlines	1908
jurisdiction, civil	2862	Liens.	
must be specially conferred by		removal of action to enforce from	
law	2861	city court of city of New York to	
none where state a party	2863	supreme court	319a, 319b
for premiums for workmen's		Life tenant.	
compensation insurance fund	2863	See <i>Real Property.</i>	
juror's oath	2998		
justice, death or vacancy, papers.			
judgments, executions	3146		
powers	2868		
mandates, general requisites	3135		
non-suit, judgment of	3013		
plaintiff to prove his case, when	2891		
pleading, general rules	2940		
summary proceedings, answer of			
title	2951		
undertaking thereupon	2952		
summons, contents	2877		
blank left in	3135		
service	2878		
upon corporation	2879		

	SEC.		SEC.
Limitations of actions.		Limitations of actions—Continued.	
<i>See Surrogates' Code.</i>		separation	388
account current	386	specific performance	388
accounting of executor	382	stockholder's action	388
acknowledgment or new promise to		suspension on reversal of judgment.	405
be in writing	395	testamentary trustees, recovery of	
actions against foreign corporations	390	excessive fees	382
	390a	trustees de son tort	382
against sheriff	385	when action deemed commenced . . .	398
not provided for	388		
to redeem from mortgage	379	Lunatics.	
administrator's action	383	<i>See Incompetents.</i>	
adverse possession, relation of land-		Magistrates.	
lord and tenant	373	city, oaths and affidavits may be	
alienation of affections	382	taken before	842
application of statute, operation of		Mandamus.	
general rule extended	414	<i>See State Writs.</i>	
attempt to commence action, service		alternative or peremptory	2067
of summons	399	alternative writ, demurrer thereto.	2076
breach of duty	382	how granted	2067
breach of promise of marriage	382	amendment of proceedings when	
computation when against foreign		certiorari appropriate remedy . . .	2148a
corporation	401	appeals	2087
condemnation, proceeding to com-		from orders to appellate division.	1356
pel award of damages	382	damages, when relator to recover.	2088
conversion	382	issues of fact	2079
decedents' estate, action by cred-		peremptory writ, when to issue in	
itors on rejected claim	1822	first instance	2070
deceit, action for	382	return, from and contents	2077
demand essential to cause of action	410.	return or demurrer to first writ . . .	2073
equitable actions	382, 388	further cannot be compelled . . .	2078
exceptions as to persons under dis-		special term, granted at	2068
ability	396	Mandates.	
executor's action	383	county courts, personal service on	
forged check	382	domestic corporations and joint-	
fraud	382	stock associations	341
fraudulent concealment	382	justices' courts, general requisites.	3135
grade, action to recover damages		New York City court, what may be	
for change of	382	executed without city	338
insurance moneys	382	Marine causes.	
judgments when satisfaction pre-		removal of action from city court	
sumed	376	of city of New York to supreme	
life insurance policy, action to cor-		court	319a. 319b
rect error	382	Marriage.	
money had and received	382	<i>See Breach of Promise of Marriage.</i>	
mortgages, actions to set aside . . .	388	Mayors.	
negligence	384	oaths and affidavits may be taken	
New York City, claim against	382	before	842
nonresident, where demand barred		Mechanic's Lien.	
by law of residence	390	complaint	481
periods of limitation, mode of com-		Money.	
puting	415	damages in action to recover, jury	
people, actions by	389	to assess	1183
person liable, dying without state.	403	instrument for payment of, how	
pleading of statute	382	pleaded	534
promissory notes	382	Money had and received.	
real property, adverse possession		action for, limitation	382
not founded on written instru-		complaint	481
ments	371. 372		
under written instrument or judg-			
ment	369		
what constitutes	370		
registration of title	362		
seizin within twenty years neces-			
sary	365		
rents, recovery of deposit to secure	382		
to recover	382		
sealed instruments	381		

	SEC.		SEC.
Money paid into court.		Negligence.	
annual reports to comptroller.....	753	action for causing death by.....	1902
attorney's claim in condemnation		amount of recovery	1904
proceedings, payment of amount		attachment, warrant	635
to secure	743	damages, distribution	1903
comptroller may examine books of		next of kin defined.....	1905
depositories	744a	action for, limitation.....	384
funds not to be surrendered without		complaint, contents	481
court order	751	contributory, to be pleaded and	
party bringing money into court		proven by defendant	841b
discharged	738		
payment or reinvestment.....	745, 747	Negotiable instruments.	
transfer to county treasurers.....	744a	checks, breach of agreement to pro-	
		cure indorsement and delivery..	481
		promissory notes, action against	
		corporation upon	1778
		complaint	481
		limitation of action.....	382
		renewing so as to take out of	
		statute of limitations.....	395
Monroe county.			
note of issue, new note not to be		New trial.	
filed for succeeding term.....	977	See <i>Trial.</i>	
notice of trial, new notice not to be			
served for succeeding term.....	977	New York city.	
		See <i>City Court of City of New York;</i>	
Mortgages.		<i>Greater New York; Municipal Court of</i>	
See <i>Real Property.</i>		<i>City of New York.</i>	
actions to redeem, limitations.....	379	chamberlain, fees	3321
to set aside, limitations.....	388	claim against, limitation of action.	382
foreclosure, complaint to state		county courts, jurisdiction in action	
whether other action brought..	1629	against	341
complaint when to be dismissed			
on payment of sums due....	1634	New York county.	
contents	481	docket books, current.....	1245a
conveyance on sale, effect.....	1632	note of issue, new note not to be	
officer making sale, duties.....	1633	filed for succeeding term.....	977
other actions for mortgaged debt,		notice of trial, new notice not to be	
when prohibited	1628	served for succeeding term.....	977
person liable for mortgage debt		preferred causes, motion for.....	793
may be made defendant....	1627	treasurer, fees	3321
people made party.....	1627		
surplus, disposition of.....	1633	New York state.	
by advertisement. foreclosure		costs against	3241
sale, deed not necessary....	2400	dower, people may be joined as de-	
limitations	2408	fendants in action for.....	1598
notice of sale, how given....	2388	justice's court to have no jurisdic-	
when mortgage may be fore-		tion where people a party.....	2863
closed	2387	limitation of actions, where people	
foreclosure sale, proof of cause of		a party	389
action on substituted service of		mortgage foreclosure, people made	
summons	437	party	1627
		partition, people interested.....	1594
Motions.		people, action in behalf of, attor-	
costs, how collected.....	779	ney-general may maintain....	1948
deposition to be used on.....	885	when not required to give se-	
definition	768	curity	1990
notice of, to be eight days.....	780		
order to show cause returnable in		Newspaper.	
less than eight days.....	780	libel, when action cannot be main-	
municipal court of city of New York		tained for	1907
appeals from	1344	none in county or city, publication	
time judgment to run.....	376	of notices, etc.	826
Municipal corporations.		Next of kin.	
when not required to give security.	1990	creditor's action against.....	1837
		defined	2768
Nassau county.			
note of issue, new note not to be			
filed for succeeding term.....	977		
notice of trial, new notice not to be			
served for succeeding term.....	977		

	SEC.		SEC.
Niagara county.		Orders—Continued.	
note of issue, new note not to be filed for succeeding term.....	977	punishment for disobedience.....	874
notice of trial, new notice not to be served for succeeding term.....	977	form	767
Nonresidents.		interlocutory, may be reviewed... 1316	
absent, testimony of	830	interpleader in certain cases.....	820
action on demand barred by law of residence	390	nature of	190
Nonsuit.		on appeal	1317
not allowed after jury retires.....	1182	preferred causes, when necessary..	793
Notary public.		publication in certain actions.....	786
certificate as evidence.....	923	stay of proceedings on appeal to ap- pellate division	1351
oaths and affidavits may be taken before	842	when not to exceed twenty days..	775
protest and memorandum as evi- dence	924	subsequent application after denial	776
Notice.		to show cause, granting of.....	780
publication, computation of time..	787	when returnable	780
Notice of pendency of action.		where entered	1345
See <i>Real Property.</i>		Ordinances.	
Notice of trial.		how read in evidence.....	941
See <i>Trial.</i>		Parties.	
Nuisance.		appearance in person or by attor- ney	55
action for, complaint.....	481	appearances in condemnation pro- ceedings	3364
Nurses.		certiorari, third person brought in..	2137
professional or registered, not to disclose professional information	834	defendants, severally liable, pro- ceedings in action against.....	456
	836	when unknown	451
Oaths.		who may be joined as.....	447
who may take.....	842	depositions by	870
Officers.		examination when not allowed....	829
See <i>Actions; Bonds and Undertakings;</i> <i>Public Officers; State Officers.</i>		infants, guardians must be ap- pointed	469
Onondaga county.		appointment without application. 477a	
note of issue, new note not to be filed for succeeding term.....	977	security of guardians.....	474
notice of trial, new notice not to be served for succeeding term.....	977	interpleader in actions on contract. 320a	
Orders.		in certain cases.....	820
See <i>Injunction; Surrogates' Code.</i>		joinder, parties united in interest..	448
affirmed or modified, mode of en- forcing	1320	persons liable for same demand may be sued together.....	454
appeals from, to appellate division. 1347		supplemental summons	453
when made out of court.....	1348	who may be joined as defendants	447
appeal to appellate division, trans- fer to another department.....	1355	plaintiffs	446
appellate division, power to grant. 1348		owners in severalty may be joined as plaintiffs	446
auxiliary, not appealable.....	190	parties in interest to sue.....	449
claims of creditors, publication of order to present.....	786	persons liable for same demand may be sued together	454
condemnation proceedings	190	poor persons	460
definition	767	severally liable, proceedings in ac- tion against	456
depositions, in proceeding for taking	190	trustees, may sue alone.....	449
entry on appeal to court of appeals	191	when court to order party to be brought in	452
where entered	1345	when one or more may sue or de- fend for all.....	448
examination of witnesses or parties	873	Partition.	
		See <i>Real Property.</i>	
		Penalty for forfeiture.	
		action by people.....	1962
		recovery of part.....	1898
		Partnership.	
		continuation of business during ac- counting	1947
		People of state.	
		See <i>New York State.</i>	

	SEC.		SEC.
Personal property.		Pleadings—Continued.	
<i>See Executions.</i>		supplemental	544
action affecting title, service of		costs	544
summons by publication	438	service, granted as matter of	
bailor, interest in goods pledged		course	544
may be sold on execution	1412	subsequent acts	544
defined	2768	to be subscribed	520
execution, bound by	1405	usury, answer setting up	536
Photographs.		variances, how provided for when	
discovery, court may direct	803	material	539
Physical examination.		when immaterial	540
order for	873	verification of answer by one of de-	
punishment for disobedience	874	fendants	523
Physicians.		affidavit, form	526
professional information, not to dis-		how and by whom made	525
close	834, 836	remedy for defective verification	
Plaintiff.		or want of verification	528
<i>See Complaint; Demurrer; Parties.</i>		required	523
Pleadings.		when defendant not excused from	
<i>See Answer; Complaint; Counterclaim;</i>		verifying answer to charge of	
<i>Demurrer; Practice Regulations; Sur-</i>		fraud	529
<i>rogates' Code; Tenders.</i>		Police justices.	
account, bill of particulars	531	oaths and affidavits may be taken	
how pleaded	531	before	842
affirmative judgment, when defend-		Poor persons.	
ant to demand	509	parties prosecuting and defending	
allegations not denied, when deemed		as	460
true	522	not liable for costs	461
indefinite or uncertain	546	petition, contents	464
irrelevant matter, motion to		Practice regulations.	
strike out	545	<i>See Complaint; Demurrer; Money Paid</i>	
amendments by court	723	<i>Into Court; Pleadings; Tenders.</i>	
of course	542	amendments by court	723
service of amended pleading	543	to conform proceedings	724
effect	543	bonds and undertakings	812
avoidances, plaintiff may set forth		bonds not affected by change of	
several in reply	517	party	815
complaint, dismissal for neglect to		to people or public officer	814
proceed	822	complaint, dismissal for neglect to	
to serve summons	821	proceed	822
conditions precedent, how pleaded	533	consolidating causes in same court	
construction to be liberal	519	by plaintiff	817
copy answer, service on co-defend-		defects cured by verdict and by	
ant	521	judgment	721
defenses or counterclaims, defend-		discovery of books, etc.	803
ant may interpose several	507	petition and order	805
defenses, partial	508	immaterial errors, disregarding	723
frivolous, how disposed of	537	interpleader by order in certain	
general statute need not be pleaded	530	cases	820
immaterial errors, disregarding	723	in actions on contract	820a
instrument for payment of money		notice of motion, to be eight days	780
how pleaded	534	omissions, relief against	724
irrelevant matter, motion to strike		orders in certain actions, how pub-	
out	545	lished	786
judgment, how pleaded	532	preferred causes	793
judgment on, motion for	547	civil actions	791
libel and slander	535	relief after expiration of time	783
mitigating circumstances in action		service of papers	797
for a wrong	536	time added when served through	
pleading over, extension of time	545	post office	798
private statute, how pleaded	530	time enlarged before expiration	781
proof, what deemed failure	541	when not to be extended	784
sham defenses to be stricken out	538		

	SEC.		SEC.
Preferred causes.		Real property.	
civil actions	791	See <i>Condemnation Proceedings; Executions; Incompetents; Mortgages; Surrogates' Code.</i>	
claim of preference in note of issue	793	action affecting title, service of summons by publication	438
ill health of plaintiff	791	action against whom to be brought	1502
motion for, in New York, Kings, Queens, Bronx and Erie counties	793	breach of covenant, action for, complaint	481
order for preference not appealable	793	claim to, action to determine, complaint	1639
service	793	judgment awarding possession	1644
when necessary	793	for plaintiff	1645
vacating order	793	proceedings	1642
Printers.		conveyances as evidence may be rebutted	936
fees	3317	action to set aside, complaint	481
Probate.		damages recoverable; set-off by defendant	1531
See <i>Surrogates' Code.</i>		decendent's, effect of application to sell	1845
Proceedings.		delivery to purchaser, how compelled	1675
See <i>Supplementary Proceedings.</i>		dower, action for, who may be joined as defendant	1598
continuation when commenced before another judge	26	action to determine, complaint	481
death or disability of attorney	65	damages may be recovered, how estimated	1600
publication, when no newspaper in county or city	826	liens to be ascertained	1617, 1621
vacancy, etc., in office of judge, no discontinuance	25	partition, provisions relative to applicable	1625
Process.		when action for cannot be maintained	1499
error, when not to vitiate	24	escheated, action to recover	1978
subscription and endorsement	24	estate of plaintiff, verdict to state	1519
special proceedings, service	433	evidence in actions involving title, depositions as evidence	1688i
Prohibition.		notice to appear	1688f
See <i>State Writs; Writ of Prohibition.</i>		referee, appointment	1688f
Proof.		to take deposition	1688g
See <i>Pleadings.</i>		forcible entry or detainer, treble damages	1669
Prostitution.		grantee of lands held adversely may maintain action	1501
See <i>Bawdy-houses; Real Property.</i>		heirship in deeds, recitals as to	841b
Provisional remedies.		infant's, sale, etc., petition	2350
See <i>Arrest; Attachment; Bail; Injunction; Receivers.</i>		approval of guardian's bond	2354
receivers, when appointed	713	disposition of proceeds, accounting	2361
Public funds.		injury by overflow, complaint	481
actions for when illegally obtained	1969	joint tenant, separate action by	1500
limitation of action	1973	may maintain action against co-tenant	1666
Public officers.		land in city consisting of strip less than six inches in width, when action cannot be maintained	1499
certificate on file with, as evidence	922	letters patent, action to vacate	1957
execution, when not to issue against	1931	lien of judgment, name of debtor to be docketed	1251
fees for certifying prepared copies	3305a	not in effect until docketed	1250
taxpayer's action against	1925	suspension upon appeal	1256
Publication.		life tenants, sale of real property in surrogate's court	2717
where no newspaper in county or city	826	limitations of actions, adverse possession not founded on written instrument	371, 372
Queens county.		under written instrument or judgment	369
note of issue, new note not to be filed for succeeding term	977		
notice of trial, new notice not to be served for succeeding term	977		
preferred causes, motion for	793		
surrogate's court, stenographer	2495		

	SEC.		SEC.
Real property—Continued.		Real property—Continued.	
what constitutes	370	person holding over land sold, re-	
registration of title	362	moval	2232
seizin within twenty years neces-		petition	2237
sary	365	same, forcible entry or detainer	2233
notice of pendency of action in two		petition, contents	2235
or more actions relating to real		precept, how served	2240
property	1670	answer	2244
effect of	1671	redemption by lessee	2256, 2258
notice, when and how cancelled	1874	restitution, appellate court may	
recording and indexing	1672	award	2263
parties in certain actions	1671a	stay	2265
partition, costs, additional allow-		warrant, issue	2251
ance to plaintiff	3252	when and how stayed	2254
commissioners, appointment	1549	who can maintain	2235
complaint	481	tenant in common, separate action	
creditors, reference to inquire as		by	1500
to	1561	trees, etc., action for cutting	1667
dower, sum to be paid to or in-		treble damages	1668
vested for person having right	1569	trespassers, persons holding over	
final judgment	1578	deemed	1664
effect upon incumbrancers	1578	waste, defendant how prevented	
future estates, interest of owners		from committing	1681
to be protected	1570	who liable for	1651
incumbrances, payment	1565		
interlocutory judgment	1546	Receivers.	
issues of fact triable by jury	1544	See <i>Provisional Remedies; Supplementary</i>	
parties, complaint to state inter-		<i>Proceedings.</i>	
est	1542	accounts, subject to control of court	2471
joinder	446, 447	appointment, security	715
provision where unknown	1541	filing with county clerk	715
title of may be tried	1543	commissions	3320
who may be made	1539	cost of bond	3320
parties who must be	1538	referee, court may consider as	827
tenants, sum to be paid to or in-		pendente lite, appointment	713
vested for	1569	property vested in	2468
when action may be brought	1532	rents and profit, to collect, appoint-	
by remainderman	1533	ment	713
state interested	1594	powers	716
persons bound by judgment in cer-		subject to control of court	2471
tain actions	1871a	without notice	714
purchase, complaint	481	Recognizance.	
by certain officers in actions relat-		to people, action on	1966
ing to, prohibited	1679		
receivers to collect rents and profit,		Records.	
appointment	714	See <i>Evidence; Surrogates' Code.</i>	
powers	716	certain, not to be removed by virtue	
recovery, action for, plaintiff may		of subpoena	866
recover damages	1496	copies, form of certificate	957
rent, action for, complaint	481	hospital, subpoenas duces tecum re-	
sales in actions relating to, how		lating to	867a
conducted	1678	in certain offices, copies presumptive	
officer to pay taxes, etc.	1676	evidence	933
referee's fees	3297		
security to stay execution on judg-		Referees.	
ment directing conveyance on ap-		See <i>Reference; Surrogates' Code.</i>	
peal to court of appeals	1330		
service of summons by publication		Reference.	
in action relating to	438	See <i>Real Property.</i>	
situate without state, place of		by consent, when and how made	1011
trial of actions relating	982a	provisions qualified	1012
summary proceedings, bawdy-		compulsory for trial of issues	1013
houses	2231	on question incidentally arising	1015
final order upon trial	2249	demurrer, report of referee upon	
lease, when canceled by warrant	2253	trial of	1021
notice to be given in certain cases	2236	issue of fact, report of referee	1022

	SEC.		SEC.
Reference—Continued.		Separation—Continued.	
particular questions, parties may require referee to determine.....	1023	sequestration	1772
referee's report, when to be made..	1019	complaint, requisites	1764
consequence of failure.....	1019	counterclaim, what deemed.....	1770
special in certain cases.....	827	judgment can be rendered only by court	1229
Registers.		may be revoked.....	1767
Greater New York.....	3332c, 3332d	regulations, interlocutory	1774
Relief.		limitation of action.....	388
after expiration of time.....	783	plaintiff's misconduct, defendant may set up	1765
Replevin.		service of summons by publication	438
See <i>Chattels</i> .		summons and complaint, indorsement	1774
city court of city of New York, removal of action to supreme court.	319a 319b	support of plaintiff.....	1771
Reply.		enforced by punishment for contempt	1773
See <i>Answer; Counterclaim; Pleadings</i> .		sequestration	1772
Revival.		wife and children, maintenance...	1766
See <i>Abatement and Revival</i> .		Service of process or papers.	
Richmond county.		methods	797
note of issue, new note not to be filed for succeeding term.....	977	time added when served through post office	798
notice of trial, new notice not to be served for succeeding term.....	977	Sheriffs.	
Satisfaction-piece.		actions against, limitations.....	385
to be given on payment of judgment	1261	attachment, duty as to satisfaction of judgment	708
Schenectady county.		action by	655
note of issue, new note not to be filed for succeeding term.....	977	plaintiff may bring action in name of	677
notice of trial, new notice not to be served for succeeding term.....	977	bail, when liable as.....	587
School trustee.		court of claims, duties as to sessions	268
action by	1926	deputy, fees when attending courts.	3312
designation in summons.....	1929	escapes, liability for.....	158
Seal.		fees, attendance upon sessions of court of claims.....	268
presumptive evidence of consideration	840	generally	3307
Secretary of state.		party to action, duties of coroner..	172
transmission of papers to, by surrogate	2489	replevin, indemnity in action for..	1711
Security.		affidavit required	1695
See <i>Surrogates' Code</i> .		Slander.	
appeals, limitation by court.....	1312	complaint, contents	481
costs, additional	3276	of woman	1906
people and municipal corporation, when not required to give.....	1990	pleadings	535
Separation.		Special guardians.	
agreement, action to set aside, complaint	481	See <i>Guardians; Infants; Parties; Surrogates' Code</i> .	
alimony, expenses, costs, how awarded	1769	Special proceedings.	
cases when action may be maintained	1762, 1763	appeal from order to appellate division	1356
children, custody and maintenance.	1771	costs	3240
enforced by punishment for contempt	1773	defined	3334
		service of process.....	433
		State comptroller.	
		transmission of papers to, by surrogate	2489
		State officers.	
		execution, when not to issue against	1931
		injunction to restrain, restrictions upon	605

	SEC.		SEC.
State writs.		Summons—Continued.	
See <i>Certiorari; Habeas Corpus; Mandamus; Prohibition; Writs.</i>		requisites	417
enumerated	1991	service, absent defendant, by publication	438
parties	1994	proof defendant not absent	438
relator	1994	designation by resident of person on whom to serve during absence	430
Statutes.		how to be made	436
how pleaded	530	order of on defendant residing in state, upon what proof to be made	435
Stay of proceedings.		proof of	434
orders for stay longer than twenty days	775	substituted, proof of cause of action in foreclosure sale	437
Stays.		upon natural person	436
See <i>Appeals.</i>		without state	443
Stenographers.		by U. S. marshal	443
See <i>Court of Claims; Surrogates' Code.</i>		failure to give notice	443
Albany county surrogate's court	2495	when defendant allowed to defend	445
fees	3311	service, by publication	438
taxation	251	action in personam	438
notes may be treated as minutes of judge on new trial	1007	relating to real property	438
Queens county surrogate's court	2495	affidavit, sufficiency	438
Westchester county surrogate's court	2495	annulment of marriage	438
Subpoenas.		by whom order made	440
book of account, production	867	concealment to avoid service	438
duces tecum, relating to hospital records	867a	deposit in post office	440
examination of witnesses for depositions for use without state	915	copy complaint or notice, when to be served with	420
how issued	854	divorce	438
issued out of court, how served	352	in Italian newspaper	22
records not to be removed pursuant to	866	effect of	438
witness, penalty for disobedience	853	failure to serve notice on defendant	442
Summary proceedings.		order, contents	440
See <i>Justices' Courts; Real Property.</i>		papers upon which made	439
Summons.		vacated, when	438
actions commenced by service of	416	validity	438
county courts, personal service of summons on domestic corporations	341	separation	438
complaint, dismissal for neglect to serve	821	title to property	438
domestic corporations, service of summons by publication	438	when deemed complete	441
personal service	431	when defendant allowed to defend when publication commenced	445
service upon	436	subscribing	55
foreign corporations, service by publication	438	Superior court of Buffalo.	
service upon	432	appeals from	1344
joinder of parties, supplemental	453	Supplementary proceedings.	
joint-stock associations, service of summons upon	436	continuance by adjournment	26
justices' courts, contents	2877	disobedience to order, how punished	2457
blank left in	3135	order permitting person indebted to pay sheriff	2446
service	2878	requiring delivery of money or property to sheriff or receiver	2447
upon corporation	2879	to examine judgment debtor after return of execution	2435
matrimonial actions, indorsement	1774	before return of execution	2436
personal service on infants	423, 427	person having property of judgment debtor	2441
on natural person, how made	426	orders, review	2433
		person not excused from answering on ground of fraud	2460

	SEC.		SEC.
Supplementary proceedings—Continued.		Surrogates' Code—Continued.	
proceedings commenced before one judge may be continued before another	2462	ACCOUNTING.	
upon examination; adjournment	2444	See subtitle, <i>Judicial Settlement</i> .	
process, service	433	"ACKNOWLEDGED, OR PROVED, AND DULY CERTIFIED."	
property that cannot be reached	2463	expression defined	2769
receiver, appointment	2484	ACTING SURROGATE.	
bond to be filed	2467	See subtitle, below, <i>Surrogate</i> .	
order to be filed	2467	official designation	2472
title to personal property, extended	2469	proceedings, where and how recorded	2509
remedies	2432	ADMINISTRATION.	
review of proceedings	2454	See subtitle, below, <i>Letters of Administration</i> .	
upon what judgment and to what country execution must have issued	2458	ADMINISTRATORS.	
Supreme court.		See subtitles, below: <i>Bonds; Judicial Settlement; Letters of Administration; Wills</i> .	
See <i>Surrogates' Code</i> .		bonds	2591, 2592
appeals to	1344	claims by, against estate, determination of	2679
appellate division, appeals to, appeal from order made in a special proceeding	1356	suspension of statute of limitations	2679
appeal papers	1353	effect of allowance	2680
from final judgment after affirmation of interlocutory judgment or denial of new trial, review in court of appeals	1350	commissions	2753
judgment	1346	contract of sale, execution of	2697
orders	1347	counsel fees, allowance	2692
surrogate's court	2754	county treasurer, acting as	2593
proceedings upon determination	2764	creditors, notice to	2677
hearing	1355	de bonis non, appointment bond	2606
limitation of time	1351	estate, custody where co-administrators disagree	2698
order to stay proceedings	1351	expenses incurred by, payment	2692
orders, power to grant	1348	funds of estates, to keep separate	2664a
transfer to another department	1355	letters of administration, issue upon foreign grant of administration	2630
causes when to be heard in another department	231	notice required, how given	2602
injunctions, right to grant or continue	606	official oath	2568
jurisdiction	220	permission to resign, application and proceedings	2572, 2573
writ of prohibition, when granted by	2093	persons incompetent to receive letters	2584
appellate term, first and second departments, appeals to	1344	property withheld, proceedings to discover	2675
county court, jurisdiction co-extensive	348	public administrator of Kings county, appointment, powers, etc.	2594
general jurisdiction	217	qualification	2605
justices, exercise of duties by county judge	241	real property, when authorized to receive rents	2701
removal of causes from city court of city of New York	319a, 319b	removal	2569-2571, 2574, 367
Sureties.		revocation of letters, deposit of securities	2700
See <i>Bonds and Undertakings; Surrogates' Code</i> .		successor, appointment	2583
Surrogates.		surviving, to act	2563
oaths and affidavits may be taken before	842	temporary, appointment, powers, etc.	2596, 2597
Surrogates' Code.		of absentee, may provide for family	2601
ABSENTEES.		powers as to paying debts	2599
real property, distribution for payment of distributive shares	2703	powers as to real property	2600
		powers as to requiring creditors to present claims	2598
		testamentary trustee, effect of acts when same person	2640

SEC.	SEC.
Surrogates' Code—Continued.	Surrogates' Code—Continued.
with will annexed, real property, powers as to	inventory, contents 2667
rights, powers and duties.	how made 2665
ADMINISTRATORS DE BONIS NON.	return of 2668
See subtitle, below, <i>Letters of Administra-</i> <i>tion.</i>	return of, how compelled. 2669
ADMINISTRATOR WITH WILL ANNEXED.	newly discovered property, ap- praisal of 2666
See subtitle, above, <i>Administrators.</i>	qualification of 2665
ADVANCEMENT.	ASSETS.
adjustment upon judicial settle- ment	See subtitle, below, <i>Judicial Settlement.</i>
ALBANY COUNTY.	custody where co-representatives disagree 2698
stenographer, appointment and compensation	debts due from executor included. 2673
ALLEGATIONS.	decree or order, when evidence of 2549
due proof when uncontroverted.	defined 2768
ANCILLARY GUARDIANS.	delivery upon order of court. 2734
See subtitle, below, <i>Guardians.</i>	payment to successor of represen- tative upon order of court. 2734
ANCILLARY LETTERS.	possession, trial to determine. 2676
See subtitles below: <i>Executors; Guar-</i> <i>dians; Letters Testamentary.</i>	decree 2676
ANNUITY.	property withheld, proceedings to discover 2675
apportionment	real property disposition, restitu- tion from, when subsequently discovered 2718
APPEAL.	sale, direction as to. 2685
appellate court, powers.	what deemed 2672
appellate division, may be taken to	ATTORNEY GENERAL.
case to be made.	compulsory judicial settlement, may petition for 2727
chapter 12, application.	voluntary judicial settlement, when to be cited 2730
costs upon, award; how payable.	BONDS.
court to which taken.	action when no successor ap- pointed 2585
facts, may be on or law.	administrator de bonis non. 2606
how taken	administrators, regulations. 2591
law, may be on or facts.	
parties	application of provisions to execu- tors, etc., heretofore appointed. 2587
proceedings upon determination.	application of sureties for release. 2579
reversal	approval 2575
review, what brought up for.	deposit of securities to reduce penalty 2576
security to perfect.	discharge, when given for per- formance of an act. 2586
security to stay commitment.	when given on appeal. 2586
amount	executor acting as testamentary trustee, required from. 2639
requisites	filing 2488
security where decree is for de- livery of property.	general guardian, of person. 2652
amount	of property 2650
requisites	new, substitution of after judi- cial settlement 2581
security where decree is for money	when principal required to give 2578
amount	when required 2577
requisites	prosecution of 2583
stay of execution of decree or or- der	by successor 2584
testimony, further may be taken 2763	record books 2486
time	recording 2575
when allowed	release of old sureties. 2580
APPEARANCES.	sureties liable for moneys re- ceived in another capacity. 2582
how made and effect.	testamentary trustee, required to give on qualifying. 2637
APPELLATE DIVISION.	from 2639
appeal to	
proceedings upon determina- tion	
APPLICATION OF CHAPTER.	
APPRAISERS.	
appointment	
appraisal in different places.	
fees	

	SEC.		SEC.
Surrogates' Code—Continued.		Surrogates' Code—Continued.	
Books.		amount	2762
indexing	2487	requisites	2762
marginal notations	2487	CONSOLIDATION OF PROCEED-	
preservation	2488	INGS	2535
to be kept by surrogate, enumer-		COSTS AND FEES.	
ated	2488	amount, limitations	2746
CHAPTER 18.		surrogate to fix	2746
application	2769	appeal, award upon; how pay-	
effect on law applicable to cer-		able	2751
tain counties	2771	appraisers, fees	2752
provisions applicable to surro-		award	2743
gates' courts	2770	collection	2745
CITATION.		discretion of surrogate	2745
See subtitle, below, <i>Wills</i> .		how made payable	2744
contents	2523, 2524	inclusive of what	2743
general guardian, upon appoint-		judicial settlement, additional al-	
ment	2647	lowance	2747
probate of wills of citizens of the		jurors, fees	2752
United States domiciled in		real property, allowance upon	
Great Britain and Ireland	2608	sales	2749
publication	2532	referees, fees	2752
service	2525	security for	2750
by publication	2526, 2530	special guardians, compensation .	2748
incompetents, upon	2530	taxation	2743
infants, upon	2530	witnesses, fees	2752
personally without state	2526-2530	COURT AND TRUST FUND REGISTER.	
proof	2531	clerk to keep	2503
"upon the return of" defined	2768	to be kept by surrogate	2486
CITY CHAMBERLAIN.		COURT OFFICERS.	
deposit of money and securities		appointment and compensation;	
with	2699	powers	2493
CLAIMS.		fees, where trial by jury	2540
See subtitle, below, <i>Debts</i> .		CREDITORS.	
judgment, prima facie evidence		affidavit of claimant	2677
and proof of claim against real		claims rejected, trial on judicial	
property	2706	settlement	2681
trial and determination	2706	defined	2768
statute of limitations	2706	failure to present claim, effect . .	2678
undetermined, provisions for pay-		limitations of actions	2681
ment	2713	notice to	2677
CLERK.		power of temporary administra-	
acts, liability of surrogate for	2475	tor to require presentation of	
additional, appointment	2491	claim	2598
appointment	2491	purchasing real property, allow-	
court and trust fund register, to		ance on bid	2712
keep	2503	representative as claimant	
deputy clerk, security	2475	against estate	2679
expenses when going to place		representative as claimant, effect	
other than surrogate's court	2501	of allowance of claim	2680
Kings county, appointment and		COUNTIES.	
compensation of additional	2492	laws applicable to certain, effect	
chief clerk, appointment and		of chapter 18 upon	2771
compensation	2492	COUNTY JUDGE.	
powers of surrogate, what to ex-		proceedings where also surrogate .	2505
ercise	2502	when and where court held by . .	2505
records, searching and certifying .	961	when to act as surrogate	2478
security	2475	proof of authority, how made	
CODE OF CIVIL PROCEDURE.		and	2479
provisions applicable to surro-		superseded	2481-2483
gates' courts	2770	COUNTY TREASURER.	
COMMISSIONS.		administrator, acting as	2593
See subtitles, <i>Administrators; Executors;</i>		deposit of moneys and securities	
<i>Guardians; Testamentary Trustees.</i>		with	2699
COMMITMENT.		CROPS.	
security upon appeal to stay		growing, deemed assets	2672
proceedings	2761		

	SEC.		SEC.
Surrogates' Code—Continued.		Surrogates' Code—Continued.	
DEBTS.		EXECUTOR WITH WILL ANNEXED.	
deemed assets	2672	See subtitle, below, <i>Executors.</i>	
defined	2768	qualification	2605
disputed or unsettled, com-		EXECUTORS.	
promise, compounding or sale.	2683	See subtitles: <i>Bonds; Judicial Settlement;</i>	
not due, provision for payment..	2713	<i>Letters Testamentary; Wills.</i>	
order of payment	2682	ancillary letters, assets, persons	
payment, proceedings to compel.	2687	acting must transmit	2634
sale of personal property	2684	payment without transmission.	2635
real property subject to disposi-		citation	2632
tion for	2703	hearing	2633
rejected, trial on judicial settle-		petition	2632
ment	2681	powers and duties of persons	
DECREE.		acting under	2636
assets, when evidence of	2549	security	2633
defined	2548	to whom granted	2631
enforcement by execution	2553	upon foreign probate	2629
enforcement, punishment for con-		bonds, when required	2567
tempt	2554	claims by, against estate, deter-	
execution, stay by appeal	2557	mination of	2679
for money, assignment	2551	suspension of statute of limita-	
discharge	2551	tions	2679
docketing	2551	effect of allowance	2680
effect	2551	commissions	2753
force and effect	2550	contract of sale, execution of	2697
general guardian, upon appoint-		counsel fees, allowance	2692
ment	2649	creditors, notice to	2677
partial satisfaction	2552	estate, custody where co-execu-	
probate, admitting will to, must		tors disagree	2698
state whether contested or not.	2614	exclusion on failure to qualify or	
revoking letters, effect and con-		renounce	2627
tents	2555, 2556	expenses incurred by, payment..	2692
DEFINITIONS.		funds of estates, to keep separ-	
expressions used in this chapter.	2768	ate	2664a
DEPUTY CLERK.		indebtedness to testator, deemed	
See subtitle, above, <i>Clerk.</i>		assets	2673
security	2475	official oath	2568
DISTRIBUTION.		permission to resign, application	
See subtitle, below, <i>Judicial Settlement.</i>		and proceedings	2572, 2573
DISTRIBUTIVE SHARES.		persons incompetent to receive	
advance payment, decree for	2691	letters	2564
payment into court	2741	powers as to estate before pro-	
payment, proceedings to compel.	2687	bate	2693
real property, disposition for pay-		property withheld, proceedings to	
ment	2703	discover	2675
DISTRICT ATTORNEY.		qualification after probate	2625
when to act as surrogate	2478	real estate, power to sell, mort-	
proof of authority, how made	2479	gage or lease to be executed by	
superseded	2481-2483	those qualifying	2694
DIVIDENDS.		real property, when authorized to	
appointment	2674	receive rents	2701
ERIE COUNTY.		removal	2569-2571, 2574
officers and attendants, appoint-		renunciation after nomination ..	2628
ment and compensation	2493	retraction thereof	2628
public administrator, appoint-		revocation of letters, deposit of	
ment, powers, etc.	2595	securities	2700
stenographer, appointment and		successor, appointment	2563
compensation	2495	supplementary letters to issue on	
EVIDENCE.		removal or disability	2626
See subtitle, below, <i>Testimony.</i>		surviving to act	2563
EXCEPTIONS.		testamentary trustee, effect of	
how taken	2542	acts when same person	2640
EXECUTION.		trustees, acting as, security re-	
stay by appeal	2557	quired from	2639
		EXEMPTIONS.	
		for benefit of family	2670

	SEC.		SEC.
Surrogates' Code—Continued.		Surrogates' Code—Continued.	
set-off, proceedings to compel...	2671	general, of property named in will not to act until probate..	2657
EXPENSES.		general, of property, qualification of	2650
administration, when real property subject to disposition for.	2703	general term of office.....	2649
allowance to representative.....	2692	infant, order for maintenance...	2664
trial and determination.....	2706	inventory and account, to file annually	2660
statute of limitations.....	2706	affidavit to be annexed.....	2661
FUNDS.		letters, limited and restricted...	2651
to be kept separate.....	2664a	official oath	2658
FUNERAL EXPENSES.		permission to resign, application and proceedings	2572, 2573
payment before probate.....	2693	persons incompetent to receive letters	2564
proceedings to compel.....	2686	real property disposition, presumption of appointment where records removed or destroyed..	2716
real property subject to disposition for	2703	removal	2569-2571, 2574
GENERAL GUARDIANS.		when accounts defective.....	2663
See subtitle, below, <i>Guardians.</i>		revocation of letters, deposit of securities	2700
general jurisdiction	2510	special compensation	2748
GENERAL RULES OF PRACTICE.		term, application of.....	2642
applicable to surrogates' courts..	2770	GUARDIANS BY DEED.	
GREAT BRITAIN.		See subtitle, above, <i>Guardians.</i>	
probate of wills of citizens of the United States, domiciled in...	2608	GUARDIANS BY WILL.	
GUARDIANS.		See subtitle, above, <i>Guardians.</i>	
See subtitles: <i>Bonds; Judicial Settlement; Letters of Guardianship.</i>		GUARDIANSHIP.	
accounts, annual examination...	2662	See subtitle, below, <i>Letters of Guardianship.</i>	
proceedings when defective...	2663	HEIRSHIP.	
ancillary, not included.....	2642	establishment, application for...	2765
by deed, defined	2642	decree	2766
qualifications of	2658	effect	2767
successor, appointment	2659	facts to be ascertained.....	2766
by will, defined.....	2642	recording	2767
letters, issue of.....	2658	HOLDING COURT.	
qualifications of	2658	time and places	2504
successor, appointment	2659	HUSBAND.	
commissions	2753	exemption for benefit of.....	2670
counsel fees, allowance.....	2692	proceedings to compel	2671
defined	2768	INCOMPETENTS.	
expenses incurred by, payment..	2692	citation, service upon.....	2530
foreign, ancillary letters, application for	2654	real property, distribution for payment of distributive shares	2703
proceedings thereupon	2655	INFANTS.	
effect of	2656	See subtitles, <i>Guardians; Judicial Settlement.</i>	
funds of estates, to keep separate	2664a	citation, service upon.....	2530
general, appointment by supreme court	2653	exemptions for benefit of.....	2670
decree	2649	proceedings to compel.....	2671
defined	2642	maintenance, order for.....	2664
hearing	2648	real property, distribution for payment of distributive shares.	2703
jurisdiction of court.....	2644	shares, payment upon judicial settlement	2739
petition of infant, by whom made	2645	INHERITANCE.	
contents	2646	defined	2768
power of court	2643	INTERMEDIATE ACCOUNTS.	
who cited	2647	See subtitle, below, <i>Judicial Settlement.</i>	
general of person named in deed not to act until deed recorded.	2657	defined	2768
general of person named in will not to act until probate.....	2657	INTERPRETERS.	
general, of person, qualification of	2652	Kings county, appointment and compensation	2494
general, of property, bond.....	2650		
general, of property named in deed not to act until deed recorded	2657		

	SEC.
Surrogates' Code—Continued.	
INTESTATE.	
defined	2768
INVENTORY.	
See subtitles, above, <i>Appraisers; Guardians.</i>	
INVOLUNTARY ACCOUNT.	
See subtitle, <i>Judicial Settlement.</i>	
IRELAND.	
probate of wills of citizens of the United States, domiciled in . . .	2608
JUDICIAL SETTLEMENT.	
accounting by representative of deceased representative	2725
advancement, adjustment of . . .	2738
affidavit to account	2732
compulsory, citation	2728
order	2728
proceedings thereon	2728
who may petition	2727
costs, additional allowance . . .	2747
defined	2768
distribution, decree for	2735
distributive shares, when to be paid into court	2741
effect of	2742
infants, payment of shares . . .	2739
intermediate account	2721
proceedings where involuntary . . .	2722
compulsory, of guardian or testamentary trustee	2724
voluntary	2723
legacies, when to be paid into court	2741
negligence action, where recovery has been had	2720
payment, decree for	2735
profit and loss, accounting for . .	2733
recording instruments	2719
retention of money or property . .	2737
specific property, delivery of . . .	2736
summary of account, decree to contain	2742
unknown persons, legacies to, disposition	2740
voluntary, citation	2730
proceedings on return	2731
when representative may petition for	2729
when court may require	2726
JURISDICTION.	
concurrent of two or more surrogates	2516
effect of exercise of	2514
exclusive	2515
locality of debts, how affected by .	2517
objection to defect in record . . .	2512
presumption of	2513
subject-matter	2512
JURORS.	
fees	2752
JURY.	
decision by surrogate after trial without jury, effect of	2541
drawing	2540
fees	2540
right to trial by	2537

	SEC.
Surrogates' Code—Continued.	
trial by	2538
powers of surrogate	2539
KINGS COUNTY.	
chief clerk, appointment and compensation	2492
clerks and officers, appointment and compensation	2492, 2493
interpreters, appointment and compensation	2494
officers and attendants, appointment and compensation	2492, 2493
public administrator, appointment, powers, etc.	2594
stenographer, appointment and compensation	2495
transfer of cause to supreme court in case of disability of surrogate	2478
proof of authority, how made and superseded	2481-2483
LEGACIES.	
advance payment, decree for . . .	2691
payment into court	2741
manner of	2688
petition to compel by testamentary trustee	2689
proceedings upon return of citation	2690
proceedings to compel	2687
sale of personal property	2637
real property, when subject to disposition for	2703
LETTERS OF ADMINISTRATION.	
See <i>Administrators.</i>	
application	2589
citation, proceedings	2590
books	2486
creditors, rights to letters	2588
defined	2589
evidence of authority	2768
issue upon foreign grants of administration	2560
limited and restricted	2630
limited issue	2559
notices required how given	2592
objections to grant of	2602
priority	2566
refusal by surrogate	2561
requisites	2565
revocation	2558
on proof of will	2569-2571, 2574
time, how reckoned on successive letters	2824
with will annexed, qualification of executor or administrator	2562
renunciation or exclusion of persons having prior right	2605
when and to whom granted	2604
who entitled to; order	2603
LETTERS OF GUARDIANSHIP.	
See subtitle, above, <i>Guardians.</i>	
books	2588
evidence of authority	2486
limited and restricted	2560
.	2559, 2651

	SEC.		SEC.
Surrogates' Code—Continued.		Surrogates' Code—Continued.	
objections to grant of.....	2566	PETITION.	
priority	2561	See subtitle, below, <i>Wills.</i>	
refusal by surrogate.....	2565	contents	2521
requisites	2558	proceedings commenced by.....	2518
revocation	2569-2571, 2574	will, to compel production.....	2607
time, how reckoned on successive letters	2562	PLACE.	
LETTERS TESTAMENTARY.		of holding court.....	2504
See subtitle, above, <i>Executors.</i>		PLEADINGS.	
ancillary letters, assets, persons, acting must transmit.....	2634	verification	2520
payment without transmission.....	2635	written required	2519
hearing	2633	PROBATE.	
petition	2632	See subtitle, below, <i>Wills.</i>	
powers and duties of persons acting under	2636	PROCEEDINGS.	
security	2633	commenced by petition.....	2518
to whom granted.....	2631	consolidation	2535
upon foreign probate	2629	PROCESS.	
books	2486	execution and return.....	2522
evidence of authority.....	2560	PROOF.	
limited and restricted.....	2559	uncontroverted allegations to constitute	2546
objections to grant of.....	2566	PROPERTY.	
priority	2561	See subtitles, <i>Judicial Settlement; Real Property.</i>	
refusal by surrogate.....	2565	delivery, petition to compel by testamentary trustee	2689
requisites	2558	proceedings upon return of citation	2690
revocation	2569-2571, 2574	proceedings to compel.....	2687
time, how reckoned on successive letters	2562	upon order of court.....	2734
when to issue	2625	payment to successor of representative upon order of court....	2734
wills of citizens of the United States domiciled in Great Britain and Ireland, issue.....	2608	POST OFFICE.	
LIFE TENANTS.		defined	2768
sale of real property, rights.....	2717	PUBLIC ADMINISTRATORS.	
MONEY PAID INTO COURT.		Erie county, appointment, powers, etc.	2595
disposition of	2699	Kings county, appointment, powers, etc.	2594
NEGLIGENCE ACTIONS.		QUEENS COUNTY.	
judicial settlement where recovery had	2720	stenographer, appointment and compensation	2495
NEW YORK COUNTY.		REAL PROPERTY.	
stenographer, appointment and compensation	2495	administrators with will annexed, powers as to.....	2695
terms, appointment	2506	application of provisions to trust relating to	2641
NEXT OF KIN.		contract of sale, execution by representative	2697
defined	2768	decendent's interest under contract, effect of conveyance.....	2715
OFFICERS.		defined	2768
See <i>Court Officers.</i>		disposition, for what purposes subject to	2703
previous acts confirmed.....	2769	when and how allowed.....	2705
ORDERS.		restitution from assets subsequently discovered	2718
assets, when evidence of.....	2549	distribution, when subject to disposition for	2702
defined	2548	estates in, deemed assets.....	2672
execution, stay by appeal.....	2557	judgment on claim, proof of claim against real property....	2706
how enforced	2548	lease, etc., by temporary administrator	2600
PAPERS.		leasing, order	2707
preservation	2488	execution	2709
PERSONAL PROPERTY.		not affected by death.....	2710
defined	2768		
PERSONS.			
jurisdiction of, when and how obtained	2511		
unknown, how set forth in petition	2524		
PERSONS INTERESTED.			
defined	2768		

	SEC.		SEC.
Surrogates' Code—Continued.		Surrogates' Code—Continued.	
decree of judicial settlement.	2711	RENTS.	
conveyance to, as.....	2711	apportionment	2674
report	2709	RESPONDENT.	
representative's bond	2708	defined	2768
when and how allowed.....	2705	SEAL.	
mortgaging not to affect mort-		use and description.....	2473
gages of heir.....	2714	SECRETARY OF STATE.	
order	2707	transmission of papers to, by	
execution	2709	surrogate	2489
not affected by death.....	2710	SECURITIES.	
conveyance to, as.....	2711	deposit on removal of testamen-	
decree of judicial settlement.	2711	tary trustee	2700
report	2709	on revocation of letters.....	2700
representative's bond	2708	on revocation of letters of rep-	
when and how allowed.....	2705	resentatives	2700
powers to sell, mortgage or lease,		SECURITIES DEPOSITED IN COURT.	
executed by executors		disposition of	2699
qualifying	2694	SECURITY.	
executed by successors of trus-		appeal, to perfect.....	2759
tees.	2696	where brought to stay commit-	
executed by trustees qualify-		ment	2761
ing	2694, 2696	amount	2762
records removed or destroyed,		requisites	2762
presumption of appointment		costs	2750
of guardians	2716	SPECIAL COUNTY JUDGE.	
records, searching and certifying.	961	when to act as surrogate.....	2478
rents, when representative au-		proof of authority, how made	
thorized to receive.....	2701	and	2479
sale, allowance of costs.....	2749	superseded	2481-2483
allowance on bid to purchasing		SPECIAL GUARDIANS.	
creditor	2712	See subtitle, <i>Guardians.</i>	
directions as to	2685	consent	2534
execution	2709	nomination by party prohibited.	2534
not affected by death.....	2710	when to be appointed.....	2534
decree of judicial settle-		SPECIAL PROCEEDINGS.	
ment	2711	regulations when before supreme	
conveyance to, as.....	2711	court	2507
life tenant's right to be con-		SPECIAL SURROGATE.	
sidered	2717	See subtitle, below, <i>Surrogate.</i>	
not to affect purchaser from		official designation	2472
heir	2714	when to act as surrogate.....	2478
order	2707	STATE COMPTROLLER.	
report	2709	transmission of papers, to, by	
representative's bond	2708	surrogate	2489
to be refused if bond given... 2704		STATE TREASURY.	
when and how allowed.....	2705	legacies to unknown persons to be	
satisfaction of charges against		paid into	2740
same, when subject to disposi-		STATUTE OF LIMITATIONS.	
tion for	2702	claims	2706
RECORDS		claims of creditors.....	2681
books enumerated	2486	expenses	2706
indexing	2487	prescribed	2518
marginal notations	2487	suspension in case of claim of	
real property disposition, pre-		representative against estate..	2679
sumption of appointment of		STENOGRAPHERS.	
guardians where removed or		acting, fees	2500
destroyed	2716	appointment	2495, 2496
REFEREES.		duties	2497
appointment, powers, compensa-		fees for copying or recording....	2499
tion	2536	minutes of testimony, how au-	
fees	2752	thenticated and bound.....	2498
reports, confirmation, approval,		SUPREME COURT.	
etc.	2536	special proceedings before, regu-	
REFERENCES.		lations	2507
of questions of fact.....	2536	transfer of causes to surrogate's	
		court	2508

Surrogates' Code—Continued.**SURETIES.**See subtitle, above, *Bonds*.**SURROGATE.**

- acting surrogate, official designation 2472
- books, indexing 2487
- preservation 2488
- to be kept, enumerated 2486
- concurrent jurisdiction of two or more 2516
- counsel, when not to be 2474
- decision after trial without jury, effect of 2541
- defined 2768
- disability, who to act 2478
- supreme court to act in New York county 2480
- proof of authority, how made and superseded 2481, 2483
- disqualifications, when enumerated 2476
- when objection must be taken 2477
- disqualified, who to act 2479
- exceptions to rulings, how taken 2542
- expenses when going to place other than surrogate's court 2501
- general jurisdiction 2510
- incidental powers 2490
- Kings county, transfer of cause to supreme court in case of disability of surrogate 2478
- proof of authority, how made and superseded 2481, 2483
- liability for clerks' acts 2475
- official designation 2472
- orders, how enforced 2548
- papers, preservation 2488
- transmission to secretary of state or state comptroller 2489
- powers, when clerk to exercise 2502
- previous acts confirmed 2769
- reference of questions of fact 2536
- seal 2473
- temporary, appointment 2484
- compensation 2485
- vacancy, who to act 2478
- supreme court to act in New York county 2480
- proof of authority, how made and superseded 2481-2483

SURROGATE'S COURT.

- defined 2768
- seal 2473

TABLE.

- showing disposition of sections of old code 600

TEMPORARY ADMINISTRATORS.See subtitle, above, *Administrators*.**TEMPORARY SURROGATE.**See subtitle, above, *Surrogate*.

- appointment 2484
- compensation 2485

TERMS.

- New York county, appointment 2506

SEC.

SEC.

Surrogates' Code—Continued.**TESTAMENTARY GUARDIANS.**See subtitle, above, *Guardians*.

- bonds, when required 2567

TESTAMENTARY TRUSTEES.See subtitles, above, *Bonds*; *Judicial Settlement*.

- bonds, when required 2567
- commissions 2753
- counsel fees, allowance 2692
- defined 2768
- executor, effect of acts when same person 2640
- expenses incurred by, payment 2692
- funds of estates, to keep separate 2664a
- legacy, petition to compel payment 2689
- proceedings upon return of citation 2690
- official oath 2538
- permission to resign, application and proceedings 2572, 2573
- persons incompetent to receive letters 2564
- property, petition to compel payment 2689
- proceedings upon return of citation 2690
- qualification 2637
- trust companies 2637
- removal 2569-2571, 2574
- deposit of securities 2700
- security required from 2639
- successors, appointment upon disability 2638

TESTIMONY.

- taken out of court by permission, filing 2547
- when surrogate may proceed to place where witness is 2543
- where surrogate may proceed to another county to examine witness 2544

TIME.

- when court open 2504

TRANSFER OF CAUSES FROM SUPREME COURT.

- regulations 2508

TRANSFER TAX.

- real property, when subject to disposition for 2703

TRUSTEES.See subtitle, above, *Testamentary Trustees*.

- real estate, power to sell, mortgage or lease, to be executed by those qualifying 2694, 2696
- to be executed by successors 2696

TRUSTS.

- created by will or relating to real property, application of provision 2641

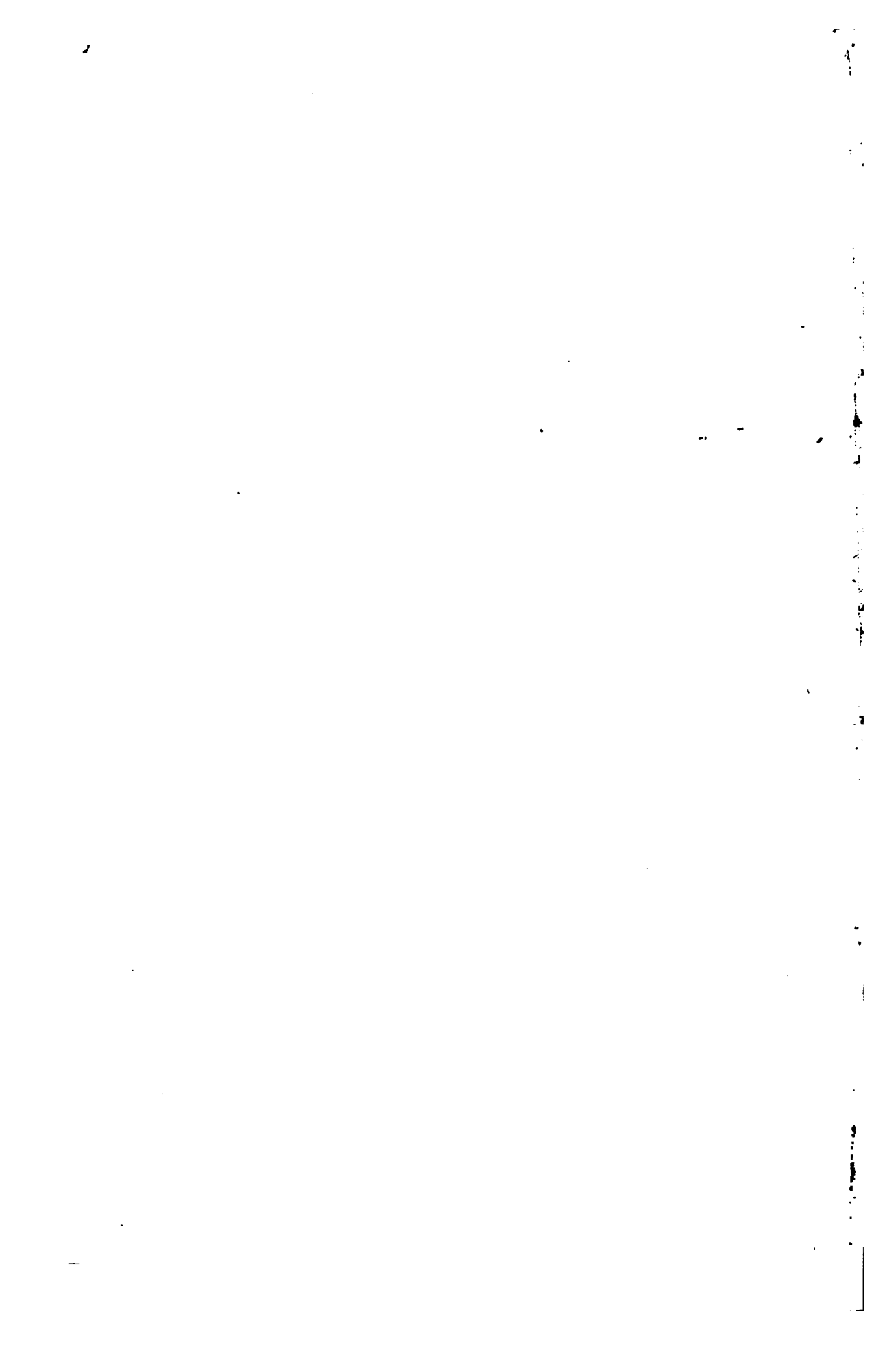
UNDERTAKING.See subtitle, above, *Bonds*.**UNKNOWN PERSONS.**

- legacies to, disposition 2740

	SEC.		SEC.
Surrogates' Code—Continued.		Surrogates' Code—Continued.	
real property, distribution for payment of distributive shares	2703	will, not disqualified when bene- ficiary under	2545
VOLUNTARY ACCOUNT.		Taxes.	
See <i>Judicial Settlement.</i>		See <i>Real Property.</i>	
WESTCHESTER COUNTY.		Temporary administrators.	
stenographer, appointment and compensation	2495	See <i>Surrogates' Code.</i>	
WIDOW.		Tenants.	
exemptions for benefit of	2670	See <i>Real Property.</i>	
proceedings to compel	2671	Tenders.	
WILLS.		after suit	731
certified, may be read in evidence	2621	amount to be paid into court	732
construction	2615	defendant's offer to compromise	738
defined	2768	failure to keep good	732
petition to compel production	2607	sufficient, effect	733
probate, citation, contents	2610	Testamentary guardians.	
contents of petition	2609	See <i>Surrogates' Code.</i>	
dycree to revoke former letters of administration	2624	action for excessive fees, limitation	382
decree to revoke former letters tested or not	2614	Testamentary trustees.	
destroyed, proof of	2613	See <i>Surrogates' Code.</i>	
jury trial	2617	Testimony.	
proceedings upon	2619	See <i>Court of Claims; Evidence; Surro- gates' Code.</i>	
letters testamentary, when to issue	2625	Timber.	
lost, proof of	2613	evidence in action for recovery of, injury to, etc., on unoccupied lands	960
notice to legatee and devisee	2616	Time.	
objections filed, notice to lega- tees and devisees	2618	extension of time, affidavit to be served with order	781
proof of service	2618	before expiration	781
objections, who may file	2617	legal notice, publication	787
of citizens of the United States domiciled in Great Britain and Ireland	2608	not to be extended, for action to abate unless continued	784
proof required	2611	for commencement of action	784
surrogate to be satisfied of validity	2614	to apply for continuance after death of party	784
testimony, commission to take	2612	to take appeal	784
testimony, dispensing with	2612	for making supplemental com- plaint to continue action	784
who may propound	2609	Title.	
who to be cited	2610	trial of claim by third party to property seized by sheriff	108
witnesses, proof of hand writ- ing	2612	Transfer of interest.	
witnesses to be accounted for	2612	See <i>Abatement and Revival.</i>	
witnesses to be examined	2611	Transfer tax.	
proved elsewhere in state, record- ing	2622	See <i>Surrogates' Code.</i>	
record book	2486	Trees.	
recording	2620	action for cutting	1667
when proved elsewhere in state	2622	treble damages	1668
record of, may be read in evi- dence	2621	Trespasser.	
when proved heretofore as evi- dence	2623	See <i>Real Property.</i>	
retention in surrogate's office; ex- ception	2620	Trial.	
trust, creating, application of pro- visions to	2641	See <i>Demurrer; Exceptions.</i>	
witness not disqualified when beneficiary	2545	calendar, preparation	977
WITNESSES.		counterclaim deemed an action	974
examination by surrogate else- where than in court	2543, 2544		
fees	2752		

	SEC.		SEC.
Trial—Continued.		Trustees.	
decision by court, filing.....	1010	See <i>Parties; Surrogates' Code.</i>	
demurrer, decision of court or report		bond, cost of.....	3320
of referee.....	1021	commissions.....	3320
issues, classification.....	977	Trusts.	
order, where issues of fact and		action to enforce, complaint.....	481
law arise.....	966	execution against income.....	1391
court may direct order of trial.	967	Undertakings.	
defined.....	963	See <i>Bonds and Undertakings; Justices'</i>	
different kinds.....	963	<i>Courts.</i>	
either party may bring to trial	980	replevin, to be given by plaintiff..	1699
of fact, decision of court or re-		upon appeal, action upon.....	1309
port of referee.....	1022	Unincorporated associations.	
in partition triable by jury.	1544	consisting of seven or more per-	
triable by jury.....	968	sons, actions by or against.....	1919
when of right.....	970	deposition, contents of affidavit in	
where triable.....	990	application for.....	872
of law, where triable.....	990	service of summons on.....	436
regulation of trial of in su-		by publication.....	438
preme court.....	976	United States departments.	
separate trial of one or more		copies of documents on file in as	
issues.....	973	evidence.....	944
triable before one judge.....	976	Usury.	
by court.....	969, 972	answer setting up, sufficiency.....	536
by jury, when discretionary.	971	Variances.	
when of right.....	970	See <i>Pleadings.</i>	
jury, trial by may be waived.....	1009	Verdicts.	
new trial, case, how made and set-		damages in action to recover	
tled.....	997	money, jury to assess.....	1183
when necessary.....	997	entry.....	1189
appeal from order.....	999	subsequent proceedings.....	1189
motion for upon judges' minutes.	999	general defined.....	1186
made at special term.....	1002	special finding with.....	1187
stenographer's notes may be		when rendered.....	1187
treated as minutes of judge...	1007	interest on to be included in re-	
note of issue, new note not to be		covery.....	1235
filed for succeeding term in cer-		jury, discharge on failure to agree.	1181
tain counties.....	977	nonsuit not allowed after jury re-	
to be filed.....	977	tires.....	1182
contents.....	977	real property action, to state plain-	
notice of trial, new notice not to be		tiff's estate.....	1519
served for succeeding term in		special, defined.....	1188
certain counties.....	977	motion for judgment.....	1233
service.....	977	specific, when rendered.....	1187
particular questions, parties may		when to be taken, subject to opinion	
require court or referee to de-		of court.....	1185
termine.....	1023	Verification.	
place of trial, actions relating to		See <i>Pleadings.</i>	
real property situate without		Westchester county.	
state.....	982a	note of issue, new note not to be	
actions triable according to resi-		filed for succeeding term.....	977
dence of parties.....	984	notice of trial, new notice not to be	
demand for change of place.....	986	served for succeeding term.....	977
governed by place where subject-		surrogate's court, stenographer....	2495
matter situated.....	982	Wife.	
justices' courts.....	2869	See <i>Husband and Wife.</i>	
motion to change.....	987	not competent to testify against	
other actions, where cause arose.	983	husband, exceptions.....	831
when court may change.....	986		
reference by consent, when and how			
made.....	1011		
provisions qualified.....	1012		
compulsory for trial of issues....	1013		
on question incidentally arising	1015		
referee's report, when to be made	1019		
consequence of failure.....	1019		
title to property seized by sheriff.	108		

	SEC.		SEC.
Wills.		Writ of prohibition.	
<i>See Surrogates' Code.</i>		alternative or absolute.....	2091
proof of lost.....	1865	appeal from order to appellate di-	
when action to establish may be		vision	1356
brought	1861	appeals	2101
when relating to real property....	1836	appellate division when granted by.	2093
		how granted	2091
Witnesses.			
<i>See Depositions; Evidence; Surrogates'</i>		Writs.	
<i>Code.</i>		<i>See State Writs.</i>	
deposition when not a party.....	871	in name of people and in English..	22
fees generally	3318	error, when not to vitiate.....	24
husband or wife of party in inter-		subscription and endorsement.....	24
est, not excluded from testifying.	828		
imprisonment for refusal to testify.	856	Wrongs.	
infant, court may examine.....	850	actions for, action for causing death	
party in interest not excluded from		by negligence	1902
testifying	828	amount of recovery	1904
subpoenas, for examination for		by negligence, damages, dis-	
depositions for use without state.	915	tribution	1903
how issued	854	next of kin defined.....	1905
penalty for disobedience....	853	libel when action cannot be main-	
issued out of court, how		tained for publication in news-	
served	852	paper	1907
weak intellect, court may examine.	850	pleading mitigating circumstance in	
when not excused from testifying..	837	action for a wrong.....	536
Woman.			
execution against	1488	Yonkers city court.	
slander of, action	1906	jurisdiction in civil actions.....	3203
Workmen's compensation.			
complaint	481		
justices' court to have no jurisdic-			
tion in action for premium due in-			
surance fund	2863		



Stanford Law Library



3 6105 064 097 707



Stanford Law Library



3 6105 064 097 707

Stanford Law Library



3 6105 064 097 707